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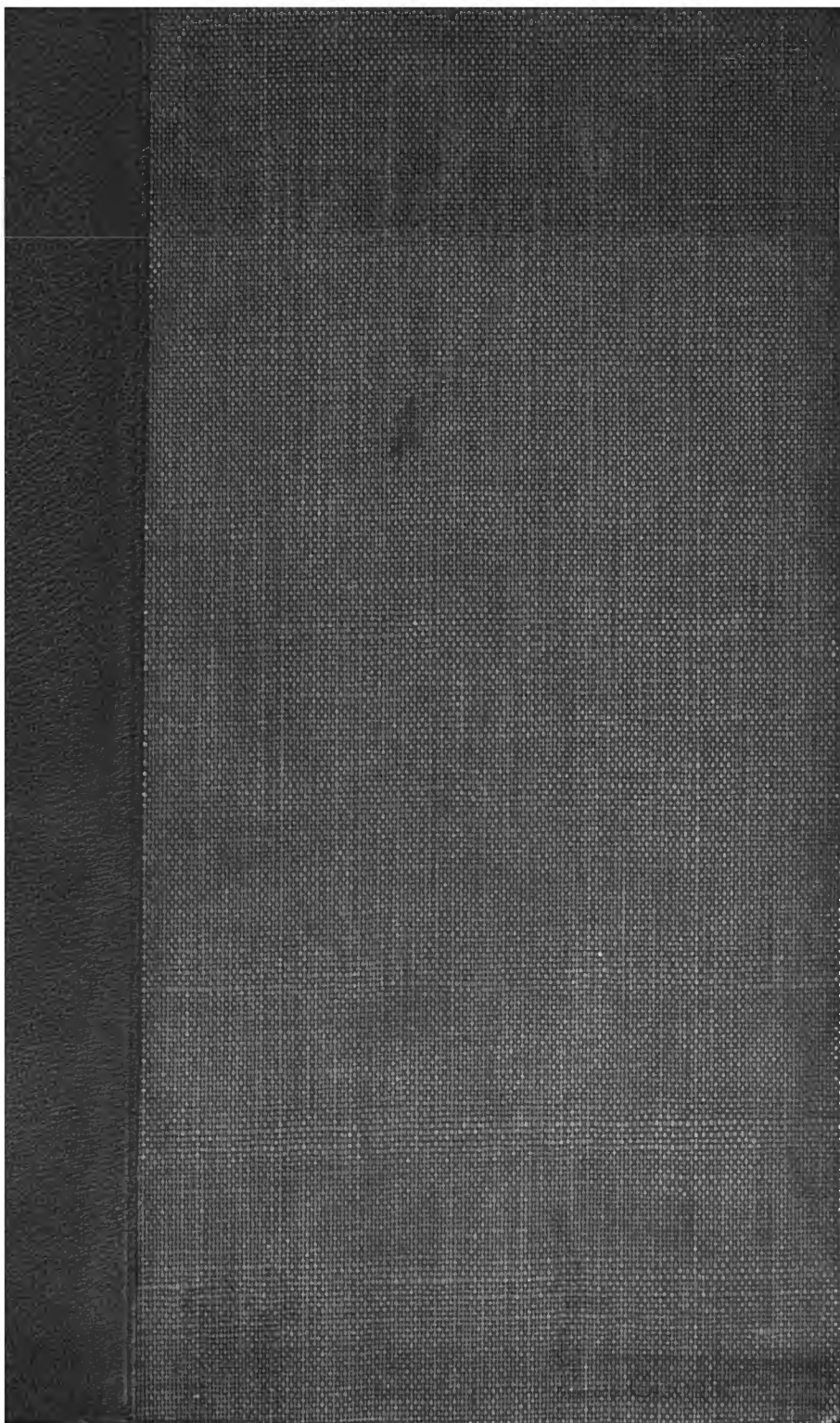
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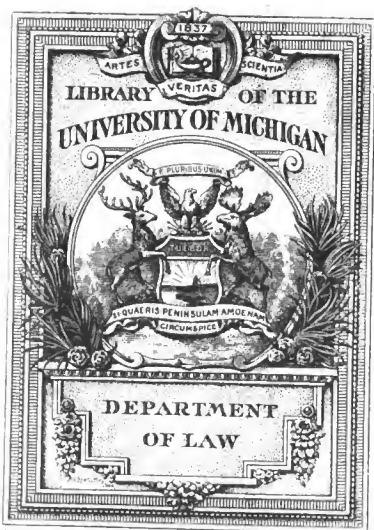
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By ROSWELL

Author of "Attachment and Garnishment
- Practice for Michigan"

IN TWO VOLUMES

VOL. I

CHICAGO
T. H. FLOOD &
1896.

A TREATISE

ON THE

PLEADINGS AND PRACTICE

IN THE

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IN TWO VOLUMES

VOL. II.

CHICAGO:

T. H. FLOOD & COMPANY

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TABLE OF CONTENTS OF PAR PROCEEDINGS

ARTICLE I. CONTINUANCES.—I

- § 734. Opening court and calling the
- 734. Continuances. (a) Generally.
- 739. (b) Granting a continuance dis
- 741. (c) Causes for continuance....
- 742. (d) Application for continuance
- 743. (e) How application made—Mc
- 744. (f) Review of ruling on motion
- 753. Continuance upon stipulation.
- 756. Continuances by operation of l
- 757. Trying case out of its order....

ARTICLE II. WHEN ONL

- § 758. Proceedings where the defende
- 760. Effect of striking case from the
- 800. How causes reinstated
- 801. Proceedings when the plaint' t
- ment
- 802. How default judgment set aside

ARTICLE III. WHERE A

- § 803. Trial by jury or by court....
- 804-809. Impaneling the jury
- 810-813. Opening the case
- 814-817. Order of presenting the evi
- 818-823. What must be proved
- 824. Excluding witnesses from tl
- 825-836. Privileges of witnesses
- 837-873. Direct examination
- 874-880. Cross-examination
- 881. Re-direct examination
- 882. Re-cross examination
- 883. Rebuttal
- 884. Recalling witness to correct
- 885-887. Impeaching witnesses
- 888-890. Supporting witnesses
- 891-893. Inspection or view

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TABLE OF CONTENTS.

CONTENTS OF VOLUME II.

PART VII.

PROCEEDINGS AT THE TRIAL.

ARTICLE I. CONTINUANCES—TRYING CASE OUT OF ITS ORDER.

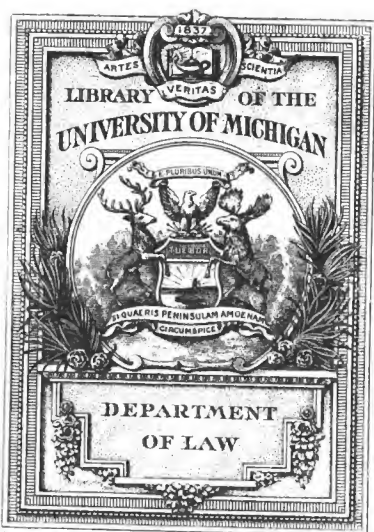
	PAGE.
Opening court and calling the calendar.....	963
Continuances. (a) Generally.....	964
) Granting a continuance discretionary with the court.....	965
) Causes for continuance.....	966
) Application for continuance to be made, when.....	969
) How application made—Motion—Affidavit.....	970
) Review of ruling on motion for continuance.....	973
Continuance upon stipulation.....	973
Continuances by operation of law.....	974
Trying case out of its order.....	974

ARTICLE II. WHEN ONLY ONE PARTY PRESENT.

Proceedings where the defendant only is present.....	976
Effect of striking case from the docket.....	977
How causes reinstated.....	978
Proceedings when the plaintiff only is present—Default judgment.....	978
How default judgment set aside.....	981

ARTICLE III. WHERE ALL PARTIES PRESENT.

Trial by jury or by court.....	984
Impaneling the jury.....	987
Opening the case.....	993
Order of presenting the evidence.....	996
What must be proved.....	999
Excluding witnesses from the court room.....	1010
Privileges of witnesses.....	1011
Direct examination.....	1021
Cross-examination.....	1056
Re-direct examination.....	1060
Re-cross examination.....	1060
Rebuttal.....	1060
Recalling witness to correct testimony.....	1061
Impeaching witnesses.....	1062
Supporting witnesses.....	1065
Inspection or view.....	1066



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VOL. II.

CHICAGO:
T. H. FLOOD & COMPANY
1896.

TABI

CONT

PRO

ARTICLE I. CONTI

- § 731. Opening court ar
- 732. Continuances. (i
- 733. (b) Granting a coi
- 734. (c) Causes for con
- 735. (d) Application fo
- 736. (e) How applicati
- 737. (f) Review of ruli
- 738. Continuance upor
- 739. Continuances by
- 740. Trying case out o

ARTICLE I

- § 741. Proceedings wher
- 742. Effect of striking
- 743. How causes reinst
- 744. Proceedings when
- 745. ment
- 746. How default judg

ARTICLE II

- § 803. Trial by jury c
- 804-809. Impaneling th
- 810-813. Opening the ca
- 814-817. Order of prese
- 818-823. What must be
- 824. Excluding with
- 825-836. Privileges of w
- 837-873. Direct examin
- 874-880. Cross-examinat
- 881. Re-direct exam
- 882. Re-cross exami
- 883. Rebuttal
- 884. Recalling witne
- 885-887. Impeaching wit
- 888-890. Supporting with
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TABLE OF CONTENTS.

CONTENTS OF VOLUME II.

PART VII.

PROCEEDINGS AT THE TRIAL.

ARTICLE I. CONTINUANCES—TRYING CASE OUT OF ITS ORDER.

	PAGE.
§ 783. Opening court and calling the calendar.....	963
789. Continuances. (a) Generally.....	964
790. (b) Granting a continuance discretionary with the court.....	965
791. (c) Causes for continuance.....	966
792. (d) Application for continuance to be made, when.....	969
793. (e) How application made—Motion—Affidavit.....	970
794. (f) Review of ruling on motion for continuance.....	973
795. Continuance upon stipulation.....	973
796. Continuances by operation of law.....	974
797. Trying case out of its order.....	974

ARTICLE II. WHEN ONLY ONE PARTY PRESENT.

§ 798. Proceedings where the defendant only is present.....	976
799. Effect of striking case from the docket.....	977
800. How causes reinstated.....	978
801. Proceedings when the plaintiff only is present—Default judgment.....	978
802. How default judgment set aside.....	981

ARTICLE III. WHERE ALL PARTIES PRESENT.

§ 803. Trial by jury or by court.....	984
804-809. Impaneling the jury.....	987
810-813. Opening the case.....	993
814-817. Order of presenting the evidence.....	996
818-823. What must be proved.....	999
824. Excluding witnesses from the court room.....	1010
825-836. Privileges of witnesses.....	1011
837-873. Direct examination.....	1021
874-880. Cross-examination.....	1056
881. Re-direct examination.....	1060
882. Re-cross examination.....	1060
883. Rebuttal.....	1060
884. Recalling witness to correct testimony.....	1061
885-887. Impeaching witnesses.....	1063
888-890. Supporting witnesses.....	1065
891-893. Inspection or view.....	1066

	PAGE.
§ 894-897. Objections to evidence, and exceptions to the rulings thereon	1067
898-903. Striking out and withdrawing evidence.....	1074
904. Reopening case after evidence all in.....	1078
905. Election of counts	1079
906-909. Argument of counsel	1079
910-918. Province of the court and jury.....	1083
919-923. Taking the case from the jury, <i>i. e.</i> , directing a verdict; demurring to evidence; moving for nonsuit.....	1088
924-942. Instructing (charging) the jury	1092
943-950. Conduct of the jury—General verdict.....	1112
951-957. Special verdict.....	1121
958-960. Finding on trial by court.....	1126

PART VIII.

PROCEEDINGS AFTER THE TRIAL.

ARTICLE I. PROCEDURE BY UNSUCCESSFUL PARTY.

§ 961. What defeated party may do after verdict and before judgment.....	1131
962. (a) Motion for <i>venire facias de novo</i>	1132
963. (b) Motion for repleader.....	1133
964. (c) Motion for new trial—When and how to be made—Form..	1133
965. Same—Grounds for the motion enumerated.....	1136
966. Same. 1. Want of proper jury.....	1136
967. Same. 2. Misbehavior of the prevailing party.....	1137
968. Same. 3. Misconduct of the jury.....	1138
969. Same. 4. The absence of a party, his counsel, or a witness	1139
970. Same. 5. Surprise	1140
971. Same. 6. Newly discovered evidence.....	1141
972. Same. 7. Excessiveness of damages.....	1142
973. Same. 8. Smallness of the damages.....	1143
974. Same. 9. Misdirection of court, and the admission or rejection of testimony.....	1144
975. Same. 10. That the verdict is against the law or the evidence.....	1145
976. Same—Hearing of the motion for a new trial—Ruling—Exception	1148
977. Same—Costs	1150
978. Same—Number of new trials granted.....	1150
979. (d) Motion in arrest of judgment—Nature.....	1151
980. Same—When motion to be made.....	1152
981. Same—How the motion shall be made.....	1153
982. Same—Exceptions, when unnecessary.....	1153

TABLE OF CONTENTS.

v

	PAGE.
§ 983. Same—Effect of granting motion in arrest of judgment....	1153
984. (e) Motion for judgment <i>non obstante veredicto</i>	1154
985. Same—When the motion shall be made.....	1154
986. (f) Motion for judgment on special finding....	1155

PART IX.

ENTRY OF JUDGMENT.

ARTICLE I. JUDGMENT—COSTS.

§ 987. Definition.....	1159
988. Kinds of judgment.....	1161
989. Classification as to their nature.....	1161
990. When and how the judgment entered.....	1162
991. Same—Taking case under advisement.....	1164
992. Same—Refusal to enter judgment— <i>Remittitur</i>	1164
993. Form of judgment—generally.....	1164
994. Joint and several judgments.....	1166
995. Judgment by default.....	1167
996. Confession of judgment.....	1168
997. (a) Conditions upon which judgment by confession entered —Practice	1171
998. (b) Proof and presumptions	1173
999. (c) Setting aside judgment by confession.....	1174
1000. (d) Review—Extent of	1177
1001. Entries <i>nunc pro tunc</i>	1178
1002. Correcting errors of fact in entry of judgment.....	1178
1003. Extent of lien created by judgments. (a) On real property..	1179
1004. (b) Upon personal property.....	1180
1005. (c) Against the body.....	1181
1006. (d) Priority of lien	1181
1007. Setting aside judgment entered upon verdict.....	1181
1008. Costs. (a) Generally.....	1183
1009. (b) When the plaintiff shall recover.....	1183
1010. (c) When defendant shall recover.....	1184
1011. (d) Division of costs on appeal	1186
1012. (e) How costs taxed.....	1186

PART X.

PROCEEDINGS TO OBTAIN REVIEW.

ARTICLE I. TO WHAT JUDGMENT, WHEN AND IN WHAT COURT A REVIEW MAY BE HAD.

§ 1013. What may be reviewed.....	1191
1014. Who may obtain a review	1193

	PAGE.
§ 1015. Two methods of obtaining review.....	1193
1016. In what tribunal a review may be obtained.....	1193
1017. (a) When causes taken from trial court to Supreme Court....	1194
1018. (b) When causes taken first to Appellate Court.....	1196
1019. (c) When causes reviewed by an Appellate Court may be re- viewed by the Supreme Court.....	1197
1020. (d) When causes reviewed by an Appellate Court may not be reviewed by the Supreme Court.....	1201
ARTICLE II. PREPARATION OF RECORD FOR REVIEW. I. BILL OF EXCEP- TIONS. II. AGREED CASES.	
§ 1021. Origin, nature and purpose.....	1203
1022. The same in the Supreme and Appellate Courts.....	1205
1023. Requisites of a bill of exceptions.....	1205
1024. Same—Forms of bills of exceptions and amendments pro- posed.....	1211
1025. Same—Signing, sealing and settling bill of exceptions.....	1215
1026. Filing bill of exceptions—Striking from files.....	1218
1027. Construction of bill of exceptions—Presumptions.....	1220
1028. Amendment of bill of exceptions.....	1223
II. AGREED CASES.	
1029. Agreed cases in lieu of bill of exceptions.....	1225
ARTICLE III. TAKING CASE UP BY APPEAL.	
1030. Who may appeal.....	1226
1031. When appeal may be taken.....	1226
1032. The appeal bond—When to be filed—Conditions—Form.....	1227
1033. Same—Security may be approved by the clerk.....	1229
1034. Same—Effect of insufficient bond—Amendment.....	1230
1035. The filing of the record.....	1230
ARTICLE IV. TAKING CASE UP BY WRIT OF ERROR.	
§ 1036. Preliminary observation.....	1231
1037. Definition and nature of writ of error.....	1231
1038. In what cases it will lie.....	1232
1039. When it will not lie.....	1234
1040. By and against whom to be issued—How parties designated.....	1236
1041. Within what time the writ may be sued out.....	1237
1042. Dismissal of a writ of error.....	1238
ARTICLE V. TAKING CASE UP BY WRIT OF CERTIORARI.	
§ 1043. Definition, nature and purpose.....	1239
1044. When the writ may be obtained.....	1239
1045. From what courts the writ may issue.....	1241

TABLE OF CONTENTS.

vii

	PAGE.
§ 1046. The procedure.....	1242
1047. Form of petition.....	1242
1048. Assignment of errors not necessary.....	1243
1049. Noticing cause for hearing and placing same on calendar....	1243
1050. Judgment.....	1243

ARTICLE VI. PRACTICE IN COURTS OF REVIEW.

§ 1051. Proceedings on writ of error when to operate as a <i>superseas</i> . (a) Generally.....	1245
1052. (b) Indorsement—Filing writ and transcript—Return—Certificate.....	1247
1053. (c) To whom writ of error directed—When service unnecessary—Return.....	1248
1054. (d) Process on writ of error.....	1248
1055. Same—Service and return of process—Appearance and notice thereof.....	1249
1056. Same—Plaintiff's duty to order <i>scire facias</i> notice—Continuance.....	1249
1057. Pending writ of error, notice to purchasers and terre-tenants.	1250
1058. Of what "authenticated copy of the record of the judgment appealed from," must consist.....	1250
1059. Same—When cause removed from Appellate Court to Supreme Court.....	1253
1060. Clerk may be directed what to include in transcript.....	1256
1061. When transcript of record to be filed—Placing case on docket.....	1256
1062. Assignment of errors.....	1258
1063. Same—In Supreme Court when reviewing Appellate Court decisions.....	1261
1064. Same—Form of assignment of errors.....	1261
1065. Assignment of cross-errors.....	1263
1066. Effect of omission to join in error.....	1264
1067. Time to plead when defendant prefers not to join in error...	1264
1068. Abstract—Preparing and filing.....	1264
1069. Same—What it shall contain.....	1265
1070. Same—When abstract to be filed—default.....	1267
1071. Same—Further abstract.....	1268
1072. Brief—Preparing and filing.....	1269
1073. Same—When brief to be filed.....	1271
1074. Same—Numbers of copy of briefs to be filed.....	1272
1075. Docketing and hearing the cause.....	1272
1076. Argument of counsel in courts of review.....	1273
1077. Same—No oral argument heard upon motion for rehearing—Exception.....	1274
1078. Same—Time allowed for oral argument.....	1274

	PAGE.
§ 1079. Judgment in courts of review.....	1275
1080. Same. (1) Judgment of affirmance—Execution.....	1276
1081. Same. (2) Judgment of reversal in whole—Execution.....	1278
1082. Same. (3) Judgment of reversal in part—Remittitur— Execution.....	1280
1083. Same. (4) Judgment of dismissal—Execution.....	1281
1084. Remanding cause—Re-trial—When unnecessary.....	1281
1085. Same—Practice when case remanded for trial.....	1283
1086. Rehearing. (a) Petition for.....	1284
1087. (b) Notice—Filing.....	1286
1088. (c) No re-argument permitted in support of the petition...	1287
1089. (d) <i>Supersedeas</i> or stay of proceedings.....	1287
1090. (e) Redocketing case when rehearing granted.....	1288
1091. (f) Record, abstract, brief and argument.....	1288
1092. (g) Reply to petition.....	1288
1093. (h) Closing argument of petitioner.....	1289
1094. (i) Oral arguments—Conclusion.....	1289
1095. Motion in courts of review.....	1289
1096. Change of Venue to the Supreme Court.....	1290

PART XI.

MISCELLANEOUS WRITS AND PROCEEDINGS.

ARTICLE I. MANDAMUS.

§ 1097. Definition and nature.....	1293
1098. When granted or denied. (a) Generally.....	1294
1099. (b) To an inferior court or tribunal.....	1297
1100. (c) To a state officer.....	1298
1101. (d) To a county officer.....	1299
1102. (e) To township officers.....	1300
1103. (f) To municipal corporations or officers.....	1302
1104. (g) To boards of education and school officers.....	1303
1105. (h) To private corporations.....	1304
1106. Parties. (a) The relator or petitioner.....	1304
1107. (b) The respondent.....	1305
1108. The petition—Notice required in the Supreme Court.....	1306
1109. Summons to show cause—When returnable.....	1309
1110. Answer—Default—Peremptory writ.....	1309
1111. Peremptory writ—Judgment—Costs.....	1313
1112. New parties defendant—Not interpleaders.....	1314
1113. Proceedings not abated by death of defendant, etc.....	1314
1114. Review of <i>mandamus</i> proceedings.....	1315
1115. How writ of <i>mandamus</i> enforced.....	1315

ARTICLE II. PROHIBITION.

	PAGE.
§ 1116. Definition and nature.....	1316
1117. <i>Prohibition</i> and injunction compared.....	1317
1118. <i>Prohibition</i> and <i>mandamus</i> compared.....	1318
1119. Practice in obtaining the writ.....	1318
1120. Examples of cases in which it may be obtained.....	1320
1121. Not available to restrain an executive.....	1320
1122. Service and return of the writ.....	1321
1123. The judgment.....	1321

ARTICLE III. QUO WARRANTO.

§ 1124. Origin, definition and nature.....	1322
1125. When the writ may issue.....	1325
1126. At whose instance the writ may issue.....	1327
1127. How leave asked—Countershowing.....	1327
1128. Names of parties to the proceeding.....	1328
1129. Requisites of the information.....	1328
1130. Summons—When returnable.....	1330
1131. Service of summons—How made.....	1330
1132. Defendants must plead or demur—Default.....	1330
1133. Replication and rejoinder—Demurrer.....	1332
1134. Extending time to plead.....	1333
1135. Issues and trial thereof.....	1334
1136. Judgment—Ouster—Fine—Costs.....	1335
1137. Review—Appeal or writ of error.....	1336

ARTICLE IV. HABEAS CORPUS.

§ 1138. Definition.....	1338
1139. Origin and nature of the writ.....	1339
1140. What courts may issue the writ—when suspended.....	1340
1141. Who entitled to the writ.....	1340
1142. Application for the writ—How made.....	1343
1143. Form of the petition.....	1343
1144. "Probable cause" must be shown.....	1345
1145. When the writ to be granted—Penalty.....	1347
1146. Form of the writ.....	1347
1147. Subpoena for witnesses—To be issued when.....	1348
1148. Services of the writ. (a) Who may make.....	1349
1149. (b) How service vacated.....	1349
1150. The return of the writ—Form.....	1350
1151. Proceedings on return. (a) Generally.....	1352
1152. (b) When the prisoner held on process will be discharged.....	1353
1153. (c) When the prisoner will not be discharged.....	1354
1154. New commitment—Recognizance of witnesses—Penalty— For omission.....	1354

	PAGE.
§ 1155. Remanding prisoner—Remanding order.....	1355
1156. Second writ of habeas corpus—Limit of court's power.....	1355
1157. Discharged person cannot be reimprisoned for same cause— Exceptions.....	1355
1158. No review of habeas corpus proceedings.....	1356
1159. Penalties. (a) For rearresting person discharged.....	1356
1160. (b) For avoiding the writ.....	1356
1161. (c) How penalties recovered.....	1357

ARTICLE V. SCIRE FACIAS.

§ 1162. Origin, nature and purpose of the writ. (a) Generally.....	1358
1163. (b) To revive a judgment.....	1360
1164. Same—To revive an execution after seven years.....	1363
1165. (c) To make defendants, not served with process, parties to a judgment.....	1364
1166. (d) To collect special assessments.....	1367
1167. (e) To try legal existence of corporation.....	1367
1168. (f) Against bail.....	1368
1169. (g) Against sureties on bond of appeal from Justice's Court..	1371
1170. (h) Against a corporation.....	1373
1171. (i) To foreclose a mortgage.....	1374
1172. Same—No declaration need be filed—Form of <i>scire facias</i>	1377
1173. Same—Service of the writ—Publication.....	1377
1174. Same—Defenses to the proceeding.....	1378
1175. Same—Judgment.....	1379
1176. Same—Special execution—Lien.....	1379
1177. Pleadings in <i>scire facias</i> proceedings generally.....	1380
1178. Judgment in <i>scire facias</i> proceedings generally—Damages— Costs.....	1382
1179. Execution in <i>scire facias</i> proceedings.....	1383

ARTICLE VI. ARBITRATION AND AWARD.

§ 1180. Origin and nature.....	1384
1181. Who can submit a matter to arbitration.....	1386
1182. Submission to arbitration at common law—Matters not in suit.....	1386
1183. Submission to arbitration under the statute—In suits pending	1388
1184. Effect of submission and of award.....	1389
1185. Who may be chosen as an arbitrator.....	1391
1186. Duty of arbitrators—To appoint a hearing—Continuances...	1392
1187. Arbitrators must be put on oath—Form of oath.....	1392
1188. Hearing—Witnesses—Subpœna for—Compelling attendance —Oath—Contempt.....	1393
1189. Requisites of the award—Form—Publication.....	1394
1190. Filing award in court on non-compliance of other party.....	1396

TABLE OF CONTENTS.

xi

	PAGE.
§ 1191. Judgment on the award.....	1397
1192. Enforcement of judgment if other than for the payment of money	1398
1193. Setting aside award for fraud, etc.....	1398
1194. Correcting award in regard to irregularities in form, etc.....	1399
1195. Time to make motion to set aside, modify, etc.	1400
1196. Effect of setting aside award.....	1400
1197. Review of arbitrations and awards.....	1400

ARTICLE VII. REFEREES AND REFERENCES.

§ 1198. Definition and nature.....	1402
1199. Appointment of referee—His power—Exceptions—Further evidence, etc.	1403
1200. Trial by referee—Compelling attendance—Oaths	1404
1201. Referee's report.....	1405
1202. Exceptions to report—Referring cause back with instructions.....	1408
1203. Judgment—Costs	1408
1204. The record.....	1409

ARTICLE VIII. FORCIBLE ENTRY AND DETAINER.

§ 1205. Definition and nature.....	1410
1206. Forcible entry forbidden—What is forcible entry within the meaning of the statute	1412
1207. When the action maintainable	1413
1208. Who to be parties plaintiff.....	1416
1209. Who to make parties defendant	1417
1210. Demand in writing, when necessary—Return—Form.....	1419
1211. Commencement of suit. (a) Complaint.....	1421
1212. (b) Summons—Form—When returnable.....	1423
1213. Same—Service of summons—Publication	1424
1214. Pleadings.....	1424
1215. Trial	1425
1216. Judgments. (a) For the whole.....	1427
1217. (b) For a part	1428
1218. Writ of restitution—Form	1429
1219. Appeal—Bonds—Form.....	1430

ARTICLE IX. DISTRESS FOR RENT.

§ 1220. Definition, nature and history.....	1433
1221. What property may be distrained—Extent of landlord's lien	1435
1222. When landlord may distrain for rent.....	1438
1223. How the proceedings begun—Warrant—Inventory—Forms.....	1439
1224. Summons—Issuance and return.....	1441

§ 1225. Notice to nonresidents, etc.—Form	PAGE.
1226. Proceedings—Pleadings	1442
1227. Set-off	1442
1228. Judgment	1443
1229. Release of distrained property by giving bond	1443
1230. Perishable property—Disposition of	1444

PART XII.

RELATION OF ATTORNEY AND CLIENT.

§ 1231. Definition of terms	1450
1232. The vocation of a lawyer—Nature of his office	1452
1233. Admission to practice. (a) Necessity thereof	1453
1234. (b) Who may be admitted	1455
1235. (c) Manner of procuring admission	1456
1236. Same. 1. Upon examination—Affidavit of applicant and certificate of instruction, or affidavit of credible wit- ness	1456
1237. Same. 2. Upon diploma issued by a law school	1457
1238. Same. 3. Upon a license granted in another state	1457
1239. (d) Certificate of moral character	1458
1240. (e) Requisite oath—Form	1458
1241. (f) Roll of attorneys	1459
1242. (g) License, by whom issued	1459
1243. (h) Admission a judgment of the court	1460
1244. Admission to the United States Supreme Court—Form	1460
1245. Summary jurisdiction of courts over attorneys. (a) Gener- ally	1461
1246. (b) To strike attorneys' names from the rolls	1462
1247. (c) To suspend attorneys from practice for a time	1464
1248. (d) Opportunity given to be heard	1464
1249. (e) The practice	1465
1250. Effect of removal or suspension	1467
1251. Restoration	1467
1252. Privileges and exemptions of attorneys. (a) Generally	1467
1253. Privilege from arrest—Liability to	1468
1254. (b) Privilege from serving as a juror	1469
1255. (c) Privilege regarding examination	1469
1256. (d) Privilege of counsel in argument	1470
1257. (e) Privileged communications	1471
1258. Disability of attorneys by reason of their profession. (a) From becoming bail or surety	1474
1259. (b) From acting on both sides	1474

TABLE OF CONTENTS.

xiii

	PAGE.
§ 1260. (c) From buying demands for suit.....	1474
1261. (d) When counsel in a case may be a witness.....	1475
1262. (e) From administering oaths in cases wherein he is counsel	1476
1263. Liability to third persons	1476
1264. Retainer and appearance. (a) Right to counsel.....	1477
1265. (b) The contract of retainer.....	1477
1266. (c) Appearance generally.....	1480
1267. (d) Withdrawal of appearance—Substitution of attorneys.	1481
1268. Authority and powers—Management of cause—Satisfaction.	1481
1269. Duties and liabilities to client. (a) Generally.....	1486
1270. (b) In the management of the cause.....	1488
1271. (c) In the collection of money.....	1489
1272. (d) In the purchase of real estate.....	1489
1273. (e) In the investigation of title.....	1490
1274. Liability of client to attorney—Compensation.....	1491
1275. Proving the retainer.....	1494
1276. Attorney's lien for services	1496

PART VII.

PROCEEDINGS AT THE TRIAL.

provided by the rules of the court (and all courts of record have power to make reasonable rules governing the transaction of business therein),¹ the calendar of the causes brought to an issue by the pleadings in time to be placed thereon, or at issue on appeal, is taken up by the court and the cases are called in their regular order thereon. This call of the calendar is generally provided by the rules of the court to be a "preliminary call" for the purpose of determining which cases are ready for trial and which cases shall be stricken off or continued to a future day or term.²

When both parties are present and ready, the trial will proceed in the usual way,³ as soon as the case may be reached in its order; but if one of the parties is unprepared to go to trial, or has reason for wanting to postpone the trial, some proceeding is had to put off the trial, or as it is commonly called to obtain a continuance.

§ 789. Continuances—(a) Generally.—Lord Mansfield has said that "no crime is so great, no proceeding so instantaneous, but that, upon sufficient grounds, the trial may put off."⁴ It is conceded, however, by the best practitioners that civil cases should, as a rule, be promptly tried, and he who is habitually seeking continuances will generally be found to be either a very careless or very timid attorney. However, whether or not a cause should be continued depends so greatly upon the nature of the particular case that no general rules can be laid down. No prudent attorney will rush into the trial of a cause without having the same fully prepared, even to the most minute detail before entering upon a trial thereof. Therefore where with diligence he has been unable to have his case ready for trial, or where there are surrounding circumstances which create a risk that a postponement might avoid, and there is a sufficient ground upon which

¹ *Ante*, Vol. 1, § 6.

² *Titely v. Kahler*, 9 Ill. App., 537, *Kilian v. Clark*, 9 Ill. App., 426; *Lincoln v. Schwartz*, 70 Ill., 134; *Morrison v. City of Chicago*, 139 Ill., 210; *Hanford v. Hagler*, 49 Ill.

App., 258; *Humphreyville v. Culver*, Page, etc., 73 Ill., 485.

³ See *post*, § 803.

⁴ *King v. D'Eon*, 1 W. Black., 510, 514.

to obtain such a postponement it will be the part of wisdom and prudence to ask for a continuance. Furthermore, where the adversary has, by permission amended his pleadings, or filed others in addition thereto, a continuance should be obtained that sufficient time may be had in which to prepare to meet the new issues raised; unless counsel feel confident that he is prepared to meet the issues tendered by the additional or amended pleadings. No wise counsel will apply for a continuance unless upon mature deliberation and the consideration of all attendant circumstances he deems that the same will be advantageous to the cause of his client.

§ 790 (b.) Granting a continuance discretionary with the court.—Applications for continuances are addressed to the sound discretion of the trial court, and unless it appears that injustice has been done the rulings of such court will not be changed by a court of review.¹ But such discretion cannot be arbitrarily and unjustly exercised. A party is frequently entitled to a continuance as a matter of right by being in such position as courts have universally recognized to be a sufficient ground therefor, and when a trial court unreasonably, unjustly and arbitrarily refuses to grant a continuance on such ground, the court of review will hold the same to be error and grant a new trial because thereof. Furthermore, where a statute prescribes what is grounds for a continuance it will be error for a court to refuse to postpone the trial when a party shows himself to be possessed of the grounds described.²

When a second continuance is asked by the same party a stronger showing is usually required to be made,³ especially where the second appearance is based upon the same state of facts as the first.⁴

¹ Home Mutual Fire Ins. Co. v. (Breese), 78; Lockhart v. Wolf, 82 Ronan, 51 Ill., 517; Vickers v. Hill, Ill., 37; Cook v. Larson, 47 Kans., 1 Scam. (Ill.), 307; Ault v. Rawson, 70; Vaught v. Rider, 86 Va., 669.

14 Ill., 484; Belk v. Belk, 97 Ind., 73; Valle v. Picton, 91 Mo., 207; Voorheis v. Chicago, etc., Railroad Co., 71 Ia., 734.

³ Shook v. Thomas, 21 Ill., 86.

⁴ Stockley v. Goodwin, 78 Ill., 127; Northwestern, etc., Ass'n v. Prim., 124 Ill., 100.

⁵ Roundtree v. Stewart, 1 Ill.

§ 791. (c) **Causes for continuance.**¹—No continuance will be granted except upon good cause shown. The mere absence of a party is not of itself sufficient grounds for continuance without a good showing that he is unable to attend and proceed with the trial of the cause, and that injustice would be done by proceeding with the trial in his absence.²

A party has a right to try his own case in this State and cannot be deprived thereof. If a party chooses to try his own case his presence will be more material than if his case is tried by counsel, and therefore his absence in such a case would be more forcible as ground for continuance.³

The mere absence of counsel is not a sufficient cause for continuance. A sufficient excuse must be shown for such absence

¹ *Continuance without application therefor.*—The continuances treated of in the text are those which a party may procure upon a proper application after issue and the case is on the calendar for trial. There are other causes which by force of the statute entitles the defendant to a continuance as a matter of right, because of irregularity or incompleteness of the proceedings against him. For example:

Service upon the defendant less than ten days before the return day entitles him to a continuance and he cannot be compelled to plead before the next succeeding term. Rev. Stat., Chap. 110, ¶ 8, § 7. And although a part have been properly served the cause must be continued as to all. *Evans v. Gill*, 25 Ill., 116.

Likewise the failure to file a declaration ten days before the first day of the term, or failure to file a copy of the note or instrument in writing sued on, will entitle the defendant to a continuance. Rev. Stat., Chap. 110, ¶ 18, § 17; *Bartlett v. Sullivan*, 87 Ill., 219; *Hopkins v. Woodward*, 75 Ill., 62; *Roberts v.*

Thomson, 28 Ill., 79; *Boyle v. Carter*, 24 Ill., 49; *Hawthorn v. Cooper*, 22 Ill., 225; *Kimball v. Kent*, 2 Scam. (Ill.), 218. How this continuance may be avoided, see *post*, § 795, note.

It is a general rule of practice that a party cannot force his adversary to act until he himself is in a condition to be forced to proceed. *Lehman v. Freeman*, 86 Ill., 208.

² *Hazen & Nunsby v. Pierson & Co.*, 88 Ill., 241; *Waarich v. Winter*, 33 Ill. App., 36; *Gates v. Hamilton*, 12 Ia., 50; *Burkhart v. Merry*, 88 Ind., 438; *Cohn v. Brownstone*, 93 Cal., 362.

³ *Gregson v. Allen*, 85 Ill., 478.

Serious illness in the family of the party has been deemed to be sufficient cause for continuance. *Welcome v. Boswell*, 54 Ind., 297. But the fact must be shown by affidavit and not the mere certificate of his physician and it must be shown that his presence at the trial is necessary. *Schnell v. Rothbath*, 71 Ill., 83; further see *Mantonya v. Huertner*, 35 Ill. App., 27; *Wick v. Weber*, 64 Ill., 167.

and when such absence has been rendered absolutely necessary the court will usually grant a continuance, unless there has already been one or more continuances for the same cause.¹

The engagement of counsel in the trial of another cause in another court is frequently urged as a ground for continuance, especially in cities where there are several courts or several branches of the same court. This, however, is not ground for a continuance as a matter of right but a continuance will usually be granted therefor where the circumstances are such that a party would be injured by failure to postpone and where both the party and his counsel are without fault and another counsel cannot be obtained, or if obtained, could not be prepared to do justice to the case within the time allowed. A refusal of an application for a continuance for this or like grounds has been held to be error.²

The lack of preparation will not, however, entitle counsel to have a cause continued if by the exercise of due care and diligence he might have been prepared for trial.³ Amendments of pleadings in matter of substance will entitle the

¹ *Northwestern Aid Ass'n v. Prim*, 124 Ill., 100; *Culver v. Colehour*, 115 Ill., 558; *Stockley v. Goodwin*, 87 Ill., 127; *Gould v. Elgin City Banking Co.*, 36 Ill. App., 390.

Sudden illness of counsel or of his family causing his absence from court has likewise been deemed to be sufficient to justify a continuance. *Thompson v. Thornton*, 41 Cal., 626; *Eslinger v. East*, 100 Ind. 844; see *Condon v. Brockway*, 50 Ill. App., 625.

² *Hearson v. Grandine*, 87 Ill., 15; *Hill v. Clark*, 51 Ga., 122; *Rossett v. Gardiner*, 3 W. Va., 531.

Absence of counsel on other business than the trial of cases is not generally sufficient cause for a continuance. *Jackson v. Wakeman*, 2 Cow. (N. Y.), 574; *Sharman v. Morton*, 31 Ga., 34.

That counsel is a member of the legislature of this State is sufficient

on which to obtain a continuance. *Rev. Stat.*, Chap. 110; ¶ 47, § 46; *Chicago Public Stock Exchange v. McClaughry*, 148 Ill., 372; *Wicker v. Boynton*, 83 Ill., 545; *Williams v. Baker*, 67 Ill., 288; *Harrigan v. Turner*, 53 Ill. App., 292.

The absence of the defendant engaged in military service of the United States is ground for continuance. *Rev. Stat.*, Chap. 110, ¶ 46, § 45.

Substitution of new counsel may possibly be a ground for continuance. *Pennsylvania Co. v. Rudel*, 100 Ill., 603.

³ *Partridge v. Ring*, 75 Ill., 236; *Foster v. Abbott*, 1 Mass., 234.

A continuance has been granted where a party was not ready for trial because of statements of his adversary leading him to believe that a compromise could be effected. *Cornogg v. Abraham*, 1 Yeates (Pa.), 18.

adverse party to a continuance when such matters are material and it is necessary to take issue thereon. Where the amendments have been as to immaterial matters no cause for continuance will thereby be given.¹

The absence of evidence is the ground on which a continuance is most often sought. Where depositions have been taken and are expected, but have not arrived, notwithstanding due diligence has been exercised, the party is entitled to a continuance to await their coming.² Newly discovered evidence, when not known in time to be procured at the trial, is just cause for continuance.³ Absence of a material witness universally conceded as a ground for a continuance when proper showing is made therefor. To obtain a continuance for this cause three things must generally be shown:

- (1) That the witness is really material:
- (2) That the party applying has been guilty of no neglect;
- (3) That the party intends to procure the attendance or deposition of the witness at the time to which the continuance is asked.⁴ The motion for a continuance based on the

¹ *Covell v. Marks*, 1 Scam. (Ill.), 525; *Chio, etc., Ry. Co. v. Palm*, 18 Ill., 22; *Chicago, etc., Ry. Co. v. Goyette*, 32 Ill. App., 574.

When amendment ground for continuance—Affidavit.—No amendment shall be cause for continuance in this State unless the party affected thereby, his agent or attorney, shall make affidavit that in consequence thereof he is unprepared to proceed to or with the trial of the cause in that term, stating in such affidavit what particular fact or facts the party expects to prove by such evidence, and that he verily believes that if the cause is continued he will be able to procure the same by the next term of court. And if then the court is satisfied that such evidence would not be material on the trial of the cause or if the other party will admit the affidavit in evi-

dence, subject to the effect given to affidavits for a continuance generally, the cause shall not be continued. Rev. Stat., Ch. 110, ¶ 26, § 25; *Dobbins v. Higgins*, 78 Ill., 442; *Wolfe v. Johnson*, 152 Ill., 280; *Mills v. Executors, etc.*, 76 Ill., 381; *Christ v. Wray*, 76 Ill., 204; *The Chicago & Pacific R. R. Co. v. Stein*, 75 Ill., 41; *Kagay v. Trustees*, 68 Ill., 75; *Clause v. Bullock Printing Press Co.*, 20 Ill. App., 113.

² *Marsh v. Hulburt*, 4 McLean (U. S. C. C.), 364; *Kenton v. Spencer*, 6 Ind. 321.

³ *Holmes v. Dobbins*, 19 Ga., 630; *Berry v. Metzler*, 7 Cal., 418; *Allcorn v. Rafferty*, 4 J. J. Marsh (Ky.), 220

⁴ *Rex v. D'Eon*, 3 Burrill, 1513, S. C., 1 W. Black., 510, 514; *Hyde v. State*, 16 Tex., 445; *Rowland v. Shepherd*, 27 Neb., 497.

absence of testimony must be supported by affidavit as herein-after shown.¹

The mere fact that an appeal is pending in another cause between the same parties, or between one of the parties and a third person, which it is alleged will determine the question at issue in the suit in which the continuance is asked, is not as a matter of right ground for continuance, but continuances are frequently allowed therefor within what appears to be the sound and reasonable discretion of the court.²

§ 792. (d) Application for continuance to be made when.—Applications for continuance are usually required by the rules of court to be made at the preliminary call of the calendar or at some particular day before the trial, nominated by the rule. Such rules of court will always be sustained when reasonable, and a court's refusal to grant a continuance when such rules are not complied with will be sustained by a court of review; but where such rule is unreasonable or facts are stated which show a good cause for continuance and good excuse for not complying with the rule, the continuance should nevertheless be granted.³ But in any event a motion for continuance should be made before entering upon the trial of a cause if the same be possible.⁴ However, it is within the discretion of the court to continue a case after the trial has commenced to enable a party to procure the attendance of a witness who has not been subpoenaed.⁵

A second application for a continuance will not be entertained at the same term unless the second be based upon facts that have arisen since the first motion was overruled.⁶

¹ *Post*, § 793.

² *Clark v. Clough*, 62 N. H., 693;
Joslyn v. Wheeler, 62 N. H., 169;
Calco Nat. Bank v. Shaw, 79 Me.,
376; *Peters v. Banta*, 120 Ind., 416.

³ *Moulder v. Kempff*, 115 Ind.,
459; *State v. Primeaux*, 39 La Ann.,
673; *Brenhamer v. State*, 123 Ind.,
577.

⁴ *Porter v. Triola*, 84 Ill., 325;
Leavitt v. Kennicott, 54 Ill. App.,

638; *Lucas v. Casady*, 12 Ia., 567;
Myers v. Schneider, 21 Mo., 77.

⁵ *Farmer v. Farmer*, 72 Ill., 32.

⁶ *Peru Coal Co. v. Merrick*, 79 Ill.,
112.

If the second application is based upon the same grounds as the first it will be overruled, even though the facts in the affidavit are sufficient to authorize a continuance. *Ib.* But where an application for con-

§ 793. (e) How application made—Motion—Affidavit.—

The application for a continuance is generally made by a motion and must be supported by an affidavit. In the absence of any statutory requirement to the contrary, the affidavit may be made by the party, his attorney, or it seems by any one in his behalf.¹

The affidavit should state the facts with certainty. It is a general rule that the statements will be taken as true if they are unequivocal and certain, but the averments will be taken most strongly against the party who offers it and the court will presume that all the facts are stated therein as favorable for the applicant as was possible. If therefore the statements are uncertain or equivocal, the affidavit will be ineffective and a continuance will be denied.²

An affidavit for a continuance on the ground of absence of a party or other witness must show his residence and that there has been an exercise of all due diligence in endeavoring to procure the presence of such witness or his testimony by deposition and that there is reason to expect that the testi-

tinuance is denied at one term without a trial at that term, the party has a right at a subsequent term, to present another affidavit for continuance and if it shows sufficient facts and diligence constituting the grounds prescribed by the statute, the court has no discretion. He must grant the application. *Morgan v. Raymond*, 38 Ill., 448.

¹ *Lockhart v. Wolf*, 82 Ill., 37; *Guyer v. Cox*, 1 Overt. (Tenn.), 184; *Ralston v. Lothain*, 18 Ind., 303.

The statutory provision.—The statute provides that when either party shall apply for a continuance of a cause on account of the absence of testimony, the motion shall be grounded on the affidavit of the party so applying, or his authorized agent, showing that due diligence has been used to obtain such testimony, or the want of

time to obtain it, and what particular fact or facts the party expects to prove by such evidence, and if the evidence is the testimony of a witness, his place of residence, or if his place of residence is not known, showing that due diligence has been used to ascertain the same, and that if further time is given his place of residence can be ascertained. *Rev. Stat.*, Chap. 110, ¶ 43, § 42.

² *Dacy v. People*, 116 Ill., 555; *Slate v. Eisenmeyer*, 94 Ill., 96; *Wick v. Weber*, 64 Ill., 167; *Evans v. Marden*, 54 Ill. App., 291.

An affidavit which does not state facts, but conclusions, will not support a motion for a continuance because the court will be unable to determine whether the presence of an absent witness will be material to the defendant. *Willard v. Pettitt*, 54 Ill. App., 257.

mony can be had at the time to which the continuance is asked.¹

It should state what particular facts are expected to be proved by him and the inability of the party to prove the same facts by other witnesses.² Such facts must be material facts and stated with such certainty that the adversary may, if he chooses, admit them to be true and go to trial.³

If the adversary will admit the affidavit in evidence the cause shall not be continued, or if the court shall be satisfied that such evidence will be immaterial on the trial of the cause, such cause shall not be continued.⁴

¹ Jamison v. The People, 145 Ill., 357; North Chicago City Ry. Co. v. Castka, 128 Ill., 613; Anheuser-Busch Ass'n v. Hutmacher, 127 Ill., 652; Northwestern Aid Ass'n v. Primm, 124 Ill., 100; Cook v. Norwood, 106 Ill., 558; Fisher v. Greene, 95 Ill., 94; Meyers v. Andrews, 87 Ill., 433; Lockhart v. Wolf, 82 Ill., 37; The Rockford Ins. Co. v. Nelson, 75 Ill., 548; Coffey v. Fosselman, 72 Ill., 69; The Richard Iron Works v. Glennon, 71 Ill., 11; Chicago & No. W. R. R. Co. v. Ingersoll, 65 Ill., 399; Wick v. Weber, 64 Ill., 167; Freeman v. Tinsley, 50 Ill., 497; Gass v. Howard, 43 Ill., 223; Morgan v. Raymond, 38 Ill., 448; Miles v. Danforth, 32 Ill., 59; Dodge v. Deal, 28 Ill., 303; Moore v. Goelitz, 27 Ill., 18; Eames v. Hennessy, 22 Ill., 629; St. Louis & K. C. R. R. Co. v. Olive, 40 Ill. App., 82; Johnson v. Glover, 19 Ill. App., 585; W. Ben. and Mutual Aid Ass'n v. Prim, 19 Ill. App., 224; Splane v. Byrne, 9 Ill. App., 392; Lee v. Quirk, 20 Ill., 392.

Where a second and third continuance is asked on the ground of the absence of the same material witnesses unusual diligence in endeavoring to procure his presence or testimony will necessarily have to be

shown. Birks v. Houston Admr., 63 Ill., 77; Slade v. McClure, 76 Ill., 319.

² Hodges v. Nash, 141 Ill., 391; Chicago City Ry. Co. v. Duffin, 126 Ill., 100; Hopkinson v. Jones, 28 Ill. App., 409.

³ Chicago City Ry. Co. v. Duffin, 126 Ill., 100; County of Montgomery v. Robinson, 85 Ill., 174; McCreary v. Newberry, 25 Ill., 496; Baily v. Hardy, 12 Ill., 459; McBain v. Enloe, 13 Ill., 76; Keith v. Knoche, 43 Ill. App., 161.

A statement that the party expects to prove by an absent witness *what some one ought to have done* is not a statement of particular facts sought to be proved and will not procure a continuance. Evans v. Marden, 54 Ill. App., 291.

Amendments to an affidavit for a continuance will not be allowed; nor can a supplemental affidavit of cause therefor be defined. McBain v. Enloe, 13 Ill., 76.

⁴ Rev. Stat., Ch. 110, ¶ 44, § 43.

Effect of admitting the affidavit.—When the affidavit is concerning the evidence of a witness, the party admitting such affidavit shall be held only to admit that if the absent witness were present he would testify as alleged in the affidavit,

NO. 360.—FORM OF AFFIDAVIT FOR CONTINUANCE.

IN THE COURT OF COUNTY.

A B }
 v. }
 C D }¹

STATE OF ILLINOIS, } ss.
 County. }

A B (name the affiant, whether party or otherwise), being duly sworn on oath says that E F of² is a material witness to him (or "plaintiff" or "defendant," when affidavit is made by another than the party himself), as he is advised by his counsel and verily believes to be true.

That (state the circumstances which will show due diligence of the party applying for the continuance and the circumstances which prevent him from obtaining the testimony of the witness. If it be the second application for continuance, state with greater particularity. State what is expected to be proved by the witness.)

That the affiant hopes and expects to procure the attendance (or "the deposition") of the said E F at the next term of this court (or the time to which the continuance is asked) and that this affidavit for a continuance is not made for delay merely, but for the purpose of justice.³

Subscribed and sworn to (etc.)

A B

Where it appears to the court that a continuance is sought merely for the purpose of delay the motion therefor will be overruled.

and such admission shall have no greater force or effect than if such absent witness were present and testified as alleged in the affidavit, leaving it to the party admitting such affidavit to controvert the statements contained therein, or to impeach said witness, the same as if such witness were present and examined in open court. Rev. Stat., Ch. 110, ¶ 45, § 44; Chicago N. W. Ry. Co. v. Clark, 70 Ill., 276; Uteley v. Burns, 70 Ill., 162.

¹ The affidavit must be properly entitled with the names of all the parties to the suit. If not properly entitled it cannot be used in support of motions. *Ante*, § 774; King v. Herrington, 14 Mich., 532; Whipple v. Williams, 1 Mich., 115; Arnold v. Nye, 11 Mich., 458.

² The place of residence of material witnesses must be shown. *Lee v. Quirk*, 20 Ill., 392.

³ *Counter-affidavits*.—Counter-affidavits will not be heard to opposition to a motion for a continuance; but in a case where a continuance was properly granted independent of such counter-affidavit the fact that they were received will not be ground for reversal. *Quincy Whig Co. v. Tillson*, 67 Ill., 351; *Price v. People*, 131 Ill., 223.

In other states it has been held to be discretionary with the court to admit counter-affidavits. *State v. Bailey*, 94 Mo., 211; *State v. Murdy*, 81 Ia., 603; *Weed v. Lee*, 50 Barb. (N. Y.), 354.

§ 794. (f) Review of ruling on motion for continuance.

—A party who seeks to review the ruling of the court in refusing to grant a continuance must enter an exception and assign the same for error; otherwise the court above will not consider the matter.¹

After a continuance has been granted and an order therefor entered the adverse party may come in and move to set the order aside, but he cannot do so in the absence of the party obtaining a continuance without having given him notice that an application to set the order of continuance aside will be made.²

§ 795. Continuance upon stipulation.—It is competent for the parties to a pending cause of action to continue the trial thereof to a subsequent time or term by filing a stipulation to that effect. Where the stipulation filed has been made by competent persons consenting to such continuance the court has no power to proceed with the cause, so long as the stipulation has not been in some way impeached or the interest or counsel or third persons in some way involved.³

¹ *McCann v. The People*, 88 Ill., 103; *Bishop Hill Colony v. Edgerton*, 26 Ill., 54; *Rankin v. Curtenius*, 12 Ill., 334.

² *Newell v. Clodfelter*, 3 Ill. App., 259; See *ante*, "Special motions," § 773.

A motion for a continuance is a dilatory motion and is subject to some of the rules governing dilatory pleas. For example the entry of the defendant's appearance and a motion to continue the cause is a submission to the jurisdiction and he cannot thereafter plead to the jurisdiction. *Roberts v. Thomson*, 28 Ill., 79; *ante*, § 795, "Dilatory pleas."

³ *Kittridge v. Toledo, etc., Ry. Co.*, 53 Mich., 354; *Devanbaugh v. Nifer*, 3 Ind. App., 379; *In re Heath's will*, 88 Ia., 215.

General competency of stipula-

tions.—A stipulation is competent for all purposes where an agreement to do or not to do certain acts or not to make objection to certain irregularities and insufficiencies, and will be deemed to operate by way of estoppel. Almost any matter of procedure can be dispensed with by stipulation except such as would affect the jurisdiction of the subject.

A continuance to which the defendant is entitled as a matter of right may be avoided by the plaintiff by stipulation not to rely upon that which gives grounds for continuance. Where a defendant was entitled to a continuance because the plaintiff did not file with his declaration on the common counts a copy of the instrument sued on (when the statute only required the same to be filed with the common counts) the plaintiff could have

A stipulation to continue a cause must be in writing. A mere verbal agreement between counsel to postpone the trial will not be binding. If such agreement is violated by one of the parties, the other will have no remedy.¹

§ 796. **Continuances by operation of law.**—By force of the statute all causes and proceedings pending and undisposed of in any of the courts of record having the powers of Circuit Courts at the end of a term shall stand continued till the next term of the court.²

§ 797. **Trying case out of its order.**—While it is made the duty of the court to try cases in the regular order in which they appear upon the docket which the Clerk is required to keep,³ yet it is within the discretion of the court, upon sufficient cause, to try the case out of the order in which it appears on the calendar prepared by the Clerk in compliance with the statute, and unless the discretion of the court is abused, a court of review will not reconsider the matter.⁴ For good and sufficient cause shown the court may, by force of the statute, take up a case for immediate trial before it has been reached in its order on the docket,⁵ or it may continue the cause or pass it to some future day and return to it afterwards when the parties are present or have had notice that the cause will be taken up, and the court may then dispose of the case. By passing a case the court does not lose its jurisdiction to dispose of such case at a subsequent day during that term.⁶ No rule is required to hear a case out of its order. After having passed a case the court may hear and dispose of it without any order having been entered upon the

avoided such continuance by stipulating that he would not rely upon the common counts. He could also have entered a *nolle prosequi* as to them. *Hawthorn v. Cooper*, 22 Ill., 225.

¹ *Oliver v. Hart*, 35 Ill., 55.

² Rev. Stat., Ch. 37, ¶ 56, § 21; *Poyer v. Village of Des Plaines*, 124 Ill., 310.

³ Rev. Stat., Ch. 110, ¶ 15, § 14.

⁴ *Morrison v. Hedenberg*, 138 Ill., 22; *Jansen v. Fricke*, 133 Ill., 171; *Anthony v. The International Bank*, 93 Ill., 225; *Reiman v. Ater*, 88 Ill., 299; Rev. Stat., Ch. 110, ¶ 17, § 16.

⁵ *Smith v. Third National Bank of St. Louis*, 79 Ill., 118.

⁶ *Crosby v. Kiest*, 135 Ill., 458.

docket for that purpose.¹ The parties may consent that a case be heard before it is reached in its regular order or may consent that it be passed and tried at a future day and if it appears that a case was tried out of its order and that the parties went to trial thereof without objection they will be deemed to have waived any objection to the trial of the cause out of its order.² The power to try a case out of its order is granted by the statute.³ Therefore, since a rule of court providing some other and particular way by which a case might be brought to a speedy trial out of its order would defeat the statute itself, such a rule would be void.⁴

Causes are presumed to be placed in their proper order upon the calendar and in the absence of proof that they have been assigned to a wrong place, a court will properly refuse leave to strike the case from the list of causes set for trial on a particular day, and place it elsewhere on the calendar.⁵

¹ Clark v. Marfield, 77 Ill., 258.

⁵ Anderson v. McCormick, 129 Ill.,

² Jansen v. Fricke, 133 Ill., 171;

308.

Munson v. Adams, 89 Ill., 450;

Cleaver v. Webster, 73 Ill., 607.

³ Rev. Stat., Chap. 110, ¶ 17, § 16.

⁴ Clapp v. Rauch, 90 Ill., 468;
Braidwood v. Weiller, 89 Ill., 606.

Rules of court must be proved.—
The Supreme Court will not take judicial notice of rules of practice in trial courts. Anderson v. McCormick, 129 Ill., 308.

PROCEEDINGS AT THE TRIAL.

ARTICLE II.

WHEN ONLY ONE PARTY TO BE PRESENT.

- | | |
|---|---|
| § 798. Proceedings where the defendant only is present. | § 801. Proceedings when the plaintiff only is present—Default judgment. |
| 799. Effect of striking case from the docket. | 802. How default judgment set aside. |
| 800. How causes reinstated. | |

§ 798. Proceedings where the defendant only is present. When a case is called on the calendar for trial and the defendant only is present, the cause will usually fail for want of prosecution and the court will either strike the case from the docket, that is, dismiss the case without judgment, or it will enter judgment for the defendant's costs.¹ Where the defendant is ready for trial and the plaintiff is not, the court will usually allow further time to the plaintiff on "just terms;" that is, a reasonable sum paid to the defendant for his costs in that regard. If then the plaintiff neglect to try the case within the time allowed the court will give judgment to the defendant as in the case of non-suit.

A defendant is sometimes entitled to a judgment as in case of non-suit before his cause comes to trial in its order on the calendar. When the plaintiff's declaration was not filed ten days before the first day of a term and the cause has been continued to the next term at the plaintiff's costs, or where the suit was begun within ten days before the first day of a term and the cause was continued for want of a declaration without costs, to the next term, and a declaration has not been filed ten days before the first day of the second term the defendant is entitled to judgment as in case of non-suit.² This is technically known as "Involuntary non-suit."³

¹ Rev. Stat., Ch. 33, ¶ 8, § 8.

² Rev. Stat., Ch. 110, ¶ 18, § 17.

³ Holmes v. Chicago & A. Ry., 94 Ill., 439.

Where a defendant has interposed a plea of set-off and the plaintiff is not present when the case is called for trial the defendant may proceed to a trial before a jury and have judgment for the amount of the demand which he establishes by proof against the plaintiff.¹

It is competent for a court to make rules providing that cases will be dismissed for want of prosecution on the preliminary call of the calendar if there is no appearance on the part of the plaintiff, but in the absence of any rule of practice to that effect it will be error to so dismiss a cause on the preliminary call of the calendar.²

Where, however, a continuance has been granted, the court cannot set aside such continuance and dismiss the suit for want of prosecution without reasonable notice first being given to the party procuring the continuance.³

§ 799. Effect of striking case from the docket.—On the

¹ Morgan v. Campbell, 54 Ill. App., 242.

Consequently if a case has been appealed from a Justice of the Peace and the plaintiff does not appear, a defendant cannot have trial and judgment as to his set-off unless he has actually interposed a written plea of set-off or a plea of the general issue with notice in writing. The only thing he can do in the absence of it is to have the suit dismissed. Morgan v. Campbell, 54 Ill. App., 252.

² Goode v. Le Clair, 10 Ill. App., 647; Nieman v. Wintker, 85 Ill., 468.

Dismissing a cause for want of prosecution when there has been a verbal agreement to postpone the trial will be sufficient cause for the reinstating of a case upon the docket. Nevertheless the reinstating of such case is within the discretion of the court and not revisable by a court of review. Oliver v. Hart, 35 Ill., 55.

³ McKee v. Ludwig, 30 Ill., 28.

Dismissal for other causes.—Cases

may be dismissed for other cause than want of prosecution. They may be dismissed for substantial defects appearing upon the face of the record before the call of the calendar and properly before the cause is at issue. Motions to strike a case from the docket are dilatory motions and should be made before a full appearance is entered. Such motions are in the nature of pleas in abatement and will not be entertained except for matters which appear upon the face of the papers. Objections to matters which do not so appear must be interposed by plea in abatement in order that an issue thereon may be made and tried. Holton v. Daly, 106 Ill., 131; McNab v. Bennett, 66 Ill., 157; Metropolitan Life Ins. Co. v. Broach, 31 Ill. App., 493.

Causes may likewise be dismissed on stipulation of the parties thereto. Chapman v. Shattuck, 3 Gilm. (Ill.), 49.

dismissal of a suit the parties are out of court and further proceedings are unauthorized unless the judgment of dismissal is vacated and the cause reinstated.¹

The striking of a case from the docket does not deprive the court of jurisdiction over it. The cause may be reinstated within a reasonable time in the discretion of the court. Merely lapse of time is said not to be sufficient to prevent the exercise of this discretion and yet it has been said that it would doubtless be error to reinstate a case after it had been off the docket for several years. It is the general practice, however, that this discretion of the court to reinstate a case will not be exercised after the expiration of the term at which it was stricken off.²

§ 800. How causes reinstated.—When a case is stricken from the calendar on a preliminary call, or is stricken from the docket, when called for trial, for want of prosecution, the plaintiff may, within a reasonable time—usually before the expiration of the term—procure the cause to be reinstated on motion, with reasonable notice to the adverse party, upon proper showing that with due diligence he was unable to be present and insist upon the trial of the cause at the time it was so called. The expiration of a term, however, is no bar to the reinstatement of a cause if there is no rule of court to the contrary and upon due notice given to the proper parties. If parties appear after a cause has been reinstated and participate in the subsequent proceedings without objections, even a want of notice will be deemed to have been waived as well as other irregularities concerning the reinstatement.³

§ 801. Proceedings when the plaintiff only is present—Default judgment.—When a case is called for trial and the

¹ Goodrich v. Hunting, 11 Ill., 646.

² Robinson v. Maghee, 85 Ill., 545; Combs v. Steeles, 80 Ill., 101; Welch v. Louis, 31 Ill., 446; Tibbs v. Allen, 29 Ill., 536.

³ Stinnett v. Wilson, 19 Ill. App., 38.

Where, however, no notice has

been given to the defendant of the reinstatement of the cause and no plea has been filed by the defendant, the court cannot, in his absence, impanel a jury and try the issues between the parties. Reynolds v. Anspach, 14 Ill. App., 38.

plaintiff only is present, the defendant failing to appear, the court may, where the process has been duly served and the plaintiff's declaration filed ten days before the term of court, give judgment by default.¹

No default can be entered unless it affirmatively appears that the defendant has been regularly served with process (or in attachment, that he has been duly notified of the proceeding). The acknowledgment of service endorsed upon the summons will not be sufficient. The regular service must be shown by the return and it must be shown what day the service was made.² No default can be taken when there is an unanswered demurrer or a plea has been filed,³ even though such plea may have been destroyed by fire.⁴ Even a demurrer to one count of the plaintiff's declaration or one of several pleas remaining undisposed of will prevent the taking of a default.⁵

¹ Rev. Stat., Ch. 110, ¶ 39, § 38.

² *Crabtree v. Green*, 36 Ill., 279; *Reed v. Curry*, 35 Ill., 536; *Chickering v. Failes*, 26 Ill., 507; *Vairin v. Edmonson*, 5 Gilm. (Ill.), 270; *Little v. Carlisle*, 2 Scam. (Ill.), 375; *Garratt v. Phelps*, 1 Scam. (Ill.), 381; *Ditch v. Edwards*, 1 Scam. (Ill.), 127.

³ *Sammis v. Clark*, 17 Ill., 398; *Jones v. Wight*, 4 Scam. (Ill.), 338; *McKinney v. May*, 1 Scam. (Ill.), 584; *Covell v. Marks*, 1 Scam. (Ill.), 391; *Lyon v. Barney*, 1 Scam. (Ill.), 387.

⁴ *Daniels v. Fifth Nat. Bank of Chicago*, 65 Ill., 409.

A default entered for want of a plea, so entered by mistake when a plea was on file, will be unavailing and cannot stand. *Faurot v. Park Nat. Bank*, 37 Ill. App., 322.

⁵ *Bradshaw v. McKinney*, 4 Scam. (Ill.), 54.

Default for want of plea, when to be entered.—When a defendant has a certain number of days in which to plead, he has the whole of the last day to file his plea, but where, by rule, his time is extended to a

specific day, the words "to that day" mean until the meeting of court on that day and not the entire day. *Clark v. Ewing*, 87 Ill., 344.

One of several defendants in default.—Where there are two or more defendants all served with process in an action *ex contractu*, judgment cannot be entered against one of them by default while a plea as to others remains undisposed of. *Wight v. Hoffman*, 4 Scam. (Ill.), 362. In such a case the court should suspend all further proceedings as to the one in default after the entry of his default until the issues tendered by the plea of the others are tried, and if the verdict be for the plaintiff on such issues joint judgment should be entered against all. *Wight v. Hoffman*, 4 Scam. (Ill.), 362; *Wight v. Meredith*, 4 Scam. (Ill.), 360.

Where there are two defendants, one of whom makes no defense, and the other submits his cause to trial, the jury should assess the damages against both. *Wells v. Reynolds*, 3 Scam. (Ill.), 191.

The defendant cannot, by im-

It is absolutely essential to the validity of the plaintiff's judgment that he have default entered before he proceeds to have the damages assessed by a jury or otherwise.¹ If any part of the plaintiff's demand is on an open account and he have filed an affidavit of claim with his declaration,² and the defendant does not appear or has not filed an affidavit of merits with his plea,³ or for *nil dicit*, such affidavit of the plaintiff's claim filed with his declaration may be taken as *prima facie* evidence of the amount due upon such account; but the court may, if it deem best, require further evidence to be adduced.⁴

In all suits where judgment by default is entered and damages are to be assessed, it shall be lawful for the court to hear the evidence and assess the damages without a jury for that purpose. In all cases where interlocutory judgment shall be given in any action brought upon a penal bond, or upon any instrument in writing, for the payment of money only, and the damages rest on computation, the court may refer it to the Clerk, to assess and report the damages and may enter judgment therefor. Either party may, however, have the damages assessed by the jury.⁵ The defendant, by permitting a default to be entered against him, admits every fact alleged in the plaintiff's declaration, but he does not admit that those facts constitute a cause of action. If the plaintiff has not, by his declaration, stated a cause of action, no final judgment can be entered on default. The defendant, by his default, admits that the plaintiff's demand is just and, where the action is upon an instrument executed by the defendant for a definite sum of money, no evidence is necessary upon the assessment of damages. It is however the instrument itself which proves the amount of the damages. The default admits that there

proper act, prevent the entry of default.—While a plaintiff, on taking default, should have a complete *prima facie* case made out by his pleadings and papers in the files, yet the defendant cannot, by withdrawing such papers and retaining them, prevent the entry of a default. *Schultz v. Meiselbar*, 144 Ill., 26.

¹ *Kelsey v. Lamb*, 21 Ill., 559; *Lehr v. Vandever*, 48 Ill. App., 511.

² *Ante*, Vol. I, § 550.

³ *Ante*, Vol. I, § 712.

⁴ Rev. Stat., Ch. 110, ¶ 88, § 37.

⁵ Rev. Stat., Ch. 110, ¶ 41, § 40.

are damages due to the plaintiff, but does not admit that such damages are the amount claimed by the declaration. Therefore the plaintiff must make proof of his damages by the written instrument (the validity of which the defendant by his default has admitted) by the affidavit of claim, or by evidence produced for that purpose. The defendant has a right to cross-examine the witnesses produced on the part of the plaintiff and to contest the amount of the damages at the inquest and may even introduce witnesses to refute the amount claimed. He may, if the inquest is before a jury, have the jury instructed and may take exceptions to have the inquest reviewed, or he may move to set aside the inquest upon affidavit and may assign errors upon the action of the court in taking the inquest.¹

§ 802. How default judgment set aside.—It is within the power of the court to set aside any default before final judgment is entered and it may, during the term, set aside any judgment upon good and sufficient cause upon affidavit upon such terms and conditions as shall be deemed reasonable.²

Whether or not the court will set aside a default is a matter within its sound discretion and the action of the court will not be reviewed unless it appears that its discretion has been abused. The affidavit supporting the motion to set aside a default must, however, disclose a meritorious defense and reasonable diligence in making it, and if, such affidavit discloses such a state of facts as to make it the legal duty of the court to set aside the default, there is such an abuse of legal discretion that a court of review will deem it to be error. The terms imposed by the court must likewise be just and reasonable.³

¹ Ante Vol. 1, § 623; *Madison Co. v. Smith*, 95 Ill., 328; *Kinkel v. Domestic S. M. Co.*, 89 Ill., 277; *Massachusetts Mut. Life Ins. Co. v. Kellogg*, 82 Ill., 614; *Lucas v. Spencer*, 27 Ill., 15; *Underhill v. Kirkpatrick*, 26 Ill., 84; *Chicago & R. I. R. R. Co. v. Ward*, 16 Ill., 522; *Morton v. Bailey*, 1 Scam. (Ill.), 213.

² Rev. Stat., Ch. 110, ¶ 40, § 39.

³ *Schultz v. Meiselbar*, 144 Ill., 26; *Burhans v. Village of Norwood Park*, 138 Ill., 147; *Hall v. First Nat. Bank of Emporia*, 133 Ill., 234; *Hinckley v. Dean*, 104 Ill., 630; *Palmer v. Harris*, 98 Ill., 507; *Andrews v. Campbell*, 94 Ill., 577; *Gallagher v. The People*, 91 Ill., 590;

In moving to set aside a default the defendant must show a meritorious defense and the exercise of diligence in interposing it; but the courts are liberal in setting aside defaults at the term in which they are entered where it appears that justice will be promoted by it. No such strictness is followed as is required of a party to entitle him to a new trial. If a reasonable excuse is shown for not having made a defense, and ordinary diligence is manifested in moving to set the default aside, especially if at the same term it is entered, the application will generally be granted. Where it is made by affidavit to appear that what has been seeming negligence on the part of the defendant or his attorney is excusable and that the defendant has a good defense the motion will not be denied. It is sufficient to show a good and meritorious defense and the exercise of reasonable and ordinary care and diligence.¹

The application to set aside a default can be made at any time before final judgment is entered, whether at the same or a subsequent term; but if final judgment has been entered the application to set aside such judgment must be made at the term in which it was entered.² This, however, does not ap-

- Hitchcock v. Herzer, 90 Ill., 543; Schroer v. Wessell, 89 Ill., 113; Mendell v. Kimball, 85 Ill., 582; Constantine v. Wells, 83 Ill., 192; Boyle v. Levi, 73 Ill., 175; Hovey v. Middleton, 56 Ill., 468; Scales v. Labar, 51 Ill., 232; Bowman v. Wood, 41 Ill., 203; United States Express Co. v. Bedbury, 34 Ill., 459; Rich v. Hathaway, 18 Ill., 548; Woodruff v. Tyler, 5 Gilm. (Ill.), 457; Garner v. Crenshaw, 1 Scam. (Ill.), 143; Harmison v. Clark, 1 Scam. (Ill.), 131; Bridges v. Stephenson, 10 Ill. App., 369; City of E. St. Louis v. Thomas, 9 Ill. App., 412; Franz v. Winne, 6 Ill. App., 82; Waugh v. Suter, 3 Ill. App., 271.
- ¹ Mason v. McNamara, 57 Ill., 274; Thomas v. Kelly, 27 Ill. App., 491; Gibbs & Sterritt Mfg. Co. v. Kaszezeki, 18 Ill. App., 623; Kalkaska Mfg. Co. v. Thomas, 17 Ill. App., 235; Spillman v. People, 16 Ill. App., 224; Dunlap v. Gregory, 14 Ill. App., 601; Allen v. Hoffman, 12 Ill. App., 573.
- ² Coursen v. Hixon, 78 Ill., 339; Messervey v. Beckwith, 41 Ill., 452; Cox v. Brackett, 41 Ill., 222; Ryder v. Twiss, 3 Scam. (Ill.), 4; Kerr and Bell v. Whiteside, 1 Ill. (Breese), 390; Rev. Stat. Chap. 110, ¶ 40, § 39.
- Irregularity in the entry of judgment at a previous term will not be ground for setting aside such judgment. Where the judgment is not void it cannot be set aside after the expiration of the term in which it was entered. Maple v. Havenhill,

ply to judgments by confession on warrant of attorney.¹ The court may open such a judgment and hear the parties on the merits and may reduce the amount of the judgment or may set the judgment aside.² Where the parties are not satisfied therewith and diligently solicit the aid of the court in that regard.³

The motion to set aside a default must be based upon an affidavit showing a meritorious defense and reasonable diligence as above indicated.⁴ The affidavits to support the motion are the only affidavits that will be considered. Counter-affidavits cannot be interposed.⁵ But the affidavit supporting the motion must show that the party is clearly entitled to have the default set aside, or the application therefor will be properly refused. The action of the court in refusing to consider contradictory affidavits cannot be assigned for error.⁶

87 Ill. App., 311. As to "Amendments after judgment," see *ante*, § 751.

¹ Heeney v. Alcock, 9 Ill. App., 431.

² Flemming v. Jencks, 22 Ill., 475.

³ Bannon v. People, 1 Ill. App., 497.

Erroneous return not ground for setting aside default.—An erroneous return as to the service of process cannot be urged as a ground for setting aside a default. The return as to the service and the mode of service must be taken as true. If it be not correct the party has his remedy for a false return. *Palmer v. Harris*, 98 Ill., 507.

Default must be set aside before motion to dismiss will be enter-

tained.—Where a regular default exists against a party, he must first have such default set aside before he will be heard on a motion made by him to dismiss the suit. *Ferguson v. Rawlings*, 23 Ill., 69.

⁴ *Schultz v. Meiselbar*, 144 Ill., 26; *Little v. Arlington*, 93 Ill., 253.

Delay "through pressure of business and inadvertance" is not a sufficient excuse. *Schultz v. Meiselbar*, 144 Ill., 26.

⁵ *Mendell v. Kimball*, 85 Ill., 562; *Reed v. Curry*, 35 Ill., 536; *Scrafield v. Sheeler*, 18 Ill. App., 507; *Kaskaska Mfg. Co. v. Thomas*, 17 Ill. App., 235; *Spillman v. People*, 16 Ill. App., 224.

⁶ *Palmer v. Harris*, 98 Ill., 507.

PROCEEDINGS AT THE TRIAL.

ARTICLE III.

WHERE ALL PARTIES PRESENT.

- § 803. Trial by jury or by the court.
- 804-809. Impaneling the jury.
- 810-813. Opening the case.
- 814-817. Order of presenting the evidence.
- 818-823. What must be proved.
- 824. Excluding witnesses from the court room.
- 825-836. Privileges of witnesses.
- 837-873. Direct examination.
- 874-890. Cross-examination.
- 881. Re-direct examination.
- 882. Re-cross examination.
- 883. Rebuttal.
- 884. Recalling witness to correct testimony.
- 885-887. Impeaching witnesses.
- 888-890. Supporting witnesses.
- 891-893. Inspection or view.
- 894-897. Objections to evidence, and exceptions to the rulings thereon.
- 898-903. Striking out and withdrawing evidence.
- 904. Reopening case after evidence all in.
- 905. Election of counts.
- 906-909. Argument of counsel.
- 910-918. Province of the court and jury.
- 919-923. Taking the case from the jury. *i. e.*, directing a verdict; demurring to evidence; moving for non-suit.
- 924-942. Instructing (charging) the jury.
- 943-950. Conduct of the jury—General verdict.
- 951-957. Special verdict.
- 958-960. Finding on trial by court.

I. Trial by Jury or by the Court.

§ 803. **Right of trial by jury—Waiver.**—All the parties being present and ready for trial the matters in question if an “issue of law” will be tried by the court; but if the matter to be litigated is a “question of fact” it may then either be tried by the court or by a jury.

"Trial by jury," says Blackstone, "hath been used time out of mind in this nation, and seems to have been coeval with the first civil government thereof."¹ The right of trial by jury is preserved by the constitution of this State which prescribed that "the right of trial by jury as heretofore enjoyed, shall remain inviolate."² Nevertheless, while a trial by jury is an inviolate right of a party he may waive such right and consent to the trial by court without a jury. When a jury is waived and the cause is tried by the court alone, such court performs both the functions that are performed by a jury and that of the court as when a jury is present; that is to say, when a jury is waived, the court sits in the dual capacity of jury and court. The findings of the court in such a case have the same force and effect as the verdict of a jury and are governed by the same rules which govern when the facts are tried by a jury. The court will therefore act in its findings upon the same principles which it would direct the jury to follow in a similar case.³ The right of trial by a jury is a constitutional right which may be demanded by either party when questions of fact are to be tried. A party cannot be deprived of this right except by his own consent thereto. Consequently all questions of fact must be tried by a jury unless the parties both consent that they may be tried by the court. This right was not created by the constitution but was merely preserved by it as it existed at the time the constitution was adopted. It has no application to statutory proceedings, but only proceedings recognized by the common law or of rights existing thereunder.⁴ A party may object to a trial by the court and a jury must then be impaneled to try the questions of fact, but if a party is present by himself or

¹ 3 Bla. Com., 348.

² Const. 1870, Article II, § 5; Whitehurst v. Coleen, 53 Ill. 247.

³ Hancock v. Lubakee, 108 Ill., 641; Field v. Chicago & R. I. R. R. Co., 71 Ill., 458; Keating v. Springer, 44 Ill. App., 547; Beadle C. Nat. Bank v. Hyman, 33 Ill. App., 618.

⁴ Puterbaugh v. Smith, 131 Ill., 199;

Commercial Ins. Co. v. Scammon, 122 Ill., 601; Marshall v. Com'rs, 120 Ill., 620; Chicago, M. & St. P. Ry. v. Hock, 118 Ill., 587; Petition of Ferrier, 103 Ill., 367; Huston v. Atkins, 74 Ill., 474; Holmes v. Stalder, 57 Ill., 209; Ward v. Farwell, 97 Ill., 595, Rev. Stat. Ch. 110, ¶ 42, § 41.

counsel and fail to object, his right to a trial by the jury is thereby waived.¹ It is indispensably necessary to a right of trial by the court that the parties who agree to a trial thereby; but it is not indispensably necessary that their consent should appear of record. Where they are present and go to trial by the court without objection their consent will be presumed, and where they have consented to a trial by the court it is not absolutely necessary to a valid judgment that the record should show that both parties were present when the trial was had. If, however, the defendant has not appeared after issue formed either by himself or by counsel a jury must be ordered by the court. In the absence of the defendant no waiver can be presumed.²

Where a defendant is in default he is not entitled to a jury to assess the damages. Furthermore, where a defendant has pleaded to the merits and his plea has been stricken from the files for want of an affidavit of merits³ he is technically in default and not entitled to a jury. The court may assess the damages in all such cases.⁴

A court has power to determine whether or not there is sufficient evidence produced on the trial to make out a *prima facie* case for the plaintiff and if not to take the case from the jury; but where there is evidence tending to prove the case the party has a right to have the jury pass upon it and decide

¹ Washington v. L. & N. Ry. Co., 136 Ill., 49; Driving Park v. West, 35 Ill. App., 496.

² Phillips v. Hood, 85 Ill., 450; Paul v. People, 82 Ill., 82; Hermann v. Pardridge, 79 Ill., 471; Ware v. Nottinger, 35 Ill., 375; Henrichsen v. Mudd, 33 Ill., 477; Burgwin v. Babcock, 11 Ill., 28.

Where issue changed after jury waived.—Where the parties have agreed to submit the cause to the trial of the court and upon the trial the plaintiff obtains leave to amend his declaration by filing an additional count, which count raises an entirely new issue, the previous

waiver of trial by jury does not apply to it and a party cannot be forced to a trial by the court if he demands a jury. Gage v. Com. Nat. Bank of Chicago, 86 Ill., 372.

³ *Ante*, § 712.

⁴ Kassing v. Griffith, 86 Ill., 265.

One who executes a bond as security for costs is not technically a party and therefore not entitled to a trial by jury notwithstanding the fact that he may be compelled to pay such costs in case judgment is rendered against the plaintiff whom he has secured. Whitehurst v. Coleen, 53 Ill., 247.

for or against him as in their minds they deem the evidence may justify.'

It seems that the court, if it sees fit, may refuse to perform the functions of a jury and may order a jury to be impaneled to try the questions of fact. And where the court so orders a jury for his own satisfaction it does not concern the parties and the Judge need not assign his reason for so ordering the jury.'

II. *Impaneling the Jury.*

§ 804. Number and qualifications of jurors.

805. Selecting and summoning the panel.

806. Selecting a jury—Challenges.

§ 807. Juror may be excused without being challenged—Effect after trial begun.

808. The jury a part of the court.

809. How proceedings in selection of jury reviewed.

§ 804. **Number and qualifications of jurors.**—By the common law a petit jury consists of neither more nor less than twelve men and the ancient law was so precise in this regard that if the jury consisted of more or less number it was a mis-trial.' This is still true in criminal cases and also in civil cases unless the parties have assented to a trial by a jury composed of a less number. The parties may consent to a trial by any number less than twelve and may consent to excuse a juror after the trial of a cause has begun, or they may, if they choose, waive a jury altogether. This is true in cases of the trial of rights of property as well as personal rights;

A juror must have the qualifications of an elector; must be an inhabitant of the town or precinct, not exempt from serving on juries; must be of the age of twenty-one years and upwards and under sixty years old; must be in the possession of the natural faculties and not infirm or decrepit; must be

¹ *People v. Nedrow*, 16 Ill. App., 182; *Sargent v. Central Warehouse Co.*, 15 Ill. App., 553. See *post*, "Taking case from the jury" and "Directing a verdict."

² *McCarthy v. Mo. Ry. Co.*, 15 Mo.

App., 385; *Mabley v. Judge*, 41 Mich., 31.

³ *Hale P. C.*, 161; *Bacon's Abr.*, "Juries." *Thompson on trials*, § 8.

⁴ *Kreuchi v. Dehler*, 50 Ill., 177; *McManus v. McDonough*, 107 Ill., 95.

free from all legal exemptions, of fair character, of approved integrity, of sound judgment, well informed, and must understand the English language.¹

Exemptions.—Persons who are exempt from serving as jurors are: Governor, Lieutenant Governor, Secretary of State, Auditor of Public Accounts, Treasurer, Superintendent of Public Instruction, Attorney General, Members of the General Assembly during their term of office, all Judges of Courts, all Clerks of Courts, Sheriffs, Coroners, Postmasters, Mail Carriers, Practicing Attorney, all Officers of the United States, Officiating Ministers of the Gospel, School Teachers during their term of school, Practicing Physicians, Constant Ferry-men, Mayors of Cities, Policemen and Active Members of the Fire Department: *Provided*, That every fireman who shall faithfully and actively have served as such in any volunteer fire department in any city of this State for the term of seven years may thereafter be exempt from serving on juries in all courts.² Furthermore, a juror is exempt who was drawn upon the list of jurors the previous year and actually served upon a jury during the year for which he was selected,³ or, if he actually served as a juror in a court of record within the county within a year previous to the time he is offered as a juror, or that he is a party to a suit pending for trial in that court at that term.⁴

§ 805. **Selecting and summoning the panel.**—The statute specifically provides for the preparation of a jury list annually by the county board,⁵ or for the appointment of a jury commission for the selection of jurors.⁶ But the particular manner in which jurors are selected is not within the cope of this work.

The jurors are summoned by a writ called the *venire facias*, (that you cause to come) issued by the Clerk of the court to the Sheriff,⁷ which writ must be by the Sheriff duly served and returned under penalty.⁸

¹ Rev. Stat., Ch. 78, ¶ 2, § 2.

² Rev. Stat. Chap. 78, ¶ 4, § 4.

³ Rev. Stat. Chap. 78, ¶ 5, § 5.

⁴ Rev. Stat. Chap. 78, ¶ 14, § 14.

⁵ Rev. Stat. Chap. 78, ¶ 1, § 1.

⁶ Rev. Stat. Chap. 78, ¶ 26, § 1 to ¶ 31, § 6.

⁷ Rev. Stat. Chap. 78, ¶ 10, § 10.

⁸ Rev. Stat. Chap. 38, ¶ 11, § 11.

At the opening of court it is provided that a panel of twenty-four jurors shall be in attendance, who shall, upon examination of the Judge, be not subject to any exemption or disqualification hereinbefore named. Such as are so disqualified shall be excused, and if the panel is not full at the opening of court or at any time during the term other jurors are drawn by the Clerk from the jury list and summoned in the same manner as the others, and so on from time to time until the panel is filled. If at any time a jury is required in court for the trial of a cause before the attendant panel is full the court shall direct the Sheriff to summon from the bystanders or from the body of the county a sufficient number of persons having the qualification of jurors to fill the panel in order that a jury to try the cause may be drawn therefrom.¹ From this attendant panel of twenty-four jurors a jury is to be selected for the trial of the cause at issue and a call therefor.

§ 806. **Selecting a jury—Challenges.**—A jury being required when a cause comes on to be heard the court requests the officer to bring in a jury of twelve men from the panel in attendance. *Objections* which either of the parties may have to the jury or otherwise are technically termed “challenges.” Challenges are divided into two technical *divisions*: (1) Challenges to the “array” and (2) Challenges to the “polls.”

(1) *Challenge to the array* is an exception to the whole panel or venire and may be made on account of some partiality of the summoning officer, irregularity in drawing the panel, fraud in selecting the list, etc.² Under the practice in this State there can be no challenge interposed to the array until the panel is full,³ and such challenge must be interposed before swearing the jury. A challenge to the array is waived by calling and swearing the jury.⁴ And if a juror has not been regularly put upon the panel that objection must be taken advantage of by challenge to the array, for if such a

¹ Rev. Stat. Chap. 78, ¶ 12, § 12; ¶ 13, § 13.

² 1 Tidd's Pr., 152; Thompson on Trials, §§ 31-39.

³ St. Louis & S. E. Ry Co. v. Wheelis, 72 Ill., 538.

⁴ St Louis & A. E. Ry. Co. v. Casner, 72 Ill., 384.

challenge is not interposed he will be treated as if properly impaneled.¹

(2) *Challenges to the polls* are granted on objections to the particular jurors, and at common law are divided into two classes: (a) Peremptory challenges, *i. e.*, Challenges for which no reason need be given; and (b) Challenges for cause (disqualification), *i. e.*, challenges for which a reason must be given.

The *peremptory* challenges allowed to a party in a civil case are three in number and the word "party" is taken to represent all the persons who may be plaintiffs or defendants.² Peremptory challenges should be interposed before the jury is accepted. They will not be thereafter allowed unless for good cause shown.³ The purpose of peremptory challenges is to permit a party to dispense with an objectionable juror where the court would not dismiss a juror for cause when such party has not been compelled to exhaust his peremptory challenges on other jurors. Such juror could have been disposed of by a peremptory challenge.⁴

The *causes* provided by the statute for the challenge of a juror are: "That he lacks one of the qualifications of a competent juror;"⁵ or that he is not one of the regular panel; that he has served as a juror on the trial of a cause in any court of record in the country within one year previous to the time of his being offered as a juror;⁶ or that he is a party to a suit pending for trial in that court at that term." It shall be the duty of the court to discharge from the panel all jurors who do not possess qualifications required by law as soon as

¹ Meullers v. Rebhan, 94 Ill., 142; see also Rockford Ins. Co. v. Nelson, 75 Ill., 548.

² Rev. Stat., Ch. 110, ¶ 49, § 48; Schmidt v. Chicago & N. W. Ry. Co., 83 Ill., 405.

³ Peoria, D. & E. Ry. Co. v. Puckett, 52 Ill. App., 222.

The error of a court in refusing to allow a peremptory challenge will be rendered harmless by the court

thereafter excusing such juror. Amick v. Young, 69 Ill., 542.

⁴ Robinson v. Randall, 82 Ill., 521; Hughes v. Cairo, 93 Ill., 339; Lycoming Fire Ins. Co. v. Ward, 90 Ill., 545.

⁵ Ante, § 804.

⁶ If a person has served on a jury in a court of record within a year he shall be exempt from again serving during such year, unless he waives such exemption.

the fact is discovered.¹ There are certain other provisions in the statute applicable to criminal cases only, which need not be mentioned here.

After twelve jurymen are in the box they are sworn to answer truthfully the questions which are put to them touching their competency to act as jurors in the cause to be tried. This examination is called an examination on their *voir dire*. After the jurors are sworn on their *voir dire* the parties by their counsel proceed to question each juror separately as to his qualifications. The examination is first conducted on the part of the plaintiff and if any of the jurors are excused the defendant need not proceed with the examination of the jurors until the box is filled. He is entitled to have the jurors, twelve in number, before he proceeds to examine them.² The jurors are questioned concerning the requisite qualifications hereinbefore indicated and others which are required by the rules of the common law and practice.

A juror who is prejudiced in favor of one of the parties is incompetent. A juror may have sympathy for one of the parties and yet if he says that he can fairly and impartially try the cause he may be competent.³ And in determining this matter it is proper to ask the jury that if the testimony was evenly balanced for which party he would be inclined to decide the case.⁴

The only purpose of examining a juror is to ascertain whether he can try a case fairly.⁵ If the juror has made up a decided opinion on the merits of the case either from his personal knowledge or from the statement of others or from relation of the parties or from the printed reports in newspapers, and his opinion is positive and not merely hypothetical, such opinion will probably prevent him from giving an impartial verdict and a challenge in such case will be properly allowed; but where the opinion of the juror is not fixed and

¹ Rev. Stat. Chap. 78, ¶ 14, § 14.

² Sterling Bridge Co. v. Pearl, 80 Ill., 251.

³ Chicago & W. I. R. R. Co. v. Bingenheimer, 116 Ill., 226; Chicago & A. Ry. Co. v. Adler, 56 Ill., 344.

⁴ Galena & S. W. R. R. Co. v. Haslam, 73 Ill., 494; Chicago & A. R. R. Co. v. Buttolf, 66 Ill., 347.

⁵ Fish v. Glass, 54 Ill. App., 655.

positive, although he may have formed some opinion which is merely hypothetical and will not prevent an impartial judgment on the facts as they may be shown on the trial, he is a competent juror.¹

It is within the discretion of the court to allow a juror on his *voir dire* examination to be asked if he knows an attorney who is claimed to be indirectly interested in the case. The question may enable counsel to judge whether he will exercise his right of peremptory challenge.² But a juror cannot be asked to state briefly his idea of the duties of a juror in an effort of counsel to ascertain whether he is a man of sound judgment and well informed. Such question is not proper for that purpose or any other.³

Although one party has completed his examination of the jury he will be entitled to a further examination if new jurors are introduced into the panel by the challenges of other parties and he may again challenge jurors if he has not before then exhausted his rights thereto.⁴

¹ Chicago, B. & Q. R. R. Co. v. Perkins, 125 Ill., 127; Gradle v. Hoffman, 105 Ill., 147; Richmond v. Roberts, 98 Ill., 472; Lycoming Fire Ins. Co. v. Ward, 90 Ill., 545; Wilson v. People, 94 Ill., 299; Hughes v. City of Cairo, 93 Ill., 339.

Relationship.—That a juror is related to one of the parties is a disqualification. The English rule extends to the ninth degree and the New York rule entered by statute extends to the sixth degree. 3 Bla. Com. 368; Cain v. Ingham, 7 Cow. (N. Y.), 478.

Remote interest in subject matter.—The interest which will disqualify need not be pecuniary. Even that of an officer or trustee of a charitable society, although he served without compensation, is disqualified from acting as juror in a case in which the interests of such society are in-

volved. Michigan Air Line Ry. Co. v. Barnes, 40 Mich., 383; Wood v. Stoddard, 2 Johns. (N. Y.), 184; Wilson v. Dickinson, 63 Ga., 682; Williams v. Smith, 6 Cow. (N. Y.), 166; Miller v. Wild Cat, etc., Co., 52 Ind., 51.

² O'Hare v. Chicago, M. & N. R. Co., 139 Ill., 151.

³ Pennsylvania Co. v. Rudel, 100 Ill., 603.

⁴ Fitzpatrick v. City of Joliet, 87 Ill., 58.

Where a juror is known to be disqualified he must be objected to at the proper time. If a party accept the jury and go to trial knowing the disqualifications of a juror he cannot thereafter urge such disqualification as cause for granting a new trial. Swarnes v. Sitton, 58 Ill., 155; Venum v. Harwood, 1 Gilm. (Ill.), 659.

§ 807. Juror may be excused without being challenged—
Effect after trial begun.—It is within the power of the court to discharge a juror upon sufficient cause, although such cause be personal to the juror himself.¹ A Sheriff has no power to excuse a juror from attendance.²

Where it is proper for the court to discharge a juror after the trial has commenced, as where such juror is taken sick, it is the duty of the court to call another juror in his place and order the trial to proceed again from the beginning.³

§ 808. The jury a part of the court.—Where both parties express themselves as satisfied with the jury the court will instruct the Clerk to swear the jury to try the cause, and the trial thereof will proceed. After a jury is sworn it is a part of the court and cannot be put beyond its supervision.⁴

§ 809. How proceedings in selection of jury reviewed.—If a party is not satisfied with the jury or the proceedings by which such jury has been obtained and the court nevertheless directs the trial to proceed, such party should have an exception entered that he may take the same up on bill of exceptions.⁵

III. *Opening the Case.*

§ 810. When in order.

811. The plaintiff's opening statement.

§ 812. The defendant's opening statement.

813. Objectionable opening statements, how reviewed.

§ 810. When in order.—The cause at issue being a "question of law," the parties being present and ready to try the cause and the court ready to hear the same or, the matter at

¹ Ayers v. Metcalf, 39 Ill., 307; People v. Carrier, 46 Mich., 442.

In the latter case the juror was excused because he was a witness in the next case on call.

² Ayers v. Metcalf, 39 Mich., 307.

³ City of Shawneetown v. Mason, 82 Ill., 337.

The court will not discharge a

juror after the jury has been accepted and the trial begun where there is nothing developed to show that he has become incompetent to discharge his duty as a juror. Chicago, M. & St. P. v. Harper, 128 Ill., 384.

⁴ Stowell v. Jackson Supervisors, 67 Mich., 31.

⁵ Martin v. Barnhardt, 39 Ill., 9.

issue being "a question of fact" and the jury having been brought in and sworn, or the court having consented to sit as a jury, the next thing in order is termed "opening the case" or the statement of the case.

§ 811. The plaintiff's opening statement.—It is a universal rule of practice that he who has the affirmative of an issue must take the initiative. On him is the burden of proof to establish his affirmative allegations; his evidence must therefore be first introduced and he necessarily has the first right to make a statement of his case. The plaintiff having the averments of his declaration to sustain generally has the affirmative of the issue and has the right to the opening statement.¹ It is therefore the duty of plaintiff's counsel, before offering the evidence to support the averments of his declaration, to make a full and fair statement of his case and all the facts which he expects to prove. This is not only true but he may go further and state the matter of defense if it appear upon the record, or from a notice of set-off, or the like, and may state the evidence by which he can disprove it.² There has been much uncertainty as to the exact length to which this rule may be extended.³ The opening statement is required to be a brief summary or outline of the substance of the evidence intended to be offered, together with clear and concise explanations, but counsel should not be allowed to relate the expected oral testimony at length, nor to read the expected documentary proofs at large, nor to pursue any other course tending to mislead the jurors. There may of course be instances where a statement of the evidence itself, or the reading of a paper may be convenient and harmless; but this

¹ Thompson on Trials, § 228.

The court has discretion to say whether the plaintiff shall open and close as he may think most conducive to the administration of justice. *Carpenter v. First Nat. Bank*, 119 Ill., 352.

² 1 Archibald's Pr., 191; 1 Burrill's Pr., 233; Thompson on Trials, § 262;

Elliott's Gen'l Pr., § 548; *Hettinger v. Beiler*, 54 Ill. App., 320; *Marder, Luce & Co. v. Leary*, 137 Ill., 319; *Colwell v. Brower*, 75 Ill., 516; *Carpenter v. First Nat. Bank*, 19 Ill. App., 549, *Huddle v. Martin*, 54 Ill., 258.

³ Thompson on Trials, Ch. 10; *Abbott's Trial Brief*, Ch. 5.

will be exceptional and not within the general rule. Statements of irrelevant matter not intended to be offered in evidence will not be allowed; but statements of matters of fact which will be relied upon may be made, and in so doing it will not be improper for counsel to refer to documents to refresh his memory.¹ Counsel will be permitted to use a diagram, if correctly drawn and admissible in evidence, to explain the situation and the evidence afterwards to be introduced. A denial of this right to counsel will be error.*

The plaintiff's opening statement should clearly state a right of the plaintiff to maintain the cause on trial. It has been held in some instances that if counsel's opening statement disclose a fatal objection, or if he expressly puts his case solely on a ground which is untenable in point of law, the court may refuse to hear evidence in support of it and may dismiss the case or direct a verdict as in case of nonsuit. The reason assigned being that the court ought not to spend time in hearing evidence of facts that will not sustain an action.* But a motion to dismiss on account of plaintiff's opening statement must be granted upon an admission therein which is necessarily fatal to the case.*

Statements made by counsel in opening a case cannot be looked upon as evidence.* Furthermore, matters which may thereafter be stated by witnesses or offered in evidence, may be restricted in its application by a statement of counsel when made expressly for that purpose.*

§ 812. The defendant's opening statement.—The general

¹ *Hennies v. Vogle*, 87 Ill., 242; *Schrippe v. Reilly*, 35 Mich., 871; *Thompson on Trials*, 263; *Elliott's Gen'l Pr.*, §§ 546, 556, 558.

² *Bateshill v. Humphrey*, 64 Mich., 494; *Thompson on Trials*, § 268.

³ *Oscanyan v. Arms Co.*, 103 U. S., 261; *Clews v. Bank*, 105 N. Y., 398.

⁴ *Stewart v. Hamilton*, 18 Abb. Pr., 298; *Emerson v. Weeks*, 58 Cal., 382.

Waiver of right to open case.—

Where plaintiff's counsel waives the opening statement and the defendant's counsel waives argument the court may properly refuse the plaintiff's counsel the right to address the jury. *Creager v. Blank*, 32 Ill. App., 615.

⁵ *Pennsylvania Co. v. Backes*, 35 Ill. App., 376.

⁶ *Lake Shore & M. S. Ry. Co. v. Richards*, 152 Ill., 59.

practice is that after the plaintiff has made his opening statement and offered evidence in support of his declaration the defendant then makes his opening statement which consists of a brief statement of the matters which he will rely upon in defense, and the statement of the defendant will be governed by the same rules which obtain as to the plaintiff's opening statement.¹

§ 813. Objectionable opening statements, how reviewed.

—The latitude that will be allowed to counsel in an opening statement is largely within the discretion of the court. Where counsel is deemed to be making an unfair opening statement, counsel for the adverse party may ask the court to restrict him therein. If the rule of the court thereon is thought to be unfair an exception may be entered and the matter taken to a court of review on bill of exceptions, but a court of review will not revise the same except in a manifest case of abuse of legal discretion calculated to injuriously affect the legal rights of a party.²

To be error for a court to limit counsel as to the time, for either opening or closing, it must be made to appear that a sufficient time was not allowed because of which the party has suffered injury and injustice.³

IV. *Order of Presenting the Evidence.*

§ 814. When proof to be offered.

815. Order in which proof to be made.

§ 816. Exhausting witnesses and subjects.

817. Order where there are several defendants.

§ 814. When proof to be offered.—The case being opened by a statement of counsel, the next thing in order is the offering of the evidence. It has been pertinently said that unless the parties are prepared to prove their allegations it is need-

¹ Thompson on Trials, § 270; Cannon v. People, 141 Ill., 270; Hettinger v. Beiler, 54 Ill. App., 320.

² Hettinger v. Beiler, 54 Ill. App., 320; Aurault v. Chamberlin, 33 Barb.

(N. Y.), 229; Schripps v. Reilly, 35 Mich., 371; Thompson on Trials, § 266; Elliott's Gen'l Pr., 559.

³ Foster v. Magill, 119 Ill., 75.

less for them to go to trial.¹ It being assumed then that they are prepared to prove their allegations, they will be given an opportunity to do so in the following order:

§ 815. Order in which proof to be made.

First.—The party having the burden of proof (usually the plaintiff) must first produce the evidence which he proposes to offer in support of his allegations, and it is the practice that one counsel alone is allowed to examine witnesses on the trial of issues of fact.

It is a general rule that the plaintiff is required to introduce *all* his evidence which is necessary to make out his side of the issue.² This is for the reason that he can produce no testimony afterwards in reply, except to contradict, cut down, modify, explain, or vary the evidence introduced by the defendant. It is true, however, that the court may allow, in its discretion, a departure from this rule and permit the party who began to supply defects in evidence and give other proof after the opposite party has put in his testimony and even after counsel have closed their arguments. Counsel may also agree between themselves as to the order in which the evidence shall be offered and no objection can be raised thereto, unless it is made to appear to the court that some undue advantage has been attempted to be gained from the opposite party.³

The order in which the party shall introduce his different matters of proof depends wholly upon his own discretion, but the skillful practitioner will so arrange the items of proof as to lead the jury from step to step to a full understanding of the case beginning with the foundation and following with the matters incident thereto.⁴

Second.—After the plaintiff has introduced evidence to sustain his allegations the defendant will proceed to exhaust his

¹ 2 Tidd's Pr., 799.

² Abbott's Trial Brief, Ch. IV; Thompson on Trials, § 344.

³ McDaniel v. Logi, 143 Ill., 487;

Muller v. Renhan, 94 Ill., 142; Black-

burn v. Mann, 85 Ill., 222; Gross v.

Turner, 21 Vt., 437; Hathaway v.

Hemingway, 20 Conn., 195; Mascull v. Wall, 6 Gray (Mass.), 507; Silverman v. Foreman, 3 E. D. Smith, 322.

⁴ Hall v. Barnes, 82 Ill., 228; Mix v. Osby, 62 Ill., 193.

testimony, one counsel alone usually being permitted to examine the witnesses. The defendant will offer proof of the matters which will support his cross-action, if he has one, as well as proof in contradiction of that adduced by the plaintiff.

Third.—After the defendant has put in his entire defense the plaintiff will be permitted to introduce evidence tending to rebut that which has been offered by the defendant, confining himself in general to such testimony as will directly rebut or modify the proof of the defendant and which he was not required to offer in order to make his case under the pleadings.¹

The plaintiff, however has a right on rebuttal to give evidence which will tend to meet the affirmative case, if any, which the defendant has sought to establish. Furthermore, it is no objection to such evidence that it tends incidentally to corroborate the plaintiff's case in chief; nor that it may necessitate the allowance to the defendant of a surrebuttal.²

Fourth.—After the plaintiff's rebuttal the defendant has a right in reply to give evidence which tends to meet the affirmative case, if any, or any new distinct fact sought to be established by the plaintiff's rebuttal, which the defendant had no opportunity to meet in his case in chief. This is called a surrebuttal and it is error in the court to refuse it.³

§ 816. Exhausting witnesses and subjects.—It is a general rule that when a party calls a *witness* he will be required to exhaust the testimony of that *witness* before calling another.⁴ A witness may, however, be recalled to rebut or contradict any new subject-matter that he had not the opportunity to

¹ State v. Alford, 31 Conn., 40; Hastings v. Palmer, 20 Wend. (N. Y.), 225; Ford v. Niles, 1 Hill (N. Y.), 300; Commonwealth v. Eastman, 1 Cush. (Mass.), 189.

² Cadbourn v. Franklin, 5 Gray (Mass.), 312; Bancroft v. Sheehan, 21 Hun (N. Y.), 550; Scott v. Woodward, 2 McCord (S. C.), 161; Hollister v. Brown, 19 Mich., 163.

³ Strong v. Connell, 115 Mass., 575;

Walker v. Fields, 28 Ga., 237; Marshall v. Davis, 78 N. Y., 414; Asay v. Hay, 89 Pa. St., 77; White v. Bailey, 10 Mich., 155; Morse v. Hewitt, 28 Mich., 481; Kent v. Lincoln, 32 Vt., 591; Thayer v. Davis, 38 Vt., 163.

⁴ People v. Mather, 4 Wend. (N. Y.), 229; Beaulieu v. Parsons, 2 Minn., 87; Treadwell v. Goodwin, 6 Bosw. (N. Y.), 538.

contradict on his first examination. It will be error for a court to refuse a party the privilege to so recall a witness.¹ It is the general practice also to require that a party offering evidence upon a subject shall exhaust all his evidence on that subject before passing to another. It is, however, within the discretion of the court to allow a party, after he has given evidence on another part of his case, to return to the former subject and offer evidence thereon. A party will usually be permitted to offer his evidence in the manner he may choose.²

§ 817. Order where there are several defendants.—If several defendants to an action have separate defenses it is within the discretion of the court to decide in what order they shall cross-examine, present their case and sum up, and if their interests are identical it seems they may all be confined to one counsel in so doing in the same manner as if their defenses were joint.³

V. *What Must be Proved.*

§ 818. Everything in issue must be proved.

819. "Variance" between pleading and proof fatal,

820. Burden of proof.

§ 821. Degree and quality of evidence required.

822. Same—facts not disputed.

823. Same — Judicial notice — Things generally known.

§ 818. Everything in issue must be proved.—The rule generally stated is that it is necessary to prove in the first instance all that is by the pleadings put in issue and no more; that the evidence must follow the pleading and that no evidence will be permitted to be introduced which has not its foundation in the pleading. All this must be established by proof or there can be no recovery thereon. There can be no recovery except by proof of the case stated in the affirma-

¹ Jones v. Smith, 64 N. Y., 180; Morse v. Hewitt, 28 Mich., 481; Brown v. Marshal, 47 Mich., 576.

² Mix v. Osby, 62 Ill., 193; Kendall v. Weaver, 1 Allen (Mass.), 267; Graham v. Davis, 4 Ohio St., 362; Babcock v. Babcock, 46 Mo., 243;

Gross v. Turner, 21 Vt., 437; Hemmens v. Bentley, 32 Mich., 89.

³ Chipdale v. Mason, 4 Camp., 174; Fletcher v. Crosby, 2 Moo. & R., 417; Mason v. Ditchbourne, 1 Moo. & R., 422 n.

tive pleading. While it is not necessary that a plaintiff should always prove every allegation it is always necessary that he prove sufficient of his allegations to make a cause of action. Surplusage in pleading need not be followed by proof; nor can a recovery be had by proving a different cause of action than that averred, but where there are several counts a recovery may be had by proving one of them.¹ If a declaration aver a joint contract, such *joint* contract must be proved. The cause of action must be established against all of the defendants.² But in actions arising from torts proof of cause of action against any one of the several defendants will sustain the action as against him.³ Likewise in actions on contract the plaintiff must prove the defendant's promise directly or by showing such facts that the law will imply a promise.⁴ But in actions for tort while the evidence is restrictive to the cause averred by the declaration, yet proof of sufficient of the material averments to establish a case of negligence, or other averred tort, will be sufficient to sustain a recovery.⁵ Matters of descrip-

¹ Lake Shore & M. Ry. Co. v. Hes-
sions, 150 Ill., 546; Texas, St. L. & K.
C. R. Co. v. Cline, 135 Ill., 41; Chi-
cago, R. I. Ry. Co. v. Clough, 134
Ill., 586; Dougherty v. Catlett, 129
Ill., 481; Endsley v. Johns, 120 Ill.,
469; Continental Life Ins. Co. v.
Rogers, 119 Ill., 476; Brant v. Gal-
lup, 111 Ill., 487; Ayers v. Chicago,
111 Ill., 406; Walker v. Ray, 111
Ill., 315; Stearns v. Cope, 109 Ill.,
340; Louisville, etc., v. Shires, 108
Ill., 617; Chicago, B. & Q. R. R. Co. v.
Warner, 108 Ill., 538; Chicago, etc.,
v. Mills, 105 Ill., 63; People, use, etc.,
v. Hunter, 89 Ill., 392; Illinois Mid.
Ry. Co. v. Town of Barnett, 85 Ill.,
313; Quincy Coal Co. v. Hood, Admr.,
77 Ill., 68; Indianapolis, B. & W.
R. W. Co. v. Rhodes, 76 Ill., 285;
Toledo, W. & W. R. W. Co. v.
Jones, 75 Ill., 311; Ball v. Benjamin,
73 Ill., 39; Chicago & A. R. R. Co. v.
Mock, Admr., 72 Ill., 141; Disbrow
v. Chicago & N. W. R. R. Co., 70

Ill., 246; Guest v. Reynolds, 68 Ill.,
478; Illinois Central R. R. Co. v.
Middlesworth, 43 Ill., 64; Lassen v.
Mitchell, 41 Ill., 101; Amos v. Sin-
nott, 4 Scam. (Ill.), 440; Humphreys
v. Collier and Powell, 1 Scam. (Ill.),
47; Forsyth v. Vehmeyer, 55 Ill.
App., 22; Hair v. Barnes, 26 Ill.
App., 580; City of Joliet v. Henry,
11 Ill. App., 154; Gibson v. Trout-
man, 9 Ill. App., 94; Stillson v.
Harger, 1 Ill. App., 584; 2 Tidd's
Pr., 799; 2 Greenleaf's Ev., § 5.

² United Workmen v. Zuhlke, 129
Ill., 298; Tedrick v. Hiner, 61 Ill.,
189; Griffith v. Furry, 30 Ill. 251;
ante § 34.

³ Indiana & St. N. R. R. Co. v.
Hackethal, 72 Ill., 612; Jansen v.
Varnum, 89 Ill., 100; *ante* § 44.

⁴ Wrought Iron Bridge Co. v.
Com'rs of Highways, 101 Ill., 518;
Wabash Western Ry. Co. v. Fried-
man, 146 Ill., 583.

⁵ Chicago, etc., v. Warner, 108 Ill.,

tion or inducement stated in the declaration must generally be proved, although it may not have been necessary that such statements be made in the declaration.¹ However, an allegation as to the time in which an act was done, or to be done, need not be proved as laid where such time is not material to the cause of action.² Nor is it necessary that the exact location be shown as laid when the same is not material to a cause of action. It will be sufficient if the court is shown to have jurisdiction.³ An averment of due care in a declaration in an action of tort must be supported by proof of due care at the trial.⁴

Surplusage, *i. e.*, averments in a declaration which are unnecessary to the statement of a cause of action, need not be proved. If an averment may be wholly stricken from the declaration without destroying the plaintiff's right of action, no proof need be offered in support of it.⁵

538; *Gavin v. City of Chicago*, 97 Ill., 66; *Camp Point Mfg. Co. v. Ballou, Admr.*, 71 Ill., 417; *Ohio & Mississippi R. R. Co. v. Taylor*, 27 Ill., 207; *McCormick Harvesting Machine Co. v. Adele*, 47 Ill. App., 542; *Peoria, D. & E. Ry. Co. v. Johns*, 43 Ill. App., 83.

¹ *Wabash Western Ry. Co. v. Friedman*, 146 Ill., 588; *Brant v. Gallup*, 111 Ill., 487.

² *Searing v. Butler*, 69 Ill., 575.

³ *Hurley v. Marsh*, 1 Scam. (Ill.), 329.

⁴ *Illinois Central R. R. Co. v. Nowicki*, 148 Ill., 29; *Wabash, etc., v. Shacklet*, 105 Ill., 364; *Hoopeston v. Eads*, 32 Ill. App., 75; *Price v. Hengen*, 5 Ill. App., 234.

In action for slander the substance of the words charged must be proved. Proof of similar or equivalent words is not sufficient. *Frank v. Kaminsky*, 109 Ill., 26; *Wallace v. Dixon*, 82 Ill., 202; *Thomas v. Fischer*, 71 Ill., 576; *Sword v. Martin*, 23 Ill. App., 304.

In action for malicious prosecution the averment that the prosecution has legally terminated in favor of the plaintiff must be shown and the particular manner of its termination must be proved as averred. *Comisky v. Breen*, 7 Ill. App., 369.

In action for damages for escaping fire from engines.—A *prima facie* case is made out by showing that sparks of fire escaped; the burden is then upon the defendant to overcome the presumption of negligence by showing that the engine was equipped with the proper appliances to prevent the escape of fire and that the same was in good order, and further that the engine was properly handled and managed by a competent and skillful engineer. *St. Louis, V. & T. H. R. R. Co. v. Funk*, 85 Ill., 460; *St. Louis, A. & T. H. R. R. Co. v. Strotz*, 47 Ill. App., 342.

⁵ *Wabash, etc., v. Mills*, 105 Ill., 63.

§ 819. "Variance" between pleading and proof fatal.—

It is a maxim of the law that the proof must follow the pleading. In other words it is necessary that the allegations in the pleading and the evidence thereafter offered must correspond. Any failure in this regard is technically called a "variance" and any variance between the allegations and proof as to matters which, in point of law, are essential to the cause of action as stated is fatal to a recovery. A party cannot make one case by his pleadings and another by his proofs and recover. A case sought to be established by the proof must be warranted by his pleadings.¹ Where a con-

¹ *Wabash Western Ry. Co. v. Friedman*, 146 Ill., 583; *City of Chicago v. Moore*, 139 Ill., 201; *Reed v. Reed*, 135 Ill., 482; *Stearns v. Reidy*, 135 Ill., 119; *Purdy v. Hall*, 134 Ill., 298; *Farris v. People*, 129 Ill., 521; *Kellogg v. Boyden*, 126 Ill., 378; *Chicago, B. & Q. R. R. Co. v. Bell*, 112 Ill., 380; *Meer v. Stevens*, 106 Ill., 549; *Pinneo v. Goodspeed*, 104 Ill., 184; *Randolph v. Onstott*, 58 Ill., 52; *Cavener v. Shinkle*, 89 Ill., 161; *Chicago & A. R. R. Co. v. Michie, Admx.*, 83 Ill., 427; *Roth v. Eppy*, 80 Ill., 283; *McCormick v. Huse*, 78 Ill., 363; *Kelser v. Topping*, 72 Ill., 226; *Lincoln v. Stowell*, 62 Ill., 84; *Byrne v. Aetna Ins. Co.*, 56 Ill., 321; *Wise, Admr., v. Twiss, Admr.*, 54 Ill., 301; *Illinois Central Ry. Co. v. Sutton*, 53 Ill., 397; *McCarthy v. City of Chicago*, 53 Ill., 39; *Metz v. Albrecht*, 52 Ill., 492; *Streeter v. Streeter*, 48 Ill., 155; *Staat v. Evans*, 35 Ill., 455; *Cast v. Roff, Admr.*, 26 Ill., 452; *Ohio & Mississippi R. R. Co. v. Brown*, 23 Ill., 94; *Morgan v. Smith*, 11 Ill., 194; *Giles v. Shaw*, 1 Ill. (Breese), 125; *Johnson v. Foreman & Sellers*, 16 Ill. App., 632; *City of Chicago v. Dignan*, 14 Ill. App., 128; *Reading v. Linington*, 12 Ill. App., 491; *Chicago, B. & Q. R. R.*

Co. v. Wilcox, 12 Ill. App., 42; *Moore v. Sayre*, 4 Ill. App., 248.

As to variance regarding the name of a party, see *Becker v. German Mut. Fire Ins. Co.*, 68 Ill., 412; *Williams v. Baker*, 67 Ill., 238; *Keith v. Sturges*, 51 Ill., 142; *Harbison v. Shook*, 41 Ill., 142; *Headley v. Shaw*, 39 Ill., 354; *Rives v. Marrs*, 25 Ill., 315; *Schoonhoven v. Gott*, 20 Ill., 46; *Stevens v. Stebbins*, 3 Scam. (Ill.), 25; *Gillham v. State Bank*, 2 Scam. (Ill.), 245; *Jockisch v. Hardtke*, 50 Ill. App., 202; *St. Clair Benevolent Society v. Fietsan*, 6 Ill. App., 151.

As to variance regarding the amount of money, see *Waidner v. Pauly*, 141 Ill., 442; *Smith v. Frazer*, 61 Ill., 164; *Boylston v. Bain*, 90 Ill., 283; *Wightman v. Tucker*, 50 Ill. App., 75.

As to variance regarding the contents of a promissory note, see *Knott v. Swannell*, 91 Ill., 25; *Rock Valley Paper Co. v. Nixon*, 84 Ill., 11; *Ingraham v. Luther*, 65 Ill., 446.

As to variance regarding the statement of time in which an act was to be done, see *Driggers v. Bell*, 94 Ill., 22; *Koch & Co. v. Merk*, 48 Ill. App., 26.

As to variance in description of a

tract is set out in *hæc verba*, greater strictness is required in the proof than where the same is set out in substance. In the former case the contract offered in evidence must accurately correspond, but in the latter case the contract to be fatal must be in some material matter.¹

The objection that the proof is variant from the pleading is in practice usually made at the time such evidence is offered by it is properly made any time before final judgment.² In fact the variance may constitute a cause for a new trial, but it cannot be considered on a motion in arrest of judgment.³ The objection can be waived either by stipulation,⁴ or by failure to take advantage of it. If specific objection is not made to the admission of evidence in the trial court by demurrer to the evidence, motion for nonsuit, or motion to strike out, the party will be deemed to have waived his objection.⁵ A general objection on the ground of variance to the evidence offered will not be sufficient. The objection must specifically set forth the ground relied upon in order that the party offering it may avoid the variance by an amendment of his pleading, or that the party raising the objection may assign the same for error in his bill of exceptions.⁶

lease, see *Harms v. McCormick*, 132 Ill., 104; *Miller v. Blow*, 68 Ill., 340.

As to variance regarding the number of animals, see *Davidson v. Johnson*, 31 Ill., 523.

As to variance in description of a bond, see *Kagay v. Trustees, etc.*, 68 Ill., 75.

As to variance in description of highway, see *Murray v. Haverty*, 70 Ill., 318.

As to variance in proof of license, see *Marey v. Taylor*, 19 Ill., 634.

¹ *Franklin Ins. Co. of Indianapolis v. Smith*, 82 Ill., 131; *Phelan v. Andrews*, 52 Ill., 486.

² *Hartford Fire Ins. Co. v. Farrieh*, 73 Ill., 166; *Doyle v. Douglas Machinery Co.*, 73 Ill., 273; *Driver v. Ford*, 90 Ill., 595.

³ *Snell v. Cottingham*, 72 Ill., 161.

⁴ *Harbison v. Shook*, 41 Ill., 142.

⁵ *Harris v. Shebek*, 151 Ill., 237; *Betting v. Hobbett*, 142 Ill., 72; *City of Elgin v. Kimball*, 90 Ill., 536; *Pearsons v. Lee*, 1 Scam. (Ill.), 193; *City of Springfield v. Rosenmeyer*, 52 Ill. App., 301; *Peake v. Walton*, 52 Ill. App., 90; *Chicago & A. R. R. Co. v. Byrum*, 48 Ill. App., 41; *McMahon v. Sankey*, 35 Ill. App., 342.

After judgment is entered on default of a plea an objection cannot be urged that the note described in the declaration is variant from the one actually sued on. *Archer v. Claffin*, 31 Ill., 306.

⁶ *Richelieu Hotel Co. v. Mil. Encampment Co.*, 140 Ill., 250; *City of Chicago v. Moore*, 139 Ill., 201; *Lake Shore & M. S. Ry. Co. v. Ward*, 135 Ill., 511; *St. Clair Benevolent Society*

Variance is a question of law to be decided by the court and it will be error for the court to leave such question to the decision of the jury.¹

§ 820. Burden of proof.—It is a universal rule that he who affirms the existence of a given state of facts must prove it; that is to say, one who avers the existence of a debt or promise, or who avers a neglect of duty on the part of the defendant, has the burden of showing by a preponderance of competent evidence the existence of that which he affirms. This is true whether an affirmative allegation is made by the plaintiff, or by the defendant as in case of set-off, and whether the plaintiff is seeking to prove a condition necessary to his right of recovery, or endeavoring to exclude a condition which his adversary asserts as part of the contract. If the affirmative is not proved the negative will be presumed. The rule has been adopted because a negative does not admit of the direct and simple proof of which an affirmative is susceptible.²

v. Fietsam, Admr., 97 Ill., 474; Smith v. Frazer, 61 Ill., 164; Ohio & Mississippi Ry. Co. v. Brown, 49 Ill. App., 40; Start v. Moran, 27 Ill. App., 119.

¹ Oxley v. Storer, 54 Ill., 159. See "Province of court and jury," post § 910, *et seq.*

What is not variance.—While it is a variance that the proof is *different* from the pleading, yet the fact that *more* is proved than was alleged does not constitute a variance. Pennsylvania Co. v. Conlon, 101 Ill., 98; Murdock v. Walker, 43 Ill. App., 590.

What is not variance in defendant's name.—The fact that the defendant did not execute the instrument sued on in his true name and by which he was sued, cannot be objected to as a variance where it is averred in the declaration that he executed the writing by such name, or where by some other means the

apparent inconsistency is corrected. Becker v. German Mut. Fire Ins. Co., 68 Ill., 412; Cummings v. People, 50 Ill., 132; Board of Education v. Greenbaum & Son, 39 Ill., 609; *ante*, Vol. 1, §§ 483, 552.

² 1 Greenl. Ev., § 74; Young v. Farwell, 146 Ill., 466; Sack v. Dolesse, 137 Ill., 129; Bartelott v. Int. Bank, 119 Ill., 259; Galeana, etc., R. R. Co. v. Ennor, 116 Ill., 55; Rople v. Town of Bishop, 111 Ill., 124; McFarlane v. Williams, 107 Ill., 33; Edgerton v. Weaver, 105 Ill., 43; Kihlholz v. Wolf, 103 Ill., 362; Dodd v. Doty, 98 Ill., 393; Willemín v. Dunn, 93 Ill., 511; Stubblefield v. Borders, 92 Ill., 279; Chicago, B. & Q. R. R. Co. v. Harwood, 90 Ill., 425; Burns v. Nichols, 89 Ill., 480; Lennon v. Goodspeed, 89 Ill., 438; Kitner v. Whitlock, 88 Ill., 514; School Directors v. Parks, 85 Ill., 338; Clayes v. White, 83 Ill., 540; Middleport v. Ætna Life Ins.

In certain cases the law will raise a presumption of the existence of a certain state of facts, and when the plaintiff brings himself within such a case he need prove no more, for the law will presume his right of recovery and the burden will be cast upon the defendant to show the contrary; as where a plaintiff brings an action on a negotiable instrument the introduction of the instrument in evidence will raise the presumption that it was made for a valid consideration and the defendant will have the burden of proving the contrary; and in like manner where a special statute gives a cause of action, as for negligence resulting from certain acts on the part of the defendant, the plaintiff's proof of such acts will be sufficient in the first instance, as the law will presume the negligence and the burden will then be upon the defendant to prove diligence.¹ When a

Co., 82 Ill., 562; Clay F. & M. Ins. Co. v. Wusterhausen, 75 Ill., 286; Smith v. Knight, 71 Ill., 148; Amick v. Young, 69 Ill., 542; Maltman v. Williamson, 69 Ill., 423; Bonnell v. Wilder, 67 Ill., 327; Union National Bank of Chicago v. Baldenwick, 45 Ill., 375; Stout v. Oliver, 40 Ill., 245; Bennett v. O'Brien, 37 Ill., 250; East v. Crow, 70 Ill., 91; Phy v. Clark, 35 Ill., 377; Sutphen v. Cushman, 35 Ill., 186; Stevenson v. Marony, 29 Ill., 532; Illinois Central R. R. Co., v. Reedy, 17 Ill., 580; Watt v. Kirby, 15 Ill., 200; Commercial Nat. Bk. v. Canniff, 51 Ill. App., 579; Engel v. Sellers, 51 Ill. App., 577; Mueller v. U. S. Mut. Accident Ass'n, 51 Ill. App., 40; Higgin v. Lessig, 49 Ill. App., 459; McKenzie v. Stretch, 48 Ill. App., 410; Ballou v. Hushing, 46 Ill. App., 174; Sundmacher v. Block, 39 Ill. App., 553; Chicago Stamping Co., v. Hanchett, 25 Ill. App., 198; Baer v. Lichten, 24 Ill. App., 311; Gardiner v. Mays, 24 Ill. App., 286; Kahl v. Cook, 22 Ill. App., 559; Schiek v. Trustees of Schools of Township, 16 Ill. App., 49; Straight v. Odell, 13 Ill. App.,

232; Williams v. Shup, 12 Ill. App., 454; Lake Erie and W. R. Co. v. Oakes, 11 Ill. App., 489; Bull v. City of Quincy, 9 Ill. App., 127; Wallace v. Wallace, 8 Ill. App., 69; Hunting v. Baldwin, 6 Ill. App., 547; Pease v. The Underwriters Union, 1 Ill. App., 288.

One who intervenes in an attachment proceeding and claims the property has the burden throughout of proving the title which he has averred. Hollenbeck v. Todd, 119 Ill., 543.

¹ Wilbur v. Wilbur, 129 Ill., 392; Hartford Life Ins. Co. v. Gray, 80 Ill., 28; Pixley v. Boynton, 79 Ill., 351; Bonnell v. Wilder, 67 Ill., 327; Leary v. Pattison, 66 Ill., 203; Pittsburg, Cincinnati, etc. Ry. Co. v. Thompson, 56 Ill., 138; Chicago & N. W. Ry. Co. v. McCahill, 56 Ill., 28; Illinois Central Ry. Co. v. Phillips, 55 Ill., 194; Mumins v. Wood, 44 Ill., 416; St. Louis, etc. R. R. Co. v. Montgomery, 39 Ill., 335; B. S. Green Co. v. Blodgett, 49 Ill. App., 180; Chicago, P. & St. L. Ry. Co. v. Lewis, 48 Ill. App., 274; Wickersham v. Beers, 20 Ill. App., 243; Bauch-

plaintiff's right is presumed or shown *prima facie*, and a deprivation of such right proved it will be sufficient. The defendant must then show the non-existence of such right or show the absence of negligence on his part.'

Where a defendant interposes an affirmative defense, as matter of set-off, justification, new promise, payment, satisfaction, release, license, fraud, estoppel, limitation, exemption, duress, infancy and the like, the burden rests upon him to prove the state of facts which in his pleading he has affirmatively averred.² The plaintiff may still, however, bring the burden of proof upon himself by his replication to the defendant's plea.³ The plaintiff having shown a *prima facie* right the burden is upon the defendant who calls that right in question.

Nevertheless, when the facts alleged are peculiarly within the knowledge of the other party than the one averring it, the averment will be taken as true unless it be disproved by the other party. This is especially true where the averment is in the negative, for in such a case the burden is upon the adverse party to prove the existence of the fact negatively averred or it will be presumed not to exist.⁴

witz v. Tyman, 11 Ill. App., 186; Gale v. Rector, 5 Ill. App., 481.

The presumption that an officer will do his duty does not change the rule. Bonnell v. Bowman, 53 Ill., 460; People v. Price, 3 Ill. App., 15.

¹ *Ibid*; Robinson v. Robinson, 51 Ill. App., 317.

² Grange Mill Co. v. Western Assurance Co., 118 Ill., 396; Chicago, B. & Q. R. R. Co. v. Bryan, 90 Ill., 126; Messmore v. Larson, 86 Ill., 268; Gizler v. Witzel, 82 Ill., 322; American v. Rimpert, 75 Ill., 228; Howard v. Bennett, 72 Ill., 297; East v. Crow, 70 Ill., 91; Robinson v. Parish, 62 Ill., 130; Bailey v. Godfrey, 54 Ill., 507; Fritz v. Joiner, 54 Ill., 101; Bonnell v. Bowman, 53 Ill., 460; Bartholomew v. St. Louis, etc., Ry. Co., 53 Ill., 227; Ellinger

v. Boneau, 51 Ill., 94; Walker v. Rogers, 40 Ill., 278; Baker v. Hunt, 40 Ill., 264; Grimes v. Hilliar, 51 Ill. App., 640; Rulse v. Tollman, 49 Ill. App., 490; Morris v. Wibaux, 47 Ill. App., 630; Truesdale Mfg. Co. v. Hoyle, 39 Ill. App., 532; Althrop v. Beckwith, 14 Ill. App., 628; Gammon v. Huse, 9 Ill. App., 557; Chapin v. Thompson, 7 Ill. App., 288.

³ Phelps v. Jenkins, 4 Scam. (Ill.), 48.

⁴ Great Western R. R. Co. v. Bacon, 30 Ill., 347; Robinson v. Robinson, 51 Ill. App., 317; Ryan v. Miller, 52 Ill. App., 191; People v. Nedrow, 16 Ill. App., 192.

In proceedings in the nature of a *quo warranto* the burden is not upon the people to show the negative, but is generally upon the defendant who

§ 821. Degree and quality of evidence required.—In civil cases a preponderance of evidence must be offered in support of the allegations or there can be no recovery. However no greater amount of evidence is required than that which will fairly preponderate the weight of the evidence introduced by the opposite party. Where a plaintiff gives evidence which makes a *prima facie* case in his favor, or raises a legal presumption of his right to recover, the defendant must offer sufficient evidence to rebut the presumption by satisfactory proof. In a civil case a party is not required to offer sufficient evidence to establish his case in the minds of a jury beyond a reasonable doubt, but only sufficient evidence is required of him to fairly preponderate that of his adversary and satisfy the jury in that regard.¹ Even where it is necessary in a civil case that the plaintiff prove that the defendant is guilty of a crime in order that a recovery may be had, it is not necessary to satisfy the jury “beyond a reasonable doubt” for while in such a case it is necessary that the proof should be clear, it is sufficient that the jury are satisfied of the guilt of the defendant. No such certainty is required as is required in criminal cases, but the plaintiff must show himself clearly entitled to recover. If an action is brought under a penal statute the plaintiff must clearly bring himself within the provisions of such statute before he can recover thereunder.*

The word “preponderance” as used in relation to the quality of evidence is intended to mean that evidence which will outweigh all of the evidence opposed to it.* The weight and value of the evidence is to be determined by the jury. It is

has the burden of proving the existence of his title or so much of it as has been traversed. Chicago, C. Ry. Co. v. People, 73 Ill., 541.

¹ Mitchell v. Hindman, 150 Ill., 538; Chicago, R. I. & P. Ry. Co. v. Clough, 134 Ill., 586; Perry v. Burton, 111 Ill., 138; Frazer v. Howe, 106 Ill., 563; Graves v. Colwell, 90 Ill., 612; Cobb, Christy & Co. v. Illinois Cent. R. R. Co., 88 Ill., 394; Holner v. Koch, 84 Ill., 408; Robin-

son v. Randall, 82 Ill., 521; Miller v. Balthasser, 78 Ill., 302; Scheel v. Eidman, 77 Ill., 301; Toledo, P. & W. Ry. v. Eastburn, 54 Ill., 381; Reed v. Rich, 49 Ill. App., 262; Fisher v. Burt, 5 Ill. App., 357.

* Grimes v. Hilliary, 150 Ill., 141; Gilbert v. Bone, 79 Ill., 341; Sprague v. Dodge, 48 Ill., 142; Grimes v. Hilliary, 51 Ill. App., 641.

* North Chicago Street Ry. Co. v. Louis, 138 Ill., 9.

not within the province of the court in any case to tell which evidence is the strongest.¹

The preponderance of evidence, that is the superior weight of it, does not depend upon the number of witnesses, for the testimony of a single honest, intelligent witness will be of greater weight and deserving of more credit than the testimony of many ignorant and unscrupulous witnesses. It is the province of the jury to determine the credibility of witnesses and to weigh the evidence introduced regardless of the number of witnesses testifying on either side.² There is no preponderance of evidence *as a matter of law*, when two witnesses testify contrary to each other. The jury must then judge of the credibility of the witnesses. If the witnesses are equally credible there is no preponderance and the party having the affirmative cannot recover under such circumstances.³ A jury, however, cannot, from mere caprice, disregard the testimony of either witnesses as to a fact in opposition to the testimony of only one. The jury must give evidence its just weight.⁴

While it is generally stated to be the rule that the best evidence must be offered, the law does not require all the evidence, nor the strongest, possible evidence. It only requires the best which the nature of the case supposes it to be within the power of the party to produce, and excludes such as from the nature of the case is not the best that is within the power of the party to offer. Especially in proving a negative it is sufficient that a party offers that evidence which in the absence of all counter testimony will render the existence of the negative probable, even though it may be vague.⁵

Evidence "tending to prove" an issue on trial cannot be rejected when it comes from competent sources. The weight of such evidence must be left for the jury to determine.

¹ Rockwood v. Poundstone, 38 Ill., 199.

² Schevalier v. Seager, 121 Ill., 169; Hubbard v. Rankin, Sr., 71 Ill., 129; Gowen v. Kehoe, 71 Ill., 66; Chicago & R. I. R. Co. v. McKean, 40 Ill., 218.

³ Broughton v. Smart, 59 Ill., 440; Herring v. Poritz, 6 Ill. App. 208.

⁴ Carney v. Tully, 74 Ill., 375.

⁵ Vigus v. O'Bannon, 118 Ill. 334.

When such evidence is introduced the court cannot instruct the jury to find for the adversary in disregard of it.¹

While it is the province of the jury to weigh evidence, it is not error for a court to refuse to allow further proof of a certain fact when it is, or has been, proved by two witnesses, whose testimony was not contradicted. When testimony is abundantly sufficient it is not error to refuse further cumulative proof.²

§ 822. Same—Facts not disputed.—Facts material to the issue which are averred in the declaration and are not denied by the plea need not be proved, because the law will presume them to exist. It is a maxim of the law that what is not denied by the plea will be considered to be admitted by the defendant. The court may properly refuse to hear evidence of facts which are not disputed and if such evidence is received it will not be error, because it will work no injury.³

§ 823. Same—Judicial notice—Things generally known.—Such things as all persons of ordinary intelligence are presumed to know do not require proof. Courts will take judicial notice of them, because every one is fairly presumed to be acquainted with them. Besides this the court will take judicial notice of matters of general knowledge and experience within their jurisdiction and matters which they are directed by statute to notice. They will take judicial notice of the common law and public statute law of this State but not the statute law of any other state, the existence of the legislature of time and place of sessions, its usual courts of proceeding, the privilege of its members, but not the transactions in its journals. The courts will take judicial notice of the general customs observed in the transaction of business, the course of

¹ *Avery v. Moore*, 133 Ill., 74; *Covenant, etc. v. Spies*, 114 Ill., 463; *Chicago v. Mills*, 105 Ill., 63; *Pennsylvania, etc., v. Sloetke*, 104 Ill., 201; *Reese v. Henck*, 14 Ill., 482.

² *Lake Shore & M. S. R. Co. v. Brown*, 123 Ill., 162.

³ *Larminie v. Carley*, 114 Ill., 196; *Johnson v. Johnson*, 114 Ill., 611; *Enos v. Chestnut*, 88 Ill., 590; *Rankey v. Raum*, 51 Ill., 88; *Wilson v. Lyon*, 51 Ill., 166; *Gill v. Caldwell*, 1 Ill. (Breese), 53; *McNeal v. Calkins*, 50 Ill. App., 17.

proceeding, and the rules of practice in the courts themselves (but not the rules of other courts), its own record books and entries therein, the other courts established by law in the same state, their Judges' extent of jurisdiction and course of proceeding, the official status and signatures of officers of the court, such as Attorneys, Clerks of the Court, Sheriff, etc. They will take judicial notice that matters must have happened according to the ordinary course of nature, the natural and artificial division of time, the meaning of English words and common abbreviations, legal weights and measures and moneys of the country; matters of general public history (but not of private or local history), and many other matters generally relating to the relationship and intercourse of this State with others of the United States and of the United States with other nations which the limit of this work will not permit to be enumerated.¹

VI. *Excluding Witnesses from the Court-Room.*

§ 824. **The rule stated.**—"In the trial of causes, both civil and criminal, it is a rule of practice, devised for the discovery of the truth and the detection and exposure of falsehood, and well adapted to the ends designed, for the presiding Judge, on motion of either party, to direct that the witnesses be examined out of hearing of each other. Such an order, upon the suggestion or motion of either party, it is said, is rarely withheld but, by the weight of authority, the party does not seem to be entitled to it as a matter of right.

"To effect this object generally the respective parties are required to disclose the names of the witnesses intended to be examined, and then the witnesses are simply ordered to with-

¹ Greenl. Ev., §§ 4, 5, 6; 1 Wharton's Ev., §§ 317, 335; Steven's Dig. of Ev., Ch. 7, Art. 58; Gormey v. Day, 114 Ill., 185; Hamilton v. People, 113 Ill., 34; Bruner v. Madison Co., 111 Ill., 11; Harnee v. Chicago, 110 Ill., 400; Chicago, B. & Q. R. R. Co. v. Warner, 108 Ill., 538; People v. Sup-

piger, 103 Ill., 434; Robinson v. Brown, 82 Ill., 279; Theilman v. Burg, 73 Ill., 293; Gooding v. Morgan, 70 Ill., 275; Grob v. Cushman, 45 Ill., 119; Dickson v. Nichols, 39 Ill., 272; Thompson v. Haskell, 21 Ill., 215.

draw from the court-room and directed not to return till called; or, as is sometimes the case, they are placed under the charge of an officer of the court, to be kept by him out of hearing in the jury-room or some other convenient place and brought into court when and as they may be severally needed for examination. If a witness, or the officer in charge, wilfully disobeys or violates such order, he is liable to be punished for his contempt; and at one time, according to the English practice, it was considered that the Judge, in the exercise of his discretion, might even exclude the testimony of such a witness; but now it seems to be the practice to allow the witness to be examined, subject to observations as to his conduct in disobeying the order.”¹

The rule seems to be well settled now that while the violation of the order by a witness will subject him to punishment for contempt, it will not deprive the party, whose witness he is, of the benefit of his testimony, where the party himself is without fault, and the court cannot lawfully refuse the examination of the witness, although it will be a matter for observation to the jury upon his evidence.”

VII. *Privileges of Witnesses.*

- § 825. Privilege of parties in interest—May testify, when.
- 826. Parties in interest may not testify, when.
- 827. Same—Partners, joint contractors and others may not testify, when.
- 828. Same—When husband and wife may not testify.
- 829. Regarding privilege of children as witnesses.
- 830. Regarding privilege of physicians and surgeons.
- 831. Regarding privilege of minister or priest.

- 832. Regarding the privilege of attorney as to communication with client.
- 833. Same—Client, patient, or penitent may waive the privilege.
- 834. Witness not compelled to criminate himself.
- 835. Same—Where the refusal to answer is evidence against the witness.
- 836. Same—Whether compulsory answer can be used as evidence against witness.

¹ Hey v. Commonwealth, 82 Gratt. (Va.), 946; Burks, J.; 1 Greenl. Ev., 432; Errissman v. Errissman, 25 Ill., 136.

² Taylor's Ev., 744; Bullinger v. People, 95 Ill., 394; Davis v. Byrd, 94 Ind., 525; Burk v. Andis, 98 Ind., 59; Keith v. Wilson, 6 Mo., 435;

§ 825. Privilege of parties in interest—May testify, when.—By both the common law and the civil law parties of record in a civil suit and co-suitors in the cause were deemed incompetent witnesses.¹

Whether it has been found that witnesses in modern times are less liable to pervert the truth for the purpose of pecuniary gain or personal interest than were the agents, or whether they regard an oath with greater solemnity, we have been unable to determine, but, however that may be, the theory of the law has undergone a change and most states have, by statutory enactment, made it competent for parties to testify in their own behalf in judicial proceedings.

The statute of this State provides "that no person shall be disqualified as a witness in any civil action, suit or proceeding (except as hereinafter stated), by reason of his or her interest in the event thereof, as a party or otherwise, by reason of his or her conviction of any crime; but such interest or conviction may be shown for the purpose of affecting the credibility of such witness; and the fact of such conviction may be proven like any fact not of record, either by the witness himself (who shall be compelled to testify thereto), or by any other witness cognizant of such conviction, as impeaching testimony, or by any other competent evidence." ²

§ 826. Parties in interest may not testify, when.—"No party to any civil action, suit, or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as the trustee or conservator of any idiot, habitual

Chandler v. Horne, 2 Moo. & R., 423.

¹ 3 Bla. Com., 275; Greenl. Ev., 226-9; Fear v. Ebertson, 20 Johns. (N. Y.), 142; Hasey v. White Pigeon, B. S. Co., 1 Doug. (Mich.), 193.

² Rev. Stat., Chap. 51, ¶ 1, § 1.

Adverse party may be compelled to testify.—"Any party to any civil action, suit or proceeding, may

compel any adverse party or person for whose benefit such action, suit or proceeding is brought, instituted, prosecuted, or defended, to testify as a witness at the trial, or by deposition, taken as other depositions are by law required in the same manner, and subject to the same rules as other witnesses." Rev. Stat., Chap. 51, ¶ 6, § 6.

drunkard, lunatic, or distracted person, or as the executor, administrator, heir, legatee, or devisee of any deceased person, or as guardian or trustee of any such heir, legatee, or devisee, unless when called as a witness by such adverse party so suing or defending, and also except in the following cases, namely:

“*First*—In any action, suit or proceeding, a party or interested person may testify to facts occurring after the death of such deceased person, or after the ward, heir, legatee or devisee shall have attained his or her majority.

“*Second*—When, in such action, suit or proceeding, any agent of any deceased person shall, in behalf of any person or persons suing or being sued in either of the capacities above named, testify to any conversation or transaction between such agent and the opposite party or party in interest, such opposite party or party in interest may testify concerning the same conversation or transaction.

“*Third*—Where, in any such action, suit or proceeding, any such party suing or defending, as aforesaid, or any person having a direct interest in the event of such action, suit or proceeding, shall testify in behalf of such party so suing or defending, to any conversation or transaction with the opposite party or party in interest, then such opposite party or party in interest shall also be permitted to testify as to the same conversation or transaction.

“*Fourth*.—Where, in any such action, suit or proceeding, any witness not a party to the record, or not a party in interest, or not an agent of such deceased person, shall, in behalf of any party to such action, suit or proceeding, testify to any conversation or admission by any adverse party or party in interest, occurring before the death in the absence of such deceased person, such adverse party or party in interest may also testify as to the same admission or conversation.

“*Fifth*.—When, in any such action, suit or proceeding, the deposition of such deceased person shall be read in evidence at the trial any adverse party or party in interest may testify as to all matters and things testified to in such deposition by

such deceased person and not excluded for irrelevancy or incompetency.”¹

§ 827. Same—Partners, joint contractors and others may not testify, when.—“In any action, suit or proceeding, by or against any surviving partner or partners, joint contractor or contractors, no adverse party, or person adversely interested in the event thereof, shall by virtue of section one of this act, be rendered a competent witness, to testify to any admission or conversation, by any deceased partner, or joint contractor, unless the same one or more of the surviving partners, or joint contractors were also present at the time of such admission; and in every action, suit or proceeding, a party to the same who has contracted with an agent of the adverse party, the agent having since died, shall not be a competent witness, as to any conversation between himself and such agent, except where the conditions are such that, under the provisions of sections two and three of this act, he would have been permitted to testify, if the deceased person had been a member and not an agent.”²

§ 828. Same—When husband and wife may not testify.—“No husband or wife shall, by virtue of section one of this act, be rendered competent to testify for or against each other as to any transaction or conversation occurring during the marriage, whether called as a witness during the existence of the marriage, or after its dissolution, except in cases where the wife would, if unmarried, be plaintiff or defendant, or where the cause of action grows out of a personal wrong or injury done by one to the other or grows out of the neglect of the husband to furnish the wife with a suitable support; and except in cases where the litigation shall be concerning the separate property of the wife, and suits for divorce; and except also in actions upon policies of insurance of property, so far as relates to the amount and value of the property

¹ Rev. Stat., Ch. 51, ¶ 2, § 2.

This incompetency of parties in interest to testify cannot be removed by any assignment or release or his

claim, made for the purpose of allowing such person to testify. Rev. Stat., Ch. 51, ¶ 7, § 7.

² Rev. Stat., Ch. 51, ¶ 4, § 4.

alleged to be insured or destroyed, or in actions against carriers, so far as relates to the loss of property and the amount and value thereof, or in all matters of business transactions where the transaction was had and conducted by such married woman as the agent of her husband, in all of which cases the husband and wife may testify for or against each other, in the same manner as other parties may, under the provisions of this act; *provided*, that nothing in this section shall be construed to authorize or permit any such husband or wife to testify to any admissions or conversations of the other, whether made by him to her, or by her to him, or by either to a third person, except in suits or causes between such husband and wife.”

The husband and wife are empowered by section one of the act to testify for or against each other as any other witness, except where the same is restricted by section five as last above given.¹ Therefore a wife may testify for a husband regarding the contents of lost baggage, and its value.² A husband may testify for a wife in an action brought by her for malicious prosecution against her for a criminal offense.³ And a husband or wife is a competent witness for the other in an action *brought for* slanderous words spoken of her or him; but a husband or wife is not a competent witness for the other in an action *brought against* him or her for slanderous words spoken.⁴ And a wife of one who as next of kin brings an action of trespass is a competent witness for the plaintiff.⁵

§ 829. **Regarding privilege of children as witnesses.**—A number of states fix the time at which an infant shall be deemed competent to testify as a witness. There is no such

¹ Rev. Stat., Ch. 51, ¶ 5, § 5; Funk v. Eggleston, 92 Ill., 515; Westchester Fire Ins. Co. v. Foster, 90 Ill., 121; Stone v. Wood, 85 Ill., 603; Robertson v. Brost, 83 Ill., 116; Hayes v. Parmelee, 79 Ill., 563; Primmer v. Clabaugh, 78 Ill., 94; Trepp v. Baker, 78 Ill., 146; Hawver v. Hawver, 78 Ill., 412; Wing v. Goodman, 75 Ill., 159; McNail v. Ziegler, 68 Ill., 224; Reeves v. Herr,

59 Ill., 81; Giffert v. McGuerner, 51 Ill. App., 387; R. J. Gunning Co. v. Cusack, 50 Ill. App., 290; Artz v. Robertson, 50 Ill. App., 27 Stort v. Ellison, 15 Ill. App., 222.

² Muller v. Rebhan, 94 Ill., 142.

³ Illinois Central R. R. Co. v. Taylor, 24 Ill., 323. Rev. Stat., Ch. 51, ¶ 5, § 1.

⁴ Anderson v. Friend, 71 Ill., 475.

⁵ Hawver v. Hawver, 78 Ill., 412.

⁶ Belk v. Cooper, 34 Ill. App., 649.

statute in this State and here the competency of an infant depends upon his intelligence to understand and capacity or ability to comprehend the nature and effect of an oath.' But children should not be examined as to indecent matters, nor matters tending to show adultery, and it is proper for a court to refuse to permit questions of that nature to be put to children on the witness stand.'

§ 830. Regarding privilege of physicians and surgeons.—Statutes providing in effect that a person duly authorized to practice medicine or surgery cannot be compelled to disclose any information which he may acquire in the attendance upon any patient in his professional character when such information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon or which information is acquired by means of his senses and acquired because of professional confidence reposed in him, have been enacted in the states of California, Indiana, Iowa, Michigan, Wisconsin, Oregon, etc., but no such statute having been yet passed in this State, the common law obtains, and medical men may be compelled to disclose communications made to them in professional confidence.'

§ 831. Regarding privilege of minister or priest.—Many state statutes likewise prescribe that ministers of the gospel and priests shall not be compelled to disclose any confessions made to them in their professional character. These statutes are manifestly just, but no such statute has been passed in this State and the common law rule obtains. The rule seems not to be well established and yet is stated to be that clergymen and priests may be compelled to disclose confessions made to them professionally.'

¹ *Draper v. Draper*, 68 Ill., 17; *McGuff v. State*, 88 Ala., 147; *Flanagan v. State*, 25 Ark., 92; *Moore v. State*, 79 Ga., 498; *State v. Sieverson*, 78 Ia., 653; *Hewes v. Detroit, etc., Ry. Co.*, 65 Mo., 10.

² *People v. White*, 53 Mich., 538; *Crowner v. Crowner*, 44 Mich., 183.

³ 1 Greenl. Ev., § 247.

⁴ *Phillip's Ev.*, 109; *Starkey on Evidence*, 40; *Steven's Dig. of Evidence*, Chase's Edition, n. XLIV.

§ 832. Regarding the privilege of attorney as to communication with client.—Professional communications between a client and attorney are regarded as confidential and are protected on the ground of public policy.¹ To entitle the communication to be privileged in this State it must be made to one who is an attorney at law duly admitted to the practice of his profession in the Supreme Court and the information must have been obtained by him through one seeking to obtain his legal opinion upon some legal right or obligation. The party must have consulted the attorney in a matter in which his private interest is concerned and with a view to enable the attorney to understand the case so as to manage it with skill, or to obtain legal advice, and to enable an attorney to better understand the client's legal rights.² Where the relation of attorney and client does not exist the communication made to an attorney is not privileged.³

Likewise a communication which the attorney makes to a third person in the presence of the client is not privileged and such third person may disclose it on the witness stand. By permitting such third person to be informed the client waived his privilege.⁴ And obviously the privilege will not extend to communications made by the client himself to other persons than the attorney in the presence of the attorney.⁵ Nor does it extend to a communication made by a third person to the attorney at the request of the client.⁶

¹ Jackson v. French, 3 Wend. (N. Y.), 337; Mobile, etc. Ry. Co. v. Yeats, 67 Ala., 164.

² Hollenback v. Todd, 119 Ill., 543; Thorp v. Goewey, Admr., 85 Ill., 611; Grainger v. Warrington, 3 Gilm. (Ill.), 299; Wharton v. Wright, 30 Ill. App., 343; McLaughlin v. Gilmore, 1 Ill. App., 563.

³ Griffin v. Griffin, 125 Ill., 430.

Where two persons come to an attorney to obtain his opinion concerning the validity of a deed between themselves, and while with him, made statements of facts to him regarding which the relation of

attorney and client did not exist, the facts so communicated were not privileged. Griffin v. Griffin, 125 Ill., 430.

⁴ Hatten v. Robinson, 14 Pick. (Mass.), 416; Mobile, etc., Ry. Co. v. Yeats, 67 Ala., 164; Jackson v. French, 3 Wend. (N. Y.), 337; People v. Barker, 60 Mich., 227.

⁵ Gallagher v. Williamston, 23 Cal. 331; Conveney v. Tannehill, 1 Hill (N. Y.), 33; Barnwell v. Lucas, 2 Barn. & C., 745.

⁶ Perkins v. Guy, 55 Miss., 153; Griffin v. Davis, 5 Barn. & Ad., 502.

Facts within the knowledge of an attorney, or information gained by him in any other way than through the channel of confidential communication from his client are not within the rule.¹

An attorney may testify as to whether the relation of attorney and client in fact existed between him and another, but he cannot be required to give in evidence what was disclosed to him in that relation.²

Papers entrusted to an attorney in professional confidence are not of necessity to be deemed confidential communications and if the attorney asserts that he is ignorant of their contents he may be ordered to produce them for the inspection of the court, and if he refuse so to do he will be guilty of contempt.³

§ 833. Same—Client, patient, or penitent may waive the privilege.—The privilege granted to a client (or to a patient or penitent when allowed) is for the benefit of such person and continues indefinitely.⁴ It may be waived by the person himself or by the person who represents him after his death.⁵ The client may waive the privilege and testify to counsel's advice and counsel may then corroborate the testimony.⁶ If the client sees fit to be a witness in this regard he makes himself liable to a full cross-examination in respect to the communications between himself and his counsel.⁷

§ 834. Witness not compelled to criminate himself.—Generally the refusal of a witness to answer a question pertinent to the issue put to him in a proceeding before a court having jurisdiction of the controversy is a contempt of court for which if the witness be competent, he may be compelled to answer or punished for contempt of court.⁸

¹ Hunter v. Watson, 12 Cal. 363.

² Leindecker v. Waldron, 52 Ill., 288.

³ Steven's Dig. of Evidence, Article 120; Greenl. Ev., §§ 451-53; Wharton on Evidence, §§ 533, 541; Commonwealth v. Nichols, 114 Mass., 285; Phelan v. Kinderdein, 20 Pa., Stat., 354; State v. Lonsdale, 48 Wis., 348.

⁴ Stores v. Scoughle, 48 Mich., 387.

⁵ Frazer v. Jennison, 42 Mich., 224.

⁶ Passmore Estate, 50 Mich., 226.

⁷ Woburn v. Henshaw, 101 Mass., 193; Landsburger v. Gorman, 5 Cal., 450.

⁸ Chicago City Ry. Co. v. McLaughlin, 146 Ill., 353.

No one is, however, required to answer any question if the answer thereto would, in the opinion of the Judge, have a tendency to expose the witness (or the wife or husband of the witness) to any criminal charge, or to any penalty or forfeiture which the Judge thinks may probably be preferred or suit brought to recover. But if the prosecution, to which the witness might probably be exposed by his answer, is barred by the statute of limitations or the offense has been pardoned, the reason for the privilege having ceased, the privilege also ceases and the witness may be compelled to answer. Furthermore no one is excused from answering any question on the ground that the answer may establish or tend to establish that he owes a debt or is otherwise liable to a civil suit.¹

The privilege of the witness from answering questions is only when the answers would tend to show him to be a criminal. That they would show him to be guilty of fraud or dishonesty is no excuse.²

The privilege belongs to the witness alone and must be claimed by him alone; the objection cannot be interposed by a party and the witness when advised of his privilege will be permitted to answer if he choose so to do.³ The privilege will not always be allowed when claimed, but only when it appears to the court from the nature of the examination that the witness is exposed to danger by the inquiry made. When it appears that the witness will be endangered by the answer he will be excused therefrom and it is not necessary that the witness should show in what manner the answer would criminate himself.⁴

When a witness discloses, without objection, a part of the transaction criminating him, it seems to be the American rule

¹ Steven's Dig. of Evidence, Art. 120; Greenl. Ev., §§ 451-53; Wharton's Ev., §§ 533-41; Welden v. Burch, 12 Ill., 374; Taylor v. McIrvey, 94 Ill., 488; Mackin v. People, 115 Ill., 312; Commonwealth v. Nichols, 114 Mass., 285; Phelin v. Kinderdein, 20 Pa. St., 354; State v. Lonsdale, 48 Wis., 348.

² Jennings v. Prentiss, 39 Mich., 421.

³ Mackin v. People, 115 Ill., 312; South Bend v. Hardie, 98 Ind., 577; Cloyes v. Thayer, 3 Hill (N. Y.), 564; Commonwealth v. Shaw, 4 Cush. (Mass.), 594; Roadey v. Finnegan, 43 Md., 390.

⁴ Youngs v. Youngs, 5 Redf., 505; In re Reynolds, L. R., 20, Ch. D., 294.

that he must disclose the whole,' unless such partial disclosure was made under innocent mistake.'

§ 835. **Same—Where the refusal to answer is evidence against the witness.**—Where the witness is a party to the suit his refusal to answer in a criminal case is not generally considered to create a presumption against him; but where he is a party to a civil suit it is said that his refusal, when testifying as a witness, to answer a material question on the ground of self crimination is a circumstance which may be considered against him.¹ And the same has been held to be true where he merely neglects to testify.⁴ But where his neglect to testify is in a case in which no fact is in issue to which it is necessary that he should testify no unfavorable presumption can thereby arise against him.⁵

Where the witness is not a party to the suit, his refusal to answer cannot create any unfavorable presumption against his testimony.⁶

§ 836. **Same—Whether compulsory answer can be used as evidence against witness.**—There is sound reason and justice in support of an English decision to the effect that where a witness has claimed the protection of the court on the ground that his answer would tend to criminate himself, through appearing to be grounds for believing that it would do so, and he is nevertheless compelled to answer, then what he says must be considered to have been obtained by compulsion and the same cannot be afterwards given in evidence against him.⁷

¹ Commonwealth v. Pratt, 126 Mass., 462; People v. Freshour, 55 Cal. 375; State v. Frye, 43 Ia., 651; Youngs v. Youngs, 5 Redf., 505.

² Mayo v. Mayo, 119 Mass., 290.

In England a partial disclosure does not forfeit the privilege.

³ Andrews v. Frye, 104 Mass., 234; Crane v. Litchfield, 2 Mich., 340.

⁴ Mooney v. Davis, 75 Mich., 188.

⁵ Farrand v. Aldrich, 85 Mich., 594.

⁶ Rose v. Blakemore, Ryan & M., 383.

⁷ Ragini v. Garbett, 2 Carr. & Ker., 474.

VIII. *Direct Examination.*

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| <p>§ 837. Preliminary examination.</p> <p>838. The oath or affirmation generally—Form.</p> <p>839. Sworn interpreter.</p> <p>840. Examination in chief.</p> <p>841. (a) Responsive answers.</p> <p>842. (b) Leading questions.</p> <p>843. (c) Narrative testimony.</p> <p>844. (d) Objections to evidence generally—Saving exceptions.</p> <p>845. (e) Number of witnesses.</p> <p>846. (f) The best evidence must be produced.</p> <p>847. Same—When made by admissions.</p> <p>848. (g) How a witness' recollection may be refreshed.</p> <p>849. Same—Adversary's right to see the memoranda.</p> <p>850. (h) Showing entries in books in evidence.</p> <p>851. Same—Proof of sales without books.</p> <p>852. Same—Proof must be made by book of original entry.</p> <p>853. Same—To what extent maps, charts, plans, photographs, etc., may be used.</p> <p>854. Same—To what extent scientific books may be used.</p> <p>855. Same—How statute laws of this State proven by books.</p> <p>856. Same—How statute laws of other states proven by books.</p> <p>857. (i) Showing the contents of documents in evidence.</p> | <p>§ 858. Same—(1) When and how contents of documents proved by primary evidence—Definition.</p> <p>859. Same—As to contents of attested copies.</p> <p>860. Same—(2) When and how contents of documents proved by secondary evidence—Definition.</p> <p>861. Same—Notice to produce documents.</p> <p>862. Same—When notice not required.</p> <p>863. (j) When papers to be produced on notice.</p> <p>864. Same—Extent of notice required—Form.</p> <p>865. Same—<i>Subpoena duces tecum</i>.</p> <p>866. Same—Evidence to excuse production of documents.</p> <p>867. Same—Manner of offering documents in evidence.</p> <p>868. Same—Written documents explained by oral evidence.</p> <p>869. Same—Changing or contradicting documents by oral evidence.</p> <p>870. Same—Manner of proving oral agreement.</p> <p>871. (k) Expert testimony offered.</p> <p>872. Same—Laying the foundation—Hypothetical questions.</p> <p>873. Same—Whether the expert to hear the evidence.</p> |
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§ 837. **Preliminary examination.**—When the competency of a witness is doubtful the court will, before permitting him to testify before a jury, examine the witness on his *voir*

dire. Under the old practice, when parties interested in the suit could not testify, the examination on their *voir dire* related solely to the question of their interest in the subject-matter of the suit.¹ But the term *voir dire* is now generally made to designate the preliminary examination of the witness touching any other incapacity which may render him incompetent to give evidence.²

When a witness is examined on his *voir dire*, he is first sworn to "make true answers to such questions as may be put to him touching his competency as a witness." He is then interrogated in such manner as will tend to develop the fact of his competency or incompetency, and the question of his competence is decided by the court and not by the jury.³

No religious tests are required under the Constitution of this State to qualify a person to be a witness.⁴

§ 838. **The oath or affirmation generally—Form.**—It is the duty of a party calling a witness to see that he is sworn, but if the oath is inadvertently omitted it seems that objection cannot be made thereto after verdict. It must be made as soon as the discovery is made or it will be deemed to have been waived.⁵

The oath, as brought from England, was administered by handing to the witness a copy of the *New Testament*, on the external cover of which was imprinted a *cross*; the Clerk of the court would, at the same time, retain hold of the book, while he recited the oath, both Clerk and witness standing the while; the witness would then nod assent, kiss the book and take his seat.⁶

¹ *Dewdney v. Palmer*, 4 Mees. & Wels., 664; 1 Greenl. Ev., 124.

² *Rapalje on Witnesses*, § 232.

³ *Ault v. Rawson*, 14 Ill., 484; *Reynolds v. Lounsbury*, 6 Hill (N. Y.), 584; *Amory v. Fellows*, 5 Mass., 219; *Tucker v. Welch*, 17 Mass., 160; *Commercial Bank v. Hewes*, 17 Wend. (N. Y.), 94; *Stahl v. Catskill Bank*, 18 Wend. (N. Y.), 466.

⁴ *McAmore v. Wiley*, 49 Ill. App., 615.

⁵ *Nesbitt v. Dallam*, 7 Gill & J. (Md.), 494; *Cady v. Norton*, 14 Pick. (Mass.), 236; *Slauter v. Whitelock*, 12 Ind., 338.

⁶ *Thompson on trials*, § 365.

The form of the oath was this; "You do solemnly swear on the Holy Evangelists of Almighty God, that the evidence you shall give in the case now in hearing wherein A. B. is plaintiff, and C. D. is defendant, (or otherwise describing the

It is now the practice in most American states that the witness, instead of laying his hand on the New Testament or Bible and thereafter kissing it, to stand with "uplifted hand" while he takes the oath which is administered by the Clerk or other person empowered so to do.

The old form of oath would, however, be lawful. The form of the oath prescribed by the statute in this State is thus:

NO. 361. FORM OF OATH OF WITNESS.

You do solemnly swear by the everliving God that the evidence you shall give in the case now in hearing wherein A. B. is plaintiff and C. D. is defendant, shall be the whole truth and nothing but the truth.¹

When the oath is administered to the witness he bows or adds the words "*I do*" and takes his seat on the witness stand.

In the case of non-christian people, oaths are to be administered in the manner that will most affect their consciences, and according to the form which they hold to be most solemn sanctioned by the usage of the country or of the sect to which they belong.*

Affirmation.—The statute provides that every person having conscientious scruples against taking an oath shall be admitted, instead thereof, to make his solemn affirmation or declaration in the following form:

NO. 362. FORM OF AFFIRMATION OF WITNESS.

You do solemnly, sincerely and truly declare and affirm that the evidence you shall give in the case now in hearing in which A. B. is plaintiff and C. D. is defendant, shall be the truth, the whole truth, and nothing but the truth.

This solemn affirmation or declaration will be equally as

parties, or omitting the description altogether), shall be the truth, the whole truth and nothing but the truth; so help you God."

¹ Rev. Stat. Chap. 101, ¶ 3, § 3.

* Gill v. Caldwell, 1 Ill. (Breese), 53.

A Jew is sworn upon the Pentateuch and a Turk upon the Koran.

In France, anciently, the witness, if a layman, raised his right hand, and if a priest, placed his hand upon his breast. Phillip's Ev., 20. The Chinese take an oath by the ceremony of killing a cock or breaking a saucer. Ormychund v. Baker, 1 Atk., 21.

valid as if the person had taken the oath in the usual form, and if a person shall be guilty of falsely and corruptly declaring or affirming he shall incur and suffer the like pains and penalties as are or shall be inflicted on persons convicted of wilful and corrupt perjury.'

In whatever form the oath or affirmation is administered, the witness will, if he thereafter knowingly testifies falsely, be guilty of perjury.'

An oath once administered to the witness suffices for the whole trial.'

§ 839. **Sworn interpreter.**—Where a witness does not understand the English language an interpreter may be sworn by the court to truthfully translate the questions put to him and the answers made to him and by him.' And in the absence of a special statute relating to interpreters it will be presumed on appeal, in the absence of a contrary showing in the record, that the party who acted as interpreter was agreed upon by the parties.'

Allowing one witness in a cause before he has given his own testimony to act as interpreter of another witness might, under certain circumstances, be bad practice, but the matter rests within the sound discretion of the court and where the witnesses both testify in behalf of the same party it will not be error. If the interpreter is objectionable an exception should be taken and the matter assigned for error on bill of exceptions.' The "next friend" may act as an interpreter if the reasons therefor appear satisfactory to the trial Judge.'

¹ Rev. Stat., Ch. 101, ¶ 4, § 4.

Another form of affirmation.—
"You do solemnly, sincerely and truly
declare and affirm under fear of the
pains and penalties of perjury, that
the evidence you shall give," etc.,
(as above).

² 1 Greenl. Ev., § 371; Rapalje on Witnesses, § 235; Sells v. Hoare, 3 Brod. & B., 232; Rev. Stat., Ch. 101, ¶ 5, § 5; Rev. Stat., Ch. 38, ¶ 225, § 225.

³ Rapalje on Witnesses, § 235.

⁴ Rev. Stat., Ch. 51, ¶ 47, § 47; Rapalje on Witnesses, 336; Amory v. Fellors, 5 Mass., 219.

⁵ Leetch v. Atlantic Ins. Co., 4 Daly (N. Y.), 518.

⁶ Chicago & Alton R. R. Co. v. Shenk, 30 Ill. App., 587.

⁷ Swift v. Applebone, 23 Mich., 252.

A witness may translate documents written by himself in a foreign language without being sworn as an interpreter.¹

A party is not bound by the interpretation given by the interpreter, but may show that the interpreter has given a wrong interpretation of a word or phrase.²

§ 840. **Examination in chief.**—After the preliminary examination has been had, if one is deemed to be necessary, and the witness held to be competent to testify,³ and the witness has been sworn as above⁴ the witness is examined by one counsel for the plaintiff⁵ whose duty it is to bring out all the evidence on his side of the issue. This is called the examination in chief.

§ 841. (a) **Responsive answers.**—It is the duty of counsel to ask such questions as will tend to elicit answers relevant to the issue and it is the duty of a witness to give answers that are responsive to the questions put to him. If the answers of a witness are not responsive, any objection because thereof is to be made by the party who asks the question. He can accept the answer if he chooses and will do so by omitting to object.⁶

A witness having answered responsively to a question once put to him cannot be required to again answer the same question.⁷ The court will not permit a witness to be insulted upon the stand and it is said the examination should not be a contest of skill or nerves between the witness and attorney.⁸

§ 842. (b) **Leading questions.**—As a general rule leading questions, *i. e.*, questions which suggest to the witness the answer to be made, or assume the existence of a fact not proven, will not, if objected to by the adverse party, be allowed on direct examination; but this is a matter largely within the discretion of the trial court, and there are many instances in

¹ Kuhlman v. Medlinka, 29 Tex., 385.

² Schnier v. People, 23 Ill., 17.

³ Ante, § 837.

⁴ Ante, § 838.

⁵ Ante, § 815.

⁶ Merkle v. Bennington, 58 Mich., 157.

⁷ Huyler v. People, 116 Ill., 330.

⁸ West Chicago St. R. R. Co. v. Groshon, 51 Ill. App., 463.

which such questions are essential to the promotion of justice and should be permitted. Where the witness is hostile to the party calling him and answers evasively, or where the witness is of tender years or dull of comprehension and does not appear to perceive the matter on which he is required to testify, and general questions propounded have failed to elicit specific answers relevant to the issue, leading questions may be asked. In such cases the discretion of the trial Judge in permitting leading questions will not be subject to review, unless there is manifest abuse thereof and injury has been done to the objecting party.¹ Furthermore, where a question is otherwise proper it is not an abuse of the discretion of the court to permit it to be put in leading form.²

That a question is leading cannot be raised by a general objection. The objection thereto must be specific.³

§ 843. (c) **Narrative testimony.**—The latitude allowed in the examination of a witness rests so largely within the sound discretion of the trial court that courts of review will not interfere therewith, unless it is made manifest that such discretion has been abused and injustice done to the rights of the objecting party. The Judge may, if he see fit, allow the witness to give his testimony in narrative form without questioning, but it will be error to permit counsel to put statements into the mouths of witnesses.⁴

✓ § 844. (d) **Objections to evidence generally—Saving exceptions.**—If the evidence, or the manner in which it is introduced, is objectionable to the adversary's counsel, he must bring such objection to the attention of the court in order that such objection may be passed upon by court. If the

¹ Weber Wagon Co. v. Kehl, 139 Ill., 644; Meyer v. Krohen, 114 Ill., 574; Erie, etc., v. Cecil, 112 Ill., 180; Flynn v. Fogarty, 106 Ill., 263; Coon v. People, 99 Ill., 368; Startout v. Evans, 41 Ill., 376; Greenup v. Stoker, 3 Gilm. (Ill.), 202; Williams v. Jaroot, 1 Gilm. (Ill.), 120; Forsyth v. Baxter, 2 Scam. (Ill.), 9; Funk v.

Babbitt, 55 Ill. App., 124; Cassem v. Galvin, 53 Ill. App., 419.

² Day v. Porter, 161 Ill., 235.

³ Edmanson v. Andrews & Co., 35 Ill. App., 223.

⁴ Chicago City Ry. Co. v. Van Vleck, 143 Ill., 480; Clark v. Field, 42 Mich., 342; Hart v. Brockway, 57 Mich., 189.

ruling of the court is then not satisfactory, counsel should have an exception entered, in order that the same may be assigned for error on bill of exceptions, for that is the only way in which the objection can be brought to the attention of the court above for review.¹

§ 845. (e) **Number of witnesses.**—A court will not be permitted generally to limit the number of witnesses which are called to testify on a disputed fact in issue; but as to matters collateral to the main issue it is within the power of the court, within its sound discretion, to refuse to hear further evidence, and likewise where a fact is undisputed the court may limit the number of witnesses to testify in regard to it. When facts are uncontroverted a court may properly limit the number of witnesses in order to prevent the cumulation of costs and the waste of time in hearing them.² When the testimony is abundantly sufficient on a point in dispute the court may properly refuse further cumulative proof thereon. The indisputed testimony of two witnesses has been held to be sufficient proof of a fact.³

§ 846. (f) **The best evidence must be produced.**—It is a fundamental rule of evidence that the best evidence of which a case in its nature is susceptible must be produced. It is said that this rule was adopted for the prevention of fraud which might be practiced by offering certain evidence when it was fair to presume that better evidence was being withheld and therefore the rule is held to exclude only that evidence which of itself indicates the existence of more original sources of evidence or information.⁴ Where there is no substitution of evidence, but merely a selection of the weaker instead of

¹ Powell v. McCord, 121 Ill., 330; Chicago, R. I. & P. Ry. Co. v. Hardt, 133 Ill., 120; Village of South Ban-ville v. Jacobs, 42 Ill. App., 533.
Graham v. People, 115 Ill., 566; McBain v. Enloe, 13 Ill., 76; Burke v. Ward, 50 Ill. App., 283.

² Green v. Phoenix Mutual Life Ins. Co., 134 Ill., 310; Chicago, P. & St. L. Ry. Co. v. Aldrich, 134 Ill., 9;
³ Lake Shore & M. S. Ry. Co. v. Brown, 123 Ill., 162.

⁴ 1 Greenl. Ev., § 82.

stronger proofs or an omission to supply all the proofs capable of being produced, the rule is not violated.¹

As an example of the application of the rule, where it appears there is a deed or other written instrument, which it is within the power of the party to produce, such deed or other written instrument is the best evidence of which the case is susceptible and it must be produced. The non-production of it would raise the presumption that it contains some matter tending to defeat itself. A written instrument must speak for itself, unless it is so ambiguous that it cannot do so, and in such case only it can be aided by parol testimony as hereinafter shown.² The contents of written instruments that have been recorded may be proved by the record or a certified copy thereof certified to by the officer having the legal possession of such record, together with the statement of the certificate of a Clerk of record in certain cases that such person is the officer he pretends to be.³ And the fact that the instrument is recorded is best proved by the record itself.

While written instruments are in existence, but not of record and are in possession of the opposite party, notice should be served upon him, in the manner hereinafter shown, to produce them. Then if they are not produced, secondary proof of their contents may be offered, that is to say, one who knows the contents thereof can give oral testimony as to what it is.⁴ Furthermore, courts have power to require the production of books or writings in the possession of the parties to suits pending before them when they are pertinent to the issue.⁵

The *existence* of a written instrument may always be proved by parol without the production of the instrument. Where the

¹ Phill. & Am. on Evidence, 438; Phil. Ev., 418.

² Carpenter v. First Nat. Bank, 119 Ill., 352; Long v. Little, 119 Ill., 600; People v. Lewis, 103 Ill., 224; Myers v. Ladd, 26 Ill., 415; Hutton v. Arnett, 51 Ill., 198; Robinson v. McNiell, 51 Ill., 225; Leonard v. Denton, 51 Ill., 482; Alvis v. Morri-

son, 63 Ill., 181; Bissel v. Price, 16 Ill., 408; Wright v. Tatham, 1 Ad. & El., 3.

³ Rev. Stat., Ch. 30, ¶¶ 29, 33, 35, 36; Ch. 51, ¶¶ 13, 14, 15, 16; Williams v. Jarrot, 1 Gilm. (Ill.), 120.

⁴ Post, § 860.

⁵ Rev. Stat., Ch. 51, ¶ 9, § 9.

contents of a written instrument is not called for, oral testimony regarding it is primary and not secondary evidence.¹

As to what is the best evidence in certain cases, the practitioner is referred to text books upon evidence and other sources. It only comes within the scope of this work to treat of the *manner of making proof*.

§ 847. **Same—When made by admissions.**—It is a maxim of the law of evidence that “hearsay is not evidence,” and yet the admissions of a party against his interest are considered to be probably true and as a general rule the admissions of a party to the record or one identified in interest with him are admissible in evidence against such party.²

Admissions may be generally unsatisfactory, but when made understandingly and deliberately and testified to by an intelligent, truthful witness, of good memory, such evidence is highly satisfactory, though perhaps not so much as that of a witness who testifies from the personal knowledge of the facts in controversy.³ An admission of a party is entitled to the same consideration as parol testimony in general and is not generally more conclusive than other oral testimony. An admission as evidence may be disproved or shown to be untrue, or to have been made for a particular purpose. While offers of compromise may be shown in evidence, yet the admissions or statements of fact made when endeavoring to effect a settlement, may be shown in evidence. It is for the jury to determine what weight shall be given to the admissions. Although an instruction to the jury may properly inform it that an explanation regarding admissions need not be believed, unless its truth is satisfactorily shown, the jury must be left to determine the truth from the entire admission and explanation. The weight to be given to an admission necessarily depends much on the accuracy of the memory of the witness and the circumstances under which the admissions were made.⁴

¹ Sprague v. Hosmer, 82 N. Y., 466.

² 1 Greenl. Ev., Ch. 11.

³ O'Reily v. Fitzgerald, 40 Ill., 310.

⁴ Ashlock v. Linder, 50 Ill., 169; Young v. Foute, 48 Ill., 33; Miller v. Bruns, 41 Ill., 293; Yundt v. Hart-runft, 41 Ill., 9; Ayers v. Metcalf,

The admissions of an attorney of record of a party to the suit in matters relating to the progress of the cause may be shown as evidence, but such admissions must be distinct and formal and be shown to have been made for the purpose of affecting the progress and disposition of the suit. But admissions made at one term cannot be used as evidence at a subsequent trial of the same cause, except by consent. And an admission made by an attorney without authority from the party whom it is sought to bind will not be taken in evidence.¹

Admissions to be an estoppel against the party making them, must have been acted upon by the party to whom they were made and must have been made upon entering into the contract in relation to which they apply and are a different class of admissions from those made to a third person as above indicated.²

It is a general rule applicable to the introduction of admissions in evidence that when a witness testifies to an admission the adversary has a right to call for the whole of the statements made by, or conversation had with, the party who is said to have made such admission, so far as the same relates to the subject-matter thereof.³

Admissions or statements made by a third person, not in any

39 Ill., 307; Hagenbaugh v. Crabtree, 38 Ill., 226; Mason v. Park, 3 Scam. (Ill.), 532; Thom v. Hess, 51 Ill. App., 274; Hartley v. Lybarger, 3 Ill. App., 524.

¹ Hardin v. Forsythe, 99 Ill., 313; Town of Carthage v. Buckner, 8 Ill. App., 152; Tappen, McKillop & Co. v. Rend, 5 Ill. App., 150.

Admissions that are not evidence.—If a defendant is not served with process his admission regarding the existence of a partnership alleged to exist between the several defendants is not competent evidence to prove the partnership. Smith v. Hulett, 65 Ill., 495.

The admissions of a person em-

ployed by a party as to the amount his employer owes another, is not evidence that will bind his employer, but such statements may be properly introduced in evidence to contradict the witness and to show whether or not he is disposed to testify falsely. Davis v. Hoepfner, 44 Ill., 306.

A party is not a competent witness to testify to the admissions made by a deceased party. Redden v. Inman, 6 Ill. App., 55.

² Tillotson v. Mitchell, 111 Ill., 578; Young v. Foute, 43 Ill., 33; Kadish v. Bullen, 10 Ill. App., 566.

³ Moore v. Wright, 90 Ill., 470; Augler v. Smith, 34 Ill., 534.

sense an agent of a party to the transaction, cannot be offered in evidence.'

§ 848. (g) How a witness' recollection may be refreshed.

—There are three circumstances under which a witness' memory may be refreshed by reference to matter of writing.

First—Where the witness, by referring to the writing, is enabled actually to recollect the facts and can testify in reality from memory. The writing may be the original one made by himself, while the facts were fresh in mind,¹ or a copy thereof,² or, it seems, a copy of a copy,³ or a copy in a newspaper,⁴ or a writing made by another person.⁵ In these cases it is not the writing, but the recollection of the witness that is the evidence in the case.⁶

Second. Where the witness, after referring to the writing, does not recollect the facts, and yet remembers that he made and saw the writing when the facts were fresh in his mind, and that it then stated the facts correctly. The writing may have been made by himself,⁷ or by another person.⁸ In this class will come all such facts as naturally escape the memory, such as items, dates, names, numerous details, etc., which the witness knows and testifies to have been correct when made.⁹

¹ *La Salle Pressed Brick Co. v. 108; Marclay v. Shultz, 29 N. Y., 346; Hill v. State, 17 Wis., 675.*

² *Chamberlin v. Ossipee, 60 N. H., 212; Morrison v. Chapin, 97 Mass., 72; Selove v. Redford's Exrs., 52 Pa. St., 308; Welcome v. Batchelder, 23 Me., 85.*

³ *Bonnett v. Hattfeldt, 120 Ill., 116; Chicago, etc., Ry. Co. v. Adler, 56 Ill., 344; Huff v. Bennett, 6 N. Y., 339; Hudnutt v. Comstock, 50 Mich., 596.*

⁴ *Folsom v. Appleriver Co., 41 Wis., 602.*

⁵ *Miner v. Phillips, 42 Ill., 123; Clifford v. Drake, 110 Ill., 135; s. c., 14 Ill. App., 75; Commonwealth v. Ford, 180 Mass., 64.*

⁶ *Paige v. Carter, 64 Cal., 489; Cameron v. Blackman, 39 Mich.,*

⁷ *Kent v. Mason, 1 Ill. App., 466; Commonwealth v. Jeffs, 132 Mass., 6; Bigelow v. Hall, 91 N. Y., 145.*

⁸ *Dugan v. Mahoney, 11 Allen (Mass.), 573; Kelsea v. Fletcher, 48 N. H., 282; Howard v. McDonough, 77 N. Y., 592; Adae v. Zang, 41 Iowa, 536.*

⁹ *Flynn v. Gardner, 3 Ill. App., 253; Chamberlain v. Sands, 27 Me., 458; Green v. Caulk, 16 Md., 556; Coffin v. Vincent, 12 Cush. (Mass.), 98.*

¹⁰ *Brown v. Galesburg Pressed Brick Co., 132 Ill., 648; Lawson v. Glass, 6 Col., 134; Howard v. McDonough, 77 N. Y., 592; King v. Faber, 51 Pa. St., 387; Pinney v. Andrus, 41 Vt., 631.*

In these cases likewise it is not the writing which is the evidence, but the recollection of the witnesses.

Third. Where the witness, after referring to the writing, neither recollects the facts nor remembers to have seen the writing before, and yet from seeing his handwriting therein, whether it be the signature or the contents, or both, is unable to testify to its genuineness and correctness.¹

The writing itself is sometimes given in evidence under other rules governing its introduction as such.²

§ 849. Same—Adversary's right to see the memoranda.—

When a witness testifies from a written memorandum, the opposite party has a right to see what purports to be the memorandum and then if he chooses he may cross-examine the witness thereon. The object of the cross-examination is for the purpose of ascertaining when and by whom the writing was made, whether it is such a writing as may be properly used for the purpose, whether the witness' memory is refreshed by every part of it, etc.³

§ 850. (h) Showing entries in books in evidence.—By the common law "shop books," or books of account, could not be offered in evidence unless such entries were made by a third person who had particular knowledge of the matter to which the entries related. This was because such third person—a clerk or other person—had no apparent motive for perverting the fact, and where others than the party defendant were shown to have settled their accounts by such books and found them to be correct the books were received as original evidence.⁴ The American rule, however, being borrowed from the Roman law, the laws of France, Scotland and Holland,⁵

¹ 1 Greenl. Ev., § 437; Crittenden v. Rogers, 8 Gray (Mass.), 452; Parsons v. Manufacturer's Ins. Co., 16 Gray (Mass.), 463; Martin v. Good, 14 Md., 398; Cole v. Jessup, 10 N. Y., 96.

² Moots v. State, 21 Ohio St., 653; Crittenden v. Rogers, 8 Gray (Mass.), 452.

³ Commonwealth v. Burk, 114 Mass., 261; Chute v. State, 19 Minn., 271; Duncan v. Seeley, 34 Mich., 369; Peck v. Lake, 3 Lans. (N. Y.), 136.

⁴ 1 Greenl. Ev., § 117.

⁵ 1 Greenl. Ev., § 119; Jackson v. Evans, 8 Mich., 476.

has long been that where the party first laid the foundation by proving that he had no clerk, that the books were his books, that at least a part of the goods had been delivered, and that he kept fair and honest accounts, then, as a kind of moral necessity, the books are admitted in evidence. But books of account are not admissible in evidence without first laying a foundation by evidence *aliunde*. The rule, as prescribed by the statute in this State is, that the party or interested person may testify to the account book and the items therein contained; that such book is a book of original entries and that the entries therein were made by himself and are true and just; or that the same is made by a deceased person, or by a disinterested person, a non-resident of the State at the time of the trial, and were made by such deceased or non-resident person in the usual course of trade, and of his duty and employment to the party so testifying. The books then are admissible as evidence in the case,¹ to the effect here stated.² Under the common law rule the books were not admissible in evidence without proof that the party kept no clerk; that part of the goods had been delivered and that persons had settled by them and found them to be correct. And a party may so now prove his books to be admissible in evidence without reference to the requirements of the statute.³ No foundation need, however, be laid for the introduction of the record book of the court because the court will take judicial notice of its record books and they prove themselves when offered in evidence in such court.⁴

¹ Rev. Stat., Ch. 54, ¶ 3, § 3.

² House v. Beak, 141 Ill., 290; Reynolds v. Sumner, 126 Ill., 58; De Land v. Dixon Nat. Bank, 111 Ill., 323; Lehman v. Rothbarth, 111 Ill., 185; Gage v. Parker, 103 Ill., 528; Lowenthal v. McCormick, 101 Ill., 143; McLean County Bank v. Mitchell, 88 Ill., 52; Ruggles v. Gatton, 50 Ill., 412; Dishon v. Schorr, 19 Ill., 59; McAmore v. Wiley, 49 Ill. App., 615; Baird v. Hooker, 8 Ill. App., 306.

The statute does not permit the

introduction of books in evidence to prove items therein charged where the entries have been made by *disinterested, living and resident* persons. Such person may, however, be called to prove the account. Stettauer v. White, 96 Ill., 72.

³ Ingersoll v. Banister, 41 Ill., 388; Dodson v. Sears, 25 Ill., 513; Wagge-man v. Peters, 22 Ill., 42; F. H. Hill Co. v. Sommer, 55 Ill. App., 345.

⁴ Robinson v. Brown, 82 Ill., 279.

When a party introduces a record in evidence, he is not bound to

Books of a corporation are no exception to the rule. Their account books may be shown in the same manner that books kept by individuals are and their minutes or record books are also evidence as between the members and to prove the regularity and legality of the proceeding; and as to these latter matters proof may be made by certified copy.¹

§ 851. Same—Proof of sales without books.—Although books may be properly kept and may be susceptible of being offered in evidence, yet it is not necessary that sales and the price thereof should be proven by them. Other evidence is competent to prove sales without the introduction of the books of the business, or the book-keeper may testify to the facts within his knowledge and may or may not testify that he kept the books and an account of such sale.²

§ 852. Same—Proof must be made by book of original entry.—The only book to be produced in evidence is the book of original entries. If this be the ledger it will be competent; but where a ledger is used for posting entries originally made in another book it is then such other book and not the ledger which must be shown in evidence. It must be the book in which the original entry of the transactions are made as they occur in the regular order of business.³ It is the books themselves that are evidence and the testimony of the clerk is only to show that they are competent evidence. It is entries in the books which are matters of evidence and not the footings of

introduce any more of it than relates to the issues in the case. *Walker v. Doane*, 108 Ill., 236.

As to compelling books to be produced after notice given and neglect so to do, see *ante*, § 846, and *post*, § 861.

¹ *Culver v. Third Nat. Bank of Chicago*, 64 Ill., 528; *Chase v. Sycamore & Courtland R. R.*, 38 Ill., 215; *Rider v. Alton & Sangamon R. R. Co.*, 13 Ill., 516; *Rev. Stat.*, Ch. 51, ¶ 15, § 15.

² *Long v. Conklin*, 75 Ill., 32; *Stekette v. Kimm*, 48 Mich., 322.

³ *Stickley v. Otto*, 86 Ill., 161; *Patrick v. Jack*, Admx., 82 Ill., 81; *Wolcott v. Heath*, 78 Ill., 433; *Kibbe v. Bancroft*, 77 Ill., 18; *Harper v. Ely*, 70 Ill., 582; *Taliaferro v. Ives*, 51 Ill., 247; *Boyer v. Sweet*, 3 Scam. (Ill.), 120; *Dickson v. Kewanee Electric Light and Motor Co.*, 53 Ill. App., 379; *Meeth v. Rankin Brick Co.*, 48 Ill. App., 602.

the account. The footings form no part of the original entries and are not admissible in evidence as such.¹

If charges are made in the first instance upon a slate and within a reasonable time thereafter are transferred in a manner to make it certain that they were correctly copied into the books, then upon proof of such facts, the books may be offered in evidence. The entries upon the slate are regarded as mere memoranda to aid the memory till the items can be transferred to the books.² Such memoranda made upon a slate or paper must be transcribed within a reasonable time in the usual course of business into the regular account books. The common business practice must have been followed, whether it be on the same day or within two or three days, or even within the space of four weeks.³

An entry made by a party in his own books, when in the presence of the other party to the transaction and at the time of an interview respecting it, is admissible as original evidence of the subject-matter.⁴

§ 853. Same—To what extent maps, charts, plans, photographs, etc., may be used.—A map may be used in evidence in connection with the oral testimony of the witness in

¹ *Rau Mfg. Co. v. Townsend*, 50 Ill. App., 558; *McAmore v. Wiley*, 49 Ill. App., 615.

Where two partners kept a day book and a ledger, one making the entries in the day book daily of the deliveries, manufactured articles, and the other kept the ledger. No clerk was kept. The ledger was held to be not sufficient evidence, although supported by the testimony of a witness who had settled by it. The court deemed that the book of original entries should also have been offered in evidence. *McCormick v. Elston*, 16 Ill., 20.

"Pass books" as evidence.—Where a merchant uses pass books which are kept in possession of the buyer, presented to the merchant when articles are purchased, and returned to

the buyer after entry of the purchase has been made therein, the pass book, it seems, is admissible in evidence for the plaintiff to prove the amount of the sales. Such book is not, however, evidence in behalf of a third person for whose use the goods were purchased. *Hovey v. Thompson & Co.*, 37 Ill., 538.

² *Redlich v. Bauerlee*, 98 Ill., 184.

³ *Redlich v. Bauerlee*, 98 Ill., 184; *Hall v. Glidden*, 38 Me., 445; *Barker v. Haskell*, 9 Cush., 319; *Hoover v. Gehr*, 62 Pa. St., 136; *McGouldrick v. Traphagan*, 88 N. Y., 334.

A cash blotter is no part of the bank books. It is simply the memorandum of a cashier or teller. *People v. Wadsworth*, 63 Mich., 500.

⁴ *Monroe v. Snow*, 131 Ill., 126.

order to enable a jury to clearly understand the facts stated.' A certified copy of a map in the land office has been admitted as proof of matters it purported to show,² but a map of a government subdivision is held not to be admissible unless accompanied by the surveyor's field notes.³ But field notes must be in some manner authenticated before they are admissible in evidence.⁴ Plans of a road are admissible in evidence in condemnation proceedings.⁵ Photographs of premises in question may be introduced in evidence in certain cases, but may be properly rejected when better and sufficient evidence has already been offered.⁶ A photograph copy of a forged note is admissible to prove the words of the note when the original has become so faded as to become illegible; but it seems not to be admissible to prove the hand-writing of signatures.⁷

§ 854. Same—To what extent scientific books may be used.—Scientific books cannot be read in evidence for the purpose of proving facts therein stated, but where the opinion of an expert witness has been offered as evidence, his opinion on some particular statement of an author may be controverted by reading from the work in question of which the expert witness has expressed himself as being familiar.⁸ The reason scientific books cannot be read to the jury is that they merely contain the opinion of the writer and are incompetent as evidence.⁹ In cross-examination and within reasonable limits counsel will be permitted to read from standard authors on scientific matters to the expert witness who has testified and may ask him if he agrees with the author. This is allowable for the purpose of testing the witness' knowledge and is not

¹ *Brown v. Galesburg Pressed Brick Co.*, 132 Ill., 648; *Sterling v. Jackson*, 69 Mich., 488; *Hoffman v. Harrington*, 44 Mich., 183.

² *Dewey v. Campau*, 4 Mich., 565.

³ *Wilson v. Hoffman*, 54 Mich., 246.

⁴ *Owens v. Crossett*, 105 Ill., 354.

⁵ *Peoria, etc., Co. v. Peoria, etc.*, 105 Ill., 110.

⁶ *Chicago M. & St. P. Ry. Co. v. Kendall*, 49 Ill. App., 398.

⁷ *Duffin v. People*, 107 Ill., 133.

⁸ *City of Bloomington v. Schwab*, 110 Ill., 219.

⁹ *North Chicago, etc., v. Monka*, 107 Ill., 340; *Gale v. Rector*, 5 Ill. App., 481.

to be considered as reading such books to the jury.¹ Furthermore where an expert witness has been asked if a certain passage read to him from a scientific book is in accordance with his observation and he has answered affirmatively, such passage may properly be read to the jury in the argument of counsel.² But on argument to the jury counsel cannot read from scientific books extracts of which have not been made evidence in the case.³

§ 855. Same—How statute laws of this State proven by books.—Courts will not take judicial notice of the contents of the journals of the legislature. Such records must be authenticated.⁴ A transcript of them must be authenticated.⁵

Laws enacted by the legislature, certified to by the Secretary of the State and published by the authority of the state will be received as proof of the statute laws of this State until they are shown not to have been properly enacted as such.⁶

Ordinances of a city, or village organized under the general law of this State, when printed in pamphlet or book form purporting to be published by the board of trustees or city council, such publication is *prima facie* evidence of the ordinances published therein. It is not necessary that the clerk of such municipal corporation should append a certificate thereto. It is sufficient if the book or pamphlet on its title page, or by printed certificate of the clerk or otherwise on its face purports to have been published by the authority of the board of trustees or city council.⁷

§ 856. Same—How statute laws of other states proven by books.—The printed statute laws of other states or territories, or of the United States, may now, by force of a statute

¹ Connecticut M. L. Ins. Co. v. Ellis, 89 Ill., 516; Pinney v. Cahill, 48 Mich., 584; Marshall v. Brown, 50 Mich., 148.

² Scott v. People, 141 Ill., 195.

³ People v. Glover, 71 Mich., 303.

⁴ Grob v. Cushman, 45 Ill., 119; Illinois Central R. R. Co. v. Wren, 48 Ill., 77.

⁵ Miller v. Goodwin, 70 Ill., 659.

⁶ Illinois Central R. R. Co. v. Wren, 48 Ill., 77.

⁷ Lindsay v. Chicago, 115 Ill., 120; Barr v. Village of Auburn, 89 Ill., 361; McGregor v. Village of Lovington, 48 Ill. App., 202.

of this State, be offered in evidence when they purport to be printed under the authority of the United States or another state or territory and shall be received as evidence in all courts and places in this State of the acts in them contained.' The statute law of another state cannot, however, be proven by parol.'

In the same manner ordinances of a city or village situate in another state may be proved by the production of the books in which such ordinance is printed or recorded when purporting to be printed or recorded by authority. They may also be proved by a sworn copy thereof.'

When printed statutes are read in evidence, counsel for the adversary must, if the same be irrelevant and objectionable, save an exception thereto and copy them into the bill of exceptions.'

The common law of another state may be shown by parol evidence. A competent person instructed in the law is usually called as a witness in such cases.' Likewise the reports of the decisions of courts of other states of the United States, as well as of this State, purporting to be published by authority, may be read as evidence of the decisions of such courts.'

§ 857. (i) Showing the contents of documents in evidence.—The contents of documents may be proved by (1) what is termed primary evidence, and under certain circumstances may be proved by (2) what is termed secondary evi-

¹ Rev. Stat. Chap. 51, ¶ 10, § 10; *Eagan v. Connelly*, 107 Ill., 458.

² *McDeed v. McDeed*, 67 Ill., 545.

But if parol evidence of them is introduced and the statute book subsequently offered in evidence the error in admitting oral evidence will be cured. *McDeed v. McDeed*, 67 Ill., 545.

Exemplified Statute.—An exemplification by the secretary of this State of the laws of other states and territories, which have been or shall hereafter be transmitted, by order of the executive or legisla-

tures of such states or territories, to the governor of this state, and by him deposited in the office of said secretary, shall be admissible as evidence in any court of this State. Rev. Stat., Chap. 51, ¶ 11, § 11; *Tinker v. Cox*, 68 Ill., 119.

³ *Louisville, etc., v. Shires*, 108 Ill., 617.

⁴ *Charlesworth v. Wilson*, 16 Ill., 338.

⁵ *The Milwaukee & St. P. Ry. Co. v. Smith*, 74 Ill., 197; *McDeed v. McDeed*, 67 Ill., 545.

⁶ Rev. Stat., Chap. 51, ¶ 12, § 12.

dence. When and how it may be proved by each will be indicated respectively.

§ 858. **Same. (1) When and how contents of documents proved by primary evidence—Definition.**—Primary evidence means the document itself produced for the inspection of the court or jury.¹ When a document is executed in parts each part is primary evidence of the document, and where each counter part is executed by one of some of the parties only, each counter part is primary evidence against the parties executing it.² And where a number of documents are all made by printing, lithography, photography, or any other process of such nature as in itself will secure uniformity in the copies, each is primary evidence of the contents of the rest.³

When the contents of a telegram is to be proved, it is best done by introducing the original message delivered for transmission.⁴ But where a contract is made by telegrams, such contract is primarily proven by the message of the sender as delivered to the receiver and the answering message of the receiver as delivered by him to the telegraph company for transmission.⁵ Where directions received by telegram are to be proved such proof is primarily made by the message which is received by the addressee.⁶

§ 859. **Same—As to contents of attested copies.**—A document which has been subscribed by witnesses cannot, by the common law, be offered in evidence until at least one of the subscribing witnesses (if any such be alive, sane, and subject to the process of the court), has been called for the purpose of proving the execution of the document.⁷ But by force of the

¹ Stephen's Dig. of Evidence, Art. 34.

² Loring v. Whitmore, 13 Gray. (Mass.), 228; C. & T. Ry. Co. v. Perkins, 17 Mich., 296; Dykes v. Wyman, 67 Mich., 236.

³ Steph. Dig. of Evidence, Art. 64; Wharton on Evidence, §§ 70, 92; King v. Worthington, 73 Ill., 16.

⁴ Western Union Telegraph Co. v. Hopkins, 49 Ind. 223.

⁵ Matteson v. Noyes, 25 Ill., 591; Wilson v. M. & N. Ry. Co., 81 Minn., 481; Saveland v. Green, 40 Wis., 431.

⁶ Morgan v. People, 59 Ill., 58; Commonwealth v. Jeffries, 7 Allen (Mass.), 548.

⁷ 1 Greenl. Ev. § 569; Wharton's Ev. §§ 723-5; White v. Wood, 8 Cush. (Mass.), 413.

statute of this State, such document, when concerning *lands, tenements or hereditaments*, and which is required to be acknowledged and recorded, may, whether recorded or not, be read in evidence without any further proof of the execution thereof. And if it is lost or not in the power of the party wishing to prove it, the record of it or a transcript thereof, certified to by the recorder in whose office it was recorded, may be read in evidence without further proof thereof.¹ The contents of such a document which is required by the statute to be acknowledged can only be shown in evidence when not acknowledged when proved by the subscribing witness as required by the common law rules of evidence. The statute only obviates such proof when the instrument is acknowledged in the manner prescribed.² Likewise all instruments which are not required to be acknowledged must be proved by the common law rules of evidence.

When the attesting witness is not alive or cannot be found, then the contents of the instrument cannot be shown in evidence until proof has been made of the genuineness of the signature of at least one of the subscribing witnesses and of the person who executed the instrument.³

¹ Rev. Stat., Chap. 30, ¶ 35, § 35. As to proof by secondary evidence generally, see post § 860.

The party wishing to introduce it (or his agent or attorney) must either orally or by affidavit state on oath that such original document is lost or not in the power of the party wishing to use it as evidence and that to the best of his knowledge, such original document shall not intentionally destroy or in any manner be disposed of, for the purpose of introducing a copy thereof in place of the original. Rev. Stat., Chap. 30, ¶ 36, § 36. Before whom such affidavit to be made, see Rev. Stat., Chap. 30, ¶ 37, § 37.

² Rev. Stat., Chap. 30, ¶ 31, § 31.

³ Stephens' Dig. of Evidence, Art. 66-69.

How handwriting proved. — A signature or handwriting of one who has executed an instrument, either as principal or witness must be proved by one who has acquired a knowledge of such writing in one of two ways: (1) by having seen the person write, or (2) from having seen letters, bills and other documents purporting to be the writing of such person and having afterwards personally communicated with him respecting them or having acted upon them as his, he having known and acquiesced in such acts, or having adopted them in ordinary business transactions of life raising a presumption of their genuineness. *Riggs v. Powell*, 142 Ill., 453; *Board of Trustees v. Misheimer*, 78 Ill., 22; *Brobston v. Cahill*, 64 Ill., 356;

However, where the adverse party permits an attested instrument to be introduced in evidence without proof by a subscribing witness, it has been held in a sister state that such proof is thereby waived and that the instrument will properly be considered in evidence.¹

§ 860. Same. (2) When and how contents of documents proved by secondary evidence—Definition.—Secondary evidence consists of (1) examined copies, exemplifications, office copies and certified copies; (2) other copies made from the original and proved to be correct; (3) counter-parts of documents used against the parties who did not execute them; and (4) oral statements of the contents of documents, made by some person who has himself seen them.²

The contents of documents are to be proved by secondary evidence in the following cases:—

First. When the original is shown or appears to be in the possession of the opposite party, and when, after proper notice so to do, he does not produce it.³

Second. When the original is shown or appears to be in the power of a stranger who is not legally bound to produce it and who refuses so to do after being served with a *subpoena duces tecum*, or after having been sworn as a witness and

Jumpertz v. People, 21 Ill., 375; Pate v. People, 3 Gilm. (Ill.), 644; Snyder v. McKeever, 10 Ill. App., 188.

Proof of signature or handwriting cannot be proved in this State by comparison with other signatures or handwriting. Riggs v. Powell, 142 Ill., 453; Putnam v. Wadley, 40 Ill., 346; Kernin v. Hill, 37 Ill., 209; Jumpertz v. People, 21 Ill., 375.

When a witness is called to testify in relation to the handwriting of a person he should first be asked if he is acquainted with such handwriting. Then if he answers in the affirmative he should be asked to state the manner in which he became

acquainted with it. Pate v. People, 3 Gilm. (Ill.), 644.

¹ Rayburn v. Mason Lumber Co, 57 Mich., 273.

² Stephen's Dig. of Evidence, Art. 70; Munn v. Goldbold, 3 Bing. 292; Loring v. Whitmore, 13 Gray (Mass.), 228; Clark v. Houghton, 12 Gray, (Mass.), 38; Huff v. Huff, 56 Mich., 456; Stebbins v. Duncan, 108 U. S., 32.

³ Steph. Digest of Evidence, Art. 71.

⁴ Cahen v. Continental Ins. Co., 69 N. Y., 300; Platt v. Platt, 58 N. Y., 646; Bogart v. Brown, 5 Pick. (Mass.), 17.

asked for the document and having admitted that it is in court.'

Third. When the original has been destroyed or is lost and proper search has been made for it.'

Fourth. When the original is of such a nature as not to be easily movable, or is in a country from which it is not permitted to be removed.'

Fifth. Where the original is a public document which the law requires shall remain in the public office.'

Sixth. Where the party has been deprived of the original by fraud so that it cannot be procured.'

¹ *Spencer v. Boardman*, 118 Ill., 558; *Fisher v. Green*, 95 Ill., 94; *Nuxon v. Cobleigh*, 52 Ill., 387; *Brant v. Klein*, 17 Johns. (N. Y.), 335; *Bird v. Bird*, 40 Me., 392.

² *Greenl. Ev.*, 399; *O'Neil v. O'Neil*, 123 Ill., 361; *Bush v. Stanley*, 122 Ill., 406; *Massey v. Farmers' Nat. Bank*, 113 Ill., 334; *Perry v. Burton*, 111 Ill., 138; *Golder v. Bresler*, 105 Ill., 419; *Milton v. Show*, 103 Ill., 277; *Rhode v. McLean*, 101 Ill., 467; *Anderson v. Irwin*, 101 Ill., 411; *Dugger v. Oglesby*, 99 Ill., 405; *Hardin v. Forsythe*, 99 Ill., 313; *Chicago Dock and Canal Co. v. Kinzie*, 93 Ill., 415; *Moore v. Wright*, 90 Ill., 470; *Hazen & Lundy v. Piereson & Co.*, 83 Ill., 241; *Cairo & St. L. R. R. Co. v. Mahoney*, 82 Ill., 73; *Williams v. Case*, 79 Ill., 356; *Wickenkamp v. Wickenkamp*, 77 Ill., 92; *Maxcy v. Williamson County*, 72 Ill., 207; *McCart v. Wakefield*, 72 Ill., 101; *Dowden v. Wilson*, 71 Ill., 485; *Strader v. Snyder*, 67 Ill., 404; *Anderson v. Jacobson*, 66 Ill., 522; *Stout v. Cook*, 47 Ill., 530; *Huls v. Buntin*, 47 Ill., 396; *Sturges v. Hart*, 45 Ill., 103; *Carr v. Miner*, 42 Ill., 179; *McMillan v. Bethold*, *Smith & Co.*, 85 Ill., 250; *Aulger v. Smith*, 34 Ill., 537; *Orne v. Cook*, 34 Ill., 238; *Matteson v. Noyes*, 25 Ill., 591; *Dick-*

inson v. Breeden, 25 Ill., 186; *Mariner v. Saunders*, 5 Gilm. (Ill.), 113; *Bestor v. Powell*, 2 Gilm. (Ill.), 119; *Palmer v. Logan*, 3 Scam. (Ill.), 56; *Western Union Telegraph Co. v. Kemp Brothers*, 55 Ill. App., 583; *Osborne & Co. v. Rich*, 53 Ill. App., 661; *Loewe v. Reismann*, 8 Ill. App., 525; *Rex v. Hawrth*, 4 Car. & P., 254; *Simpson v. Dahl*, 3 Wall. (U. S.), 60; *American Ins. Co. v. Rosenangel*, 77 Pa. St., 507.

³ For example a libel on a wall, *Mortimore v. McCallum*, 6 Mees. & W., 67,—or a placard pasted upon a wall. *Bruce v. Nicopolo*, 11 Exch., 133,—or an inscription on a tombstone. *Northbrookfield v. Warren*, 16 Gray (Mass.), 171; 1 *Greenl. Ev.*, § 94,—or the name on a vessel. *Cozzens v. Higgins*, 1 Abb. Dec., 45.

⁴ *Gormley v. Uthe*, 116 Ill., 643; *Willoughby v. Dewy*, 54 Ill., 266; *Mariner v. Saunders*, 5 Gilm. (Ill.), 113.

As to the proof in this State of court records, records of municipal corporations, records of private corporations and records of justices of the peace, see *Rev. Stat.*, Chap. 51, ¶¶ 13, 14, 15, 16, 17, 18, also *ante*, § 846.

⁵ *Marlow v. Marlow*, 77 Ill., 633; *Great Western R. R. Co. v. McDon-*

Seventh. When the original is a document, for the proof of which special provision is made by statute.¹

Eighth. When the original consists of numerous documents which cannot be conveniently examined in court and the fact to be proved is the general result of the whole collection; provided the result is capable of being ascertained by calculations.²

The trial Judge is to decide whether secondary evidence is admissible or not, unless by so doing he would decide the whole case.³

The contents of no document, however, can be proved by secondary evidence until a foundation is laid for the introduction of such evidence. In other words it must be clearly shown to the court that at least one of the cases exists under which the law permits secondary evidence to be offered. Such a showing must be made to the court who alone is to judge whether or not it is proper that secondary evidence shall be offered to the jury. If upon such showing the Court rules that secondary evidence is proper then the jury may be informed of the contents of the document by the introduction of secondary evidence.⁴ Furthermore, when secondary evidence is admissible the proof must be made by a satisfactory kind of secondary evidence, and secondary evidence will not be of a satisfactory kind when it is apparent that better evidence is procurable.⁵ A party must show himself to be controlled by circumstances under which secondary evidence is admissible whatever that circumstances may be, and if the statute prescribes particular, preliminary or fundamental proof, as the

ald, 18 Ill., 172; *Mitchell v. Jacobs*, 17 Ill., 235; *Palmer v. Goldsmith*, 15 Ill. App., 544; *Grimes v. Kimball*, 3 Allen (Mass.), 518.

¹ *Ante*, § 859.

² 1 Greenl. Ev., § 93; *Wharton Ev.*, § 80; *Fordan v. Osgood*, 109 Ill., 457; *Burton v. Driggs*, 20 Wall. (U. S.), 125.

³ *Elwell v. Mersick*, 50 Conn., 272; *Mason v. Libby*, 90 N. Y., 683.

⁴ *Macvey v. McQuality*, 97 Ill., 93;

Bowman v. Wettig, 39 Ill., 416; *Keith v. Maffit*, 38 Ill., 303; *Birkbeck v. Tucker*, 2 Hall (N. Y.), 121; *Norton v. Heyworth*, 20 Mich., 359; *Baldney v. Ritchie*, 1 Starkey, 333.

⁵ *Wilson v. South Park Commissioners*, 70 Ill., 46; *White v. Herrman*, 62 Ill., 73; *Bryan v. Smith*, 2 Scam. (Ill.), 47; *Anderson v. Irwin*, 101 Ill., 411; *Land Company v. Bonner*, 75 Ill., 315.

affidavit of the loss of a note,¹ or the giving of notice to produce and a non-compliance therewith,² such preliminary proof is a prerequisite or foundation to be laid before the secondary evidence can be heard.

§ 861. **Same—Notice to produce documents.**—There is no means known to the common law by which the adverse party, when in possession of documents or writings which it is desired to produce in evidence, can be compelled to produce them. The general practice at the common law is that the party desiring to offer documents or writings in evidence should give notice to the adverse party in possession of them to produce them on the trial with notice likewise that if they are not so produced their contents will be proved by secondary evidence. If then the writings for which request was made, are not produced on the trial, the substance of such writings may be proved by one of the four kinds of secondary evidence hereinbefore named.³ By statute in this State courts are given more power than they possess at common law to compel the production of books or writings in the possession or power of adverse party when such books or writings contain evidence pertinent to the issue. All courts in this State, by force of such statute, now have power in any action pending before them, upon motion, and good and sufficient cause shown, and reasonable notice thereof given, to require such party or parties to produce the papers or books desired.⁴ The additional power given by the statute is that the court may punish for contempt of a rule to produce the paper in evidence.

¹ *Dormady v. State Bank*, 2 Scam. (Ill.), 236.

² *First National Bank v. Mansfield*, 48 Ill., 494; *post*, § 861.

³ *Ante*, § 860; 2 Tidd's Pr., 802; *Greenl. Ev.*, § 562; *Utica Ins. Co. v. Caldwell*, 8 Wend. (N. Y.), 296; *Hammond v. Hopping*, 18 Wend. (N. Y.), 505.

Business correspondence and other letters come within this rule and if copies thereof have been kept, they

may be offered in evidence after notice has been given to the opposite party to whom the letters were sent to produce the originals. *Richards Iron Works v. Glennon*, 71 Ill., 11.

⁴ *Rev. Stat.*, Chap. 51, ¶ 9, § 9; *Meeth v. Rankin Brick Co.*, 48 Ill. App., 602; *Pynchon v. Day*, 18 Ill. App., 147; *Field v. Zemansky*, 9 Ill. App., 479.

The practice, when an adversary fails to produce the papers on notice, will be for the person having given such notice to ask the court for a rule upon the adversary to show cause why he should not be punished for contempt of court. Such rule being entered, a disobedience thereto will render the party disobeying it liable for punishment as for contempt.

§ 862. **Same — When notice not required.** — Notwithstanding the fact that documents in the possession of the adverse party, there are four classes of cases in which "notice to produce" is unnecessary.¹

First. — Where the first document to be proved is itself a notice.²

Second. — Where, from the nature of the action, the adverse party has notice that he will be charged with its possession and its production is therefore required. The proceedings themselves supply the notice.³

Third. — When it appears or is proved that the adverse party has obtained possession of the original from a person subpoenaed to produce it.⁴

Fourth. — When the adverse party, or his agent, has the original in court. In this case a verbal notice in court is sufficient,⁵ or the court may compel the witness to produce the document.⁶

In the old books on practice another circumstance is given under which secondary (?) evidence without notice to produce is enumerated, which is, where the original was *executed in*

¹ Notice to produce is, of course, not required, unless the original is in the party's possession or control. Taylor v. McIrdin, 94 Ill., 488; Roberts v. Spencer, 123 Mass., 397; Parker v. Pike, 33 Me., 218.

² 2 Tidd's Pr. 803; Steph. Digest of Evidence, 141.

³ 2 Tidd's Pr., 803; Steph. Dig. of Evidence, 141; 2 Phillips' Ev. 373; How v. Hall, 3 East., 421; Hotchkiss v. Mosher, 48 N. Y., 479.

⁴ 2 Tidd's Pr., 803; 1 Phillips Ev.,

424; Bonesteal v. Lynd, 8 How. (N. Y.) Pr., 226; Scott v. Pentz, 5 Sandf. (N. Y.), 572.

⁵ Barton v. Kane, 17 Wis., 37; Hammond v. Hopping, 13 Wend. (N. Y.), 505; Kerr v. McGuire, 28 N. Y., 446; Chadwick v. United States, 3 Federal Rep., 750.

⁶ Boynton v. Boynton, 25 How. (N. Y.), Pr., 490; Shelp v. Morrison, 13 Hun (N. Y.), 110; McGregor v. Wait 10 Gray, (Mass.), 75.

duplicate; but each of the parts is now considered "primary evidence," and consequently should not now be classed herein.

§ 863. (j) **When papers to be produced on notice.**—The regular time for calling for the production of papers is not until the party who requires them has entered upon the trial of his case, and until that period has arrived the other party may refuse to produce them and there can be no cross-examination as to their contents although the notice to produce them be admitted.*

§ 864. **Same—Extent of notice required—Form.**—Notice to produce papers must be given to the party or his attorney for a length of time which the court will regard as reasonably sufficient to enable them to be produced.* And a notice to counsel to produce papers which will only give time to communicate with clients by telegraph, is not sufficient.*

The notice must so describe the writing demanded as to leave no doubt that the party notified was aware of the particular instrument desired.*

Notice may be in the following form :

NO. 363. FORM OF NOTICE TO PRODUCE PAPERS, ETC.

IN THE.....COURT OF.....COUNTY.

STATE OF ILLINOIS, }
COUNTY OF..... } ss.

A.... B.... }

vs. }

C.... D.... }

Mr.....

The above named.....

SIR: I hereby require you to produce on the trial of this cause a certain instrument in writing (or "deed" or "note" or "receipt," etc., as the case may be), by which (*here describe, as near as may be, the date of the in-*

¹ *Ante*, § 858.

² 2 Tidd's Pr., 804; 1 Greenl. Ev., § 563.

³ 2 Tidd's Pr., 803; Draper v. Hatfield, 124 Mass., 53; People v. Walker, 38 Mich., 159.

⁴ 2 Tidd's Pr., 803; 2 Chitt. Rep., 403; Dewitt v. Prescott, 51 Mich., 298.

⁵ 1 Greenl. Ev., § 562; Walden v. Davison, 11 Wend. (N. Y.), 65.

strument, the contents thereof, and the parties to the same) or I shall give
parol or secondary evidence of its contents.

Yours respectfully,

Attorney for-----

Dated-----

§ 865. Same—*Subpœna duces tecum*.—A *Subpœna duces tecum* (a subpoena that you bring with you) was designed to be served upon witnesses and consists of a clause or requisition particularly designating the document added to the ordinary subpoena. Now since parties may themselves be witnesses they are held to be amenable to the *subpœna duces tecum*.¹

Objections that books or papers are not produced in answer to a *subpœna duces tecum* is made available by entering an exception and assigning the same as error in bill of exceptions.²

§ 866. Same—Evidence to excuse production of documents.—The party notified or subpoenaed to produce the document may produce evidence showing that the document is lawfully out of his possession, whereupon the trial Judge will decide whether secondary evidence of its contents can be admitted—the question being exclusively within his cognizance.³

§ 867. Same—Manner of offering documents in evidence.—It has been said that documentary evidence should be introduced by presenting each piece to the Judge, exhibiting it to opposing counsel, if desired, having it identified by the court stenographer with suitable marks, and, if objected to, establishing its genuineness by testimony.⁴

The opposite party must, of course, be given the privilege of cross-examination.⁵ When it is deemed proper the court

¹ Cummer v. Kent Circuit Judge, 38 Mich., 351.

The service of this *subpœna* is governed by the rules governing subpoenas to witnesses.

² International Bank v. Ferris, 118 Ill., 465.

³ Harvey v. Mitchell, 2 Moo. & Rob., 366; 1 Thompson on Trials, §§ 787, 318, *et seq.*

⁴ Virgie v. Stetson, 73 Me., 572.

⁵ See *post*, § 874.

may permit the document to be offered conditionally and may afterwards instruct the jury as to its effect.¹

When a document is offered in evidence it is within the Judge's discretion either to read the paper himself so as to keep its contents from the jury until admitted, or to direct counsel to read it to the jury.²

The party is not bound to offer in evidence all the papers produced in response to his notice, especially where the papers produced were not named in the notice.³

§ 868. Same—Written documents explained by oral evidence.—A contract cannot be partly in writing and partly on parol. Where a contract is in writing, the writing itself is the only primary evidence of its terms and conditions as between the parties themselves.⁴ But inasmuch as such contract may not be clear and explicit in its terms and may not be susceptible of being readily understood, it may be explained or interpreted in the following cases and for the following reasons:

First. In order to "aid the court in giving a true construction to it" where a written instrument is uncertain in effect, oral evidence may be offered.⁵

¹ Smith v. Shattuck, 12 Ore., 362.

² Brill v. Flagler, 23 Wend. (N. Y.), 354.

³ Heaffer v. New Era Life Ins. Co., 101 Pa. St., 178.

⁴ Gardt v. Brown, 113 Ill., 475; Bowen v. Allen, 113 Ill., 53; Wadhams v. Swan, 109 Ill., 46; Washburn, Moen & Co. v. Chicago, G. W. F. Co., 109 Ill., 71; Ruff v. Jarrett, 94 Ill., 475; Courtney v. Hogan, 93 Ill., 101; Wood v. Surrels, 89 Ill., 107; Lucas v. Beebe, 88 Ill., 427; Gautzert v. Hoge, 73 Ill., 30; Emery v. Mohler, 69 Ill., 221; Winnesheik Ins. Co. v. Colsgrafe, 53 Ill., 516; Ball v. Benjamin, 56 Ill., 105; Lighthall v. Colwell, 56 Ill., 108; Lane v. Sharpe, 3 Scam. (Ill.), 566.

This rule is inflexible in regard to

negotiable instruments. Walker v. Crawford, 56 Ill., 444; Daggett v. Gage, 41 Ill., 465.

When the suit is not between the parties to the suit, but between others, or between one of them and another, this rule is not applicable. Needles v. Hanifan, 11 Ill. App., 303.

⁵ Bulkley v. Devine, 127 Ill., 406; Bearss v. Ford, 108 Ill., 16; Ludeke v. Sutherland, 87 Ill., 481; Donlin v. Daegling, 80 Ill., 608; Tiernan v. Granger, 65 Ill., 351; O'Brien v. Palmer, 49 Ill., 72; Miller v. Ballard, 46 Ill., 377; Wolf v. Willits, 35 Ill., 88; White v. Merrell, 32 Ill., 511; Atchison, Topeka & S. F. R. R. Co. v. Goetz, etc., Co., 51 Ill. App., 151.

Second. If ambiguous or equivocal words have been used oral evidence may be introduced to explain the circumstances under which the instrument was made and the sense in which the words were employed.¹

Where, however, there is no ambiguity, the legal meaning cannot be varied by oral evidence of the understanding between parties.²

Third. If the words are so ambiguous as to be unmeaning no evidence can be given to show what the author intended to say. The instrument is then *void for uncertainty*.³

Fourth. If a document has one distinct meaning in reference to the case it must be construed accordingly and no evidence can be introduced to show another meaning.⁴

Fifth. If the language of the document, though plain in itself, will apply equally well to more objects than one, evidence may be given both of the circumstances of the case and of the statements made by the parties to the document as to their intentions relating to the subject matter of the document.⁵

Sixth. Where the document is of such a nature that the court will presume that it was executed with any other than the apparent intention, evidence may be given to show that it was in fact executed with its apparent intention. This is called evidence to "rebut an equity," that is to say evidence to rebut an equitable presumption.⁶

¹ Converse v. Wead, 142 Ill., 132; Village of Hyde Park v. Andrews, 87 Ill., 229; Fowler v. Redican, 52 Ill., 405; Marshall v. Gridley, 46 Ill., 247; Baker v. Michigan, S. & N. I. R. R. Co., 42 Ill., 73; Reed v. Hobbs, 2 Scam. (Ill.), 297; Graham v. Eisner, 28 Ill. App., 269; Riebling v. Tracy, 17 Ill. App., 158.

² Steph. Digest of Evidence, Art. 91.

³ Moulding v. Prussing, 70 Ill., 151; Palmer v. Albee, 50 Ia., 429; Heald v. Heald, 56 Md., 303.

⁴ Kurtz v. Hibner, 55 Ill., 514;

Sherwood v. Sherwood, 45 Wis., 357; Jackson v. Sill, 11 Johns. (N. Y.), 201; Nostrand v. Moore, 52 N. Y., 12.

⁵ 1 Greenl. Ev., §§ 289, 290, 297, 298; People v. Young, 72 Ill., 411; Holliday & Ball v. Hunt, 70 Ill., 109; Trustee v. Colgrove, 4 Hun (N. Y.), 362; Morgan v. Burrows, 45 Wis., 211.

⁶ 1 Greenl. Ev., § 296; Steph. Digest of Evidence, 170; Van Houghton v. Post, 33 N. J. Eq., 344; Bank v. Fordyce, 9 Pa. St., 245.

§ 869. Same—Changing or contradicting documents by oral evidence.—It is a fundamental principle of the law of evidence that the contents of a written document cannot be contradicted, altered, added to, or varied by parol evidence.¹ But this rule is subject to the following exceptions:

First. Where the instrument is invalid, because of fraud or mistake, either in fact or in law;² illegal consideration or want of consideration;³ that it was usurious;⁴ that it is wrongly dated;⁵ want of capacity in the contracting party;⁶ that the instrument apparently absolute is not;⁷ that an absolute indorsement is conditional;⁸ that the signor of a joint and several note is surety only;⁹ or any other matter which if proved would produce any effect upon the validity of the document, or of any part of it, or which would entitle any person to any judgment, decree, or order relating thereto.¹⁰

Second. The existence of any separate oral agreement as to any matter on which the document is silent and which is not inconsistent with its terms, if from the circumstances of the case the court will infer that the parties did not intend the document to be a complete and final settlement of the whole transaction between them.¹¹

¹ Steph. Digest of Evidence, Art. 90; Greenl. Ev., §§ 275-282; 2 Wharton's Ev., §§ 920-927.

² Johnson v. Glover, 121 Ill., 283; Hicks v. Stevens, 121 Ill., 186; Bradley v. Rees, 113 Ill., 327; Ewing v. Sandoval, 110 Ill., 290; Sapp v. Phelps, 92 Ill., 588; Race v. Weston, 86 Ill., 91; Thorp v. Goewey, 85 Ill., 611; Emery v. Mohler, 69 Ill., 221; Packard v. VanSchoick, 58 Ill., 79; Kinzie v. Penrose, 2 Scam. (Ill.), 515; Van Buskirk v. Day, 32 Ill., 260.

³ Buff v. Jarrett, 94 Ill., 475; Wolf v. Fletemeyer, 83 Ill., 418; Barker v. Garvey, 83 Ill., 184; Primm v. Legg, 67 Ill., 500; Babcock v. Lisk, 57 Ill., 327; Booth v. Hynes, 54 Ill., 363; Illinois Central Ins. Co. v. Wolf, 37 Ill., 354; Morgan v. Fallen-

stein, 27 Ill., 31; Kinzie v. Penrose, 2 Scam. (Ill.), 515.

⁴ Hewitt v. Dement, 57 Ill., 500.

⁵ Long v. Conklin, 75 Mich., 32; Wiley v. Sutherland, 41 Ill., 25; Cook v. Knowles, 38 Mich., 316.

⁶ Greenl. Ev., §§ 28, 367.

⁷ Knowles v. Knowles, 86 Ill., 1; Low v. Graff, 80 Ill., 360; Smith v. Cremer, 71 Ill., 185; Tillson v. Moulton, 23 Ill., 648.

⁸ Hill v. Goodridge, 39 Mich., 439.

⁹ Hedges v. Bowen, 83 Ill., 161; Stevens v. Otis, 58 Mich., 343.

¹⁰ Greenl. Ev., §§ 284, 285; Steph. Digest of Evidence, 162.

¹¹ Hartshorn v. Byrne, 147 Ill., 418; The People v. Madison County, 125 Ill., 334; Drury v. Holden, 121 Ill., 30; Black v. W. S. L. & P. R. R. Co., 111 Ill., 357; Wright v. Gay,

Third. The existence of a separate oral agreement constituting a condition precedent to the attaching of any obligation under any contract, grant, or disposition of property.¹

Fourth. The existence of a distinct subsequent oral agreement to rescind or modify any such contract, or disposition of property, provided such agreement is not invalid under the statute of frauds or otherwise.²

Fifth. Any usage or custom by which incidents not expressly mentioned in any contract are annexed to contracts of that description unless the annexation incident to such contract would be repugnant to or inconsistent with the express terms of the contract.³

Receipts for the payment of money are not "written instruments" within the meaning of this rule of evidence. They are merely matter of evidence and are only *prima facie* proof. Hence oral evidence may be introduced to explain and rebut them.⁴

§ 870. **Same—Manner of proving oral agreement.**—The proper way of proving an agreement by parol by a witness other than the party is said to be to require the witness to state what was said, if anything, by either of the parties in the presence of the other, upon the subject. When the witness cannot give the words of the parties he may state the substance of what was said but he must not be allowed to

101 Ill., 233; Gammon v. Huse, 100 Ill., 234; Harvey v. Drew, 82 Ill., 606; Ball v. Benjamin, 73 Ill., 39; Kirkham v. Boston, 67 Ill., 599.

¹ Belleville Savings Bank v. Bornman, 124 Ill., 200; Robinson v. Margarity, 28 Ill., 423; Ottawa, etc., Ry. Co. v. Hall, 1 Ill. App., 612; Wilson v. Powers, 131 Mass., 539; Westman v. Krumweide, 30 Minn., 313; Michels v. Olmstead, 14 Fed. Rep., 219.

² Marshall v. Gridley, 46 Ill., 247; Kennebeck Co. v. Augusta Ins. Co., 6 Gray (Mass.), 204; Pratt's Admrs. v. United States, 22 Wall., 496; Brown v. Everhart, 32 Wis., 205.

³ Howes v. Austin, 35 Ill., 396; Page v. Cole, 120 Mass., 37; Burger v. Farmers' Ins. Co. 71 Pa. St., 422; 1 Greenl. Ev., §§ 294, 295.

⁴ Stumpf v. Osterhage, 111 Ill., 82; Richards v. Hadsall, 106 Ill., 476; Rosenmueller v. Lampe, 89 Ill., 212; Ransom v. Fox, 65 Ill., 204; Milliken v. Marlin, 66 Ill., 13; O'Brien v. Palmer, 49 Ill., 721; Elston v. Kennicott, 46 Ill., 187; Winchester v. Grosvenor, 44 Ill., 425; Carr v. Miner, 42 Ill., 179; Osgood v. McConnell, 32 Ill., 74; Bissell v. Price, 16 Ill., 408; Lyons v. Williams, 15 Ill. App., 27.

substitute his inferences from what was said or to state what was his understanding.¹

§ 871. (3) **Expert testimony offered.**—As an exception to the rule that opinions relating to facts in issue, or relevant to the issue, are incompetent and cannot be offered in evidence, it is stated that: "Where there is a question as to any point of *science* or *art*, the opinions upon that point, of persons specially skilled in any such matter are deemed relevant facts and are competent evidence." Such persons are called "experts."²

Proof will be allowed to be made by expert witnesses only when the facts upon which such opinions are to be formed cannot be ascertained and made intelligible to the jury. Where the jury are as competent to form an opinion as an expert witness, his opinion will not be received as evidence.³ The witness must have, from study and observation, acquired some special skill in the science or art in order that his opinion may be received in evidence.⁴ And the words "science" or "art" include all subjects on which a course of special study or experience is necessary to the formation of an opinion.⁵ Handwriting is included herein.

No special study or experience is necessary, and therefore no "expert" is required to testify whether or not in his opinion a man was drunk,⁶ or to prove the state of the plaintiff's health,⁷ or the value of real estate,⁸ or the damage done by

¹ Hewitt v. Clark, 91 Ill., 605.

² Steph. Dig. of Evidence, 101, 103.

³ Illinois Central R. R. Co. v. People, 143 Ill., 434; Wight Fire Proofing Co. v. Poczekai, 130 Ill., 139; Pennsylvania Co. v. Coulan, 101 Ill., 93; Linn v. Sigsbee, 67 Ill., 76; Pate v. The People, 3 Gilm. (Ill.), 644; Sallwasser v. Hazlitt, 18 Ill. App., 243.

⁴ Lake Shore & M. S. Ry. Co. v. B. & O. & C. R. R. Co., 149 Ill., 272; Birmingham Fire Ins. Co. v. Pulver, 126 Ill., 329; Pennsylvania Co. v.

Coulan, 101 Ill., 93; Hoener v. Koch, 84 Ill., 408; City of Chicago v. McGiven, 78 Ill., 347.

⁵ Citizens' Gaslight & Heating Co. v. O'Brien, 19 Ill. App., 231; Henry v. Hall, 13 Ill. App., 343.

⁶ 1 Greenl. Ev., § 440; Steph. Digest of Evidence, p. 103n.

⁷ Dimick v. Downs, 82 Ill., 570; Parker v. Parker, 52 Ill. App., 333; Girard Coal Co. v. Wiggins, 52 Ill. App., 69.

⁸ Chicago City Ry. Co. v. Van Vleck, 143 Ill., 480.

⁹ Chicago, etc., R. R. Co. v. Blake,

the overflow of water,¹ or what is meant by a contract to erect a monument,² or to prove the existence of a local custom.³

The opinions of experts is not conclusive upon the jury, but is to be weighed like other evidence and it is said the jury may consider any other evidence in the case upon the subject on which the expert was called and that the court may so instruct them.⁴ Furthermore, it has been held that the evidence of mere experts based simply upon a theory is entitled to little, if any, weight.⁵

It is said the tendency of the law is to broaden the application of the rule relating to proof by expert testimony.⁶

§ 872. Same — Laying the foundation — Hypothetical questions.—A witness cannot be permitted to give his opinion as an expert until it appears, by a preliminary examination, that he is a person particularly skilled in that department of science or special matter in which his opinion is desired. And where he is called upon to testify from his experience and personal knowledge it must be made to appear that he has trustworthy knowledge of the facts involved, and upon which his opinion is to be founded.⁷ The questions which are directed to the witness in order to lay this foundation present a preliminary question of fact for the decision of the trial Judge as to the competency of such witness to testify as an expert.⁸

The manner of putting questions to an expert witness is generally something like this:

After having been required to state his name, age, resi-

116 Ill., 163; Galena & S. W. R. R. Co. v. Haslam, 73 Ill., 494; Ottawa Gaslight & Coke Co. v. Graham, 35 Ill., 346; Ohio & Mississippi R. R. Co. v. Taylor, 27 Ill., 207; Ohio & Mississippi Ry. Co. v. Long, 52 Ill. App., 670.

¹ Ohio & Mississippi Ry. Co. v. Long, 52 Ill. App., 670.

² Sanford v. Rawlings, 48 Ill., 92.

³ Wilson v. Bauman, 80 Ill., 493.

⁴ Chicago B. & Q. Ry. Co. v. Gregory, 58 Ill., 272.

⁵ Peoria, etc., v. Peoria, etc., 105 Ill., 110; Johnson v. F. & M. R. R. Co., 111 Ill., 413.

⁶ Thompson on Trials, § 588.

⁷ Thompson on Trials, § 588; Chicago & A. R. R. Co. v. S. & N. W. R. R. Co., 67 Ill., 142; Chicago, etc., R. R. Co. v. Martin, 112 Ill., 16; Shannon v. Lee, 86 Mich., 557.

⁸ Thompson on Trials, §§ 588, 323.

dence, and occupation, the witness is required to state how long he has been engaged in such occupation, or is asked regarding other matters tending to show the extent of his knowledge of the matters on which he will be called to state his opinion and then he is questioned like this:

From your knowledge of (*here state the nature of the matter in question*) are you able to state the day ("value," "condition," "cause," or whatever it may be) of (*here state matter similar to that in question*)?

If the witness answers affirmatively counsel then states an assumed fact or condition based upon evidence theretofore offered in the case and asks the witness to state his opinion thereon.¹ Hypothetical questions, however, must only assume the existence of facts, upon which there is substantial evidence tending to prove them. Furthermore, the facts and circumstances upon which the expert is to base his opinion must be shown. He cannot be asked to state his conclusions of facts which have not been shown when question, nor can his testimony be based upon evidence which has been rejected. The hypothetical questions asked must be based upon assumptions that are justified by evidence.² The question must be full enough to form a basis for an opinion and the hypothe-

¹ When laying a foundation for expert testimony it is proper to ask a medical expert what has been his own experience in regard to a certain disease, for although the matter of experience was not in issue, yet such question would tend to strengthen the testimony of the witness. Having been afflicted with the disease himself would tend to lead him to give special study to that subject. *Chicago, etc., R. R. Co. v. Lambert*, 119 Ill., 255.

In an action for injury occasioned by ejecting a child of six years from a train the plaintiff endeavored to prove that she was suffering from heart disease produced by the fright which she received when put off

the train. It was held proper to ask a physician when testifying as an expert, whether fright would produce the heart trouble. *Illinois Central R. R. Co. v. Latimore*, 128 Ill., 163.

² *Harsh v. Payson*, 107 Ill., 368; *Chicago, R. I. & P. R. R. Co. v. Moffit*, 75 Ill., 524; *City of Decatur v. Fisher*, 63 Ill., 241; *Truesdale Mfg. Co. v. Hoyle*, 39 Ill. App., 532; *McFall v. Smith*, 32 Ill. App., 463; *White v. Bailey*, 10 Mich., 155; *Hitchcock v. Burgett*, 38 Mich., 501; *Grand Rapids, etc., R. R. Co. v. Huntley*, 38 Mich., 537; *VanDusen v. Newcomber*, 40 Mich., 690; *Stone v. Chicago, etc., Ry. Co.*, 66 Mich., 76; *Daniels v. Aldrich*, 42 Mich., 458.

sis must, for the purpose of the witness' consideration, be received by him as true.¹

Where the opinion asked does not require special skill, experience, or study, such as distance, speed, value, state of health, intoxication, and other matters upon which all persons are informed, then it is not only unnecessary to call an "expert witness" to testify thereto, but it is also unnecessary to lay a foundation for such evidence. Any witness may be asked in regard thereto without preliminary examination to show his knowledge or skill therein.²

§ 873. Same—Whether the expert to hear the evidence.

—The old rule has been that a hypothetical case should be stated to the expert, which case should be substantially based upon the facts theretofore testified to in the case and that upon such facts the expert should found his conclusions, and that the expert should not be allowed to state his opinion based upon the evidence which he has heard given in the case.³ Other cases, however, hold that where the facts are not controverted the expert may be asked to state his opinion based upon the testimony as he has heard it.⁴ But it would seem that the hypothetical question should not be omitted and the expert asked to state his opinion upon the evidence which he has heard unless he has heard *all the testimony*.⁵

¹ Girard Coal Co. v. Wiggins, 52 Ill. App., 69; Chicago, M. & St. P. R. R. Co. v. Pendall, 49 Ill. App., 398.

² Illinois Central R. R. Co. v. Swisher, 53 Ill. App., 411; City of Aurora v. Hillman, 90 Ill., 61; Chicago, etc., R. R. Co. v. Johnson, 103 Ill., 512; Johnson v. Freport, 111 Ill., 413; Dimick v. Downs, 82 Ill., 570; Parker v. Parker, 52 Ill. App., 333; Girard Coal Co. v. Wiggins, 52 Ill. App., 69.

³ Woodbury v. O'Bear, 7 Gray (Mass.), 467; Jamison v. Drinkald, 12 Moore, 148; Dolz v. Morris, 10 Hun (N. Y.), 201; Butler v. St. Louis Life Ins. Co., 45 Ia., 93.

⁴ Davis v. State, 35 Ind., 496; Guiterman v. Liverpool, etc., S. S. Co., 83 N. Y., 358; McNaulton's Case, 10 Clark & Fin., 200.

⁵ Carpenter v. Blake, 2 Lans. (N. Y.), 206; People v. Lake, 12 N. Y., 358.

IX. *Cross-Examination.*

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| <p>§ 874. (a) Time for, and importance of cross-examination.</p> <p>875. (b) Objects of cross-examination.</p> <p>876. Same. 1. To sift, explain, or modify—Extent of the application to the rule.</p> <p>877. Same. 2. Discrediting witness.</p> | <p>§ 878. Same. 3. To develop new matter favorable to the cross-examining party.</p> <p>879. (c) Leading questions permissible.</p> <p>880. (d) The whole testimony of witness taken together.</p> |
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§ 874. (a) **Time for, and importance of, cross-examination.**—After one party has introduced the direct testimony of his witness, the opposite party is entitled to the privilege of a cross-examination of that witness.

The right of cross-examination is considered of such importance that evidence will not be admitted where the other party has not had the opportunity of cross-examining the evidence elicited by the direct examination; but while the right of cross-examination is a substantial one, yet its scope is largely within the discretion in the trial court and a judgment will not be reversed because certain questions were not permitted to be asked on cross-examination, unless it appears that the party denied such right has been injured thereby. If he has, a judgment entered thereon will be reversed.¹

§ 875. (b) **Objects of cross-examination.**—All examination expends itself in three efforts:

1. To shift, explain, or modify what has been said on the direct examination.
2. To discredit the witness.
3. To develop new matter favorable to the cross-examining party.²

Each of these objects will be in their respective order.

¹ Cooper v. Randall, 59 Ill., 317; Tudor Iron Works v. Weber, 139 Ill., 535; Petrie v. Lane, 58 Mich., 527; Sperry v. More's Estate, 42 Mich., 354.

In the last case the witness died after testifying in chief and before

cross-examination. The evidence adduced by the examination in chief was excluded.

² 1 Greenl. Ev., 446; Stevens v. Beach, 13 Vt., 585; Hyland v. Milner, 99 Ind., 308; Baird v. Daily, 68 N. Y., 547.

§ 876. Same. 1. To sift, explain, or modify—Extent of the application of the rule.—The rule in this State is that a party on cross-examination is limited to the facts, elicited by the examination in chief, and that extend to all facts and circumstances connected with the matters stated in such direct examination. A party on cross-examination has no right to call out evidence which has no reference to any portion of the witness' testimony in chief. If the party wishes to examine such witness as to other matters he must do it by making the witness his own and should call him as such in the subsequent progress of the case. But whether the witness is subsequently called, or examined on such matters at the time he is cross-examined, he is nevertheless to be considered the witness of the cross-examiner as to such matters.¹

Greater latitude will be allowed in the cross-examination of a witness who is himself a party to the suit than of a disinterested witness. This is especially true where fraud is charged. The latitude to be allowed rests largely within the discretion of the court, which discretion is to be exercised according to the circumstance of each particular case.² And no matter to what extent the court permits a cross-examination to be conducted, or to what limits it is restricted by the court, there will be no substantial error, unless it appears that the party objecting thereto has been injured thereby.³

¹ Hartshorn v. Byrne, 147 Ill., 418; Hansen v. Miller, 145 Ill., 538; Rigdon v. Conley, 141 Ill., 565; Achilles v. Achilles, 137 Ill., 589; Maynard v. People, 135 Ill., 416; Anheuser, Busch Brewing Ass'n v. Hutmacher, 127 Ill., 652; Birmingham Fire Ins. Co. v. Pulver, 126 Ill., 329; Erie & Pacific Dispatch v. Stanley, 123 Ill., 158; Bonnet v. Glatfeldt, 120 Ill., 166; Black v. Wabash, 111 Ill., 351; Hurbut v. Meeker, 104 Ill., 541; Peru Coal Co. v. Merrick, 791 Ill., 112; Bell v. Prewitt, 62 Ill., 361; Chicago & I. R. R. Co. v. N. Ill. & Iron Co., 36 Ill., 60; Stafford v. Fargo, 35 Ill., 381; Truesdale Mfg. Co. v. Hoyle, 39 Ill. App., 532; City of Mt. Vernon v. Brooks, 39 Ill. App., 426; Stevens v. Brown, 12 Ill. App., 619; Lloyd v. Thompson, 5 Ill. App., 90; *post*, § 877.

² Hollenbeck v. Todd, 119 Ill., 543; Hanchett v. Kimbark, 118 Ill., 121; Strohm v. Hayes, 70 Ill., 41; Marshall v. Laughran, 47 Ill. App., 29; Ottawa O. & F. R. R. Co. v. McMath, 1 Ill. App., 429.

³ Cooper v. Randall, 59 Ill., 317; Stafford v. Fargo, 35 Ill., 481; Birmingham Fire Ins. Co. v. Pulver, 27 Ill. App., 17.

§ 877. Same. 2. **Discrediting the witness.**—The rule is well settled in this country that a witness in a civil case may be cross-examined as to specific facts which tend to disgrace or degrade him for the purpose of impairing his *credibility* although these facts are irrelevant and collateral to the main issue. The extent to which this may be allowed is within the sound discretion of the trial Judge, who commits no error unless he abuses such discretion.¹

The witness may claim the privilege of declining to answer, when the Court allows questions tending to disgrace or degrade him, but when answers are called for which are material to the issue there is no privilege.² But the refusal of a witness to respond will always damage his credit in regard to so much of the direct testimony as it might have qualified.³ Nevertheless a witness is entitled to be protected by the Court from unnecessary insult and abuse by counsel.⁴

The limit of the rule as recognized by all courts, is that a witness cannot be cross-examined as to matters which are purely collateral to the issues on trial with a view of thereafter impeaching him by contradiction.⁵

Counsel will not be permitted to assume any material facts to be in issue which are not found to be by the jury, nor to assume that particular answers have been given contrary to the fact.⁶

§ 878. Same. 3. To develop new matter favorable to the

¹ Ray v. Bell, 24 Ill., 444; Craig v. Rohrer, 63 Ill., 325; Gilbert v. Bone, 79 Ill., 341; 1 Greenl. Ev., 446.

² Steph. Digest of Evidence, 225; Gutterson v. Morse, 58 N. H., 165; Marx v. Hilsendeggen, 46 Mich., 333; Player v. Burlington, etc., R. R. Co., 62 Ga., 723; South Bend v. Hardy, 98 Ind., 577.

³ Heath v. Waters, 40 Mich., 458.

⁴ Toledo, W. & W. Ry. Co. v. Williams, 77 Ill., 354.

⁵ 1 Thompson on trials, §§ 468, 461; Central Ry. Co. v. Allmon, 147 Ill., 471.

It was at one time not an unusual practice for counsel to cross question a witness in relation to his former statements regarding his belief in a Supreme Being with a view of thereafter impeaching him by contradiction. People v. Guinness, 5 Mich., 305.

But this will not now be permitted in this State, because there are no religious tests of the competency of a witness. McAmore v. Wiley, 49 Ill. App., 615.

⁶ Haish v. Munday, 12 Ill. App., 539.

cross-examining party.—As before said,¹ a party cannot cross-examine a witness as to matters not elicited on the examination in chief; but when he interrogates the witness upon such matters he makes the witness his own and his examination is then in chief on his own behalf. He should call the witness in his own behalf at a time subsequent to the cross-examination; but in either event he has made the witness his own and will be bound to that extent and as to those matters by the rules governing him in regard to his own witnesses.² He is not necessarily bound by any matter *material to the issue* which he brings out in such examination, but may contradict it as he might contradict the testimony of any other witness.³ But it seems that where a party on cross-examination interrogates a witness as to matters which are purely *collateral* and cannot arise under any issue raised in the case, he thereby makes the witness his own in regard to such matters and cannot contradict the testimony which he gives.⁴

§ 879. (c) **Leading questions permissible.**—While questions suggesting the answer which the person asking the question wishes or expects to receive, or suggesting disputed facts as to which the witness is to testify, will not, if objected to by the adverse party, be permitted to be asked in the examination in chief or re-examination except by the permission of the court;⁵ yet such “leading questions” may be asked on cross-examination. And counsel are not even bound to disclose the object of the questions.⁶

¹ *Ante*, § 875.

² *Bonnet v. Glattfeldt*, 120 Ill., 166; *Waller v. Carter*, 8 Ill. App., 511.

³ *Newberry v. Furnival*, 46 How. (N. Y.) Pr., 139; 1 *Thompson on Trials*, 470.

⁴ *Kaler v. Builders, etc., Ins. Co.*, 120 Mass., 333; *Farnam v. Farnam*, 13 Gray (Mass.), 508; *Fletcher v. Boston & M. Ry. Co.*, 1 Allen (Mass.), 9; 1 *Thompson on Trials*, 470.

⁵ *Ante*, § 842.

⁶ *Doran v. Miller*, 78 Ill., 34; *Phares v. Barber*, 61 Ill., 271; *Vrooman v. Griffeth*, 1 Keys (N. Y.), 53; *Farmers' Ins. Co. v. Blair*, 87 Pa. St., 124; *Steph. Dig. of Evidence*, Art. 128; *Greenl. Ev.*, §§ 434, 435, 445; 1 *Wharton Ev.* §§ 499-504.

As to what is a leading question see *Harvey v. Osborne*, 55 Ind., 535.

§ 880. (d) The whole testimony of witness taken together.—The whole testimony of the witness, whether given in chief or drawn out by cross-examination, will be by the jury weighed and considered together. That which is given in chief will be contradicted, explained, enlarged, narrowed and modified by the legitimate cross-examination in the minds of the jury and will be considered to be evidence on the part of the party calling the witness and he cannot thereafter exclude such testimony.¹

X. *Redirect Examination.*

§ 881. For what purpose allowable.—The general rule is that after cross-examination of a witness the party who produced him may re-examine the witness as to matters called out on cross-examination and it is within the discretion of the court to permit questions to be put to the witness touching new matters; but the party producing him has no right to such examination as to new matters over the objection of the other party without permission of the court.²

After a witness has left the stand he may be recalled for certain purposes as hereinafter shown.³

XI. *Re-Cross-Examination.*

§ 882. A consequent right.—If the court permits new matter to be introduced on the re-examination of a witness the adverse party has a consequent right to further cross-examine the witness upon such matter.⁴

XII. *Rebuttal.*

§ 883. In what it consists.—After a plaintiff, having the burden of proof, has by the witness made out his case and the

¹ Capen v. De Steiger, 105 Ill., 185; Ill., 34; Beebe v. Koshnick, 55 Campau v. Dewey, 9 Mich., 381; Mich., 604.
Wilson v. Wagar, 26 Mich., 452; ³ Post § 884.
Maxwell v. City Bridge Co., 46 Mich., 278. ⁴ Steph. Dig. of Evidence, Art. 127; Greenl. Ev., § 467.

² City of Springfield v. Dalby, 139

defendant has offered his defense, the plaintiff has then a right to offer evidence in rebuttal, that is to say he can disprove, repel, explain, or counteract by witnesses of his own, the evidence introduced by the defendant. Likewise witnesses produced by the defendant may be examined by the plaintiff on matters not within the bounds of cross-examination and such witnesses will, to that extent, be the witnesses of the plaintiff, and such evidence will be his evidence in rebuttal of the evidence introduced by the defendant. Strictly speaking evidence in rebuttal must follow and be confined within the limits of the matters offered in evidence by the defendant; but it is within the discretion of the court to admit evidence which is not strictly in rebuttal and such admission cannot generally be assigned for error.¹

Surrebuttal.—Where a court has permitted the plaintiff to go beyond the limit of strict rebuttal and give evidence of matters which he should have brought forth on his examination in chief, the defendant will then have the right of surrebuttal as to those matters, which surrebuttal should be confined to the matters brought out on rebuttal, but any departure from this rule is likewise matter of indulgence and discretion of the court and not ordinarily subject to review.²

XIII. *Recalling Witness to Correct Testimony.*

§ 884. **Discretionary with the court.**—It is within the sound discretion of the court to permit a witness to be recalled for the purpose of correcting his own testimony by examination or cross-examination, or to refuse to permit or order a witness to be recalled for that purpose, or for the purpose of laying a foundation to impeach him by contradictory evidence as to prior statements.³ Where impeaching testimony is given

¹ *City of Sandwich v. Dolan*, 141 Ill., 430; *Hodges v. Bearse*, 129 Ill., 87; *Herrick v. Gary*, 83 Ill., 85; *Dimick v. Downs*, 82 Ill., 570; *Wickenkamp v. Wickenkamp*, 77 Ill., 92; *Stolp v. Blair*, 68 Ill., 541; *Bois v. Henney*, 32 Ill., 130; *Chicago, etc., R. R. Co. v. Johnson*, 116 Ill., 206; *Black v. Wabash, etc.*, 111 Ill., 351; *Village of Harrin v. Wright*, 103 Ill., 298; *Huls v. Buntin*, 47 Ill., 396;

Montag v. Linn, 23 Ill., 551; *Kingman & Co. v. Glover*, 53 Ill. App., 139.

If a witness on cross-examination emphatically denies certain matters he cannot be again called upon to testify to such matters in rebuttal. *Winslow v. Covert*, 52 Ill. App., 63.

² *Sandwich v. Dolan*, 42 Ill. App., 53.

³ *Russell v. Martin*, 2 Scam. (Ill.),

as to a witness' statements he should be permitted to be recalled and examined as to such statements.¹

XIV. *Impeaching Witnesses.*

§ 885. (a) How witnesses may be impeached.

886. (b) Impeaching testimony not evidence.

§ 887. (c) Cross-examination of impeaching witness.

§ 885. (a) **How witnesses may be impeached.**—It is a well established rule of evidence that after a witness has been examined in chief that his *credit may be impeached* in various modes other than that of exhibiting the improbabilities of his story by cross-examination. It is generally done in the following manner:

1. By directly disproving the facts, stated by him, by the testimony of other witnesses.

2. By proof of his general bad reputation for truth and veracity.²

A witness can only be impeached by a direct attack upon his testimony and character.³ A mere conflict of testimony is not what is meant by impeaching evidence.⁴ The statement of the witness must be shown to be absolutely false, or else it must be shown that his statement will not be generally believed by those who know him. If he has made contradictory statements on the trial, his evidence should be disregarded by the jury; but the mere fact that a witness has made a contradictory statement out of court will not be sufficient to discredit him unless on his examination his attention has been called to the alleged contradictory statements, and the time, place and person to whom such statement was made particularly specified. This is called laying a foundation for impeaching testimony by contradiction.⁵ The reason for the

492; *Northwestern R. R. Co. v. Hack*, 66 Ill., 238; *Brown v. Berry*, 47 Ill., 175; *Lycan v. People*, 107 Ill., 423.

¹ *Robertson v. Brost*, 83 Ill., 116.

² *Greenl. Ev.*, § 461; *Chicago City Ry. Co. v. McLaughlin*, 146 Ill., 353; *Loehr v. People*, 132 Ill., 504; In the

Matter of Noble, 124 Ill., 266; *Gir-rord v. People*, 87 Ill., 210; *Northern L. Packet Co. v. Binninger*, 70 Ill., 571.

³ *Hansell v. Erickson*, 28 Ill., 257.

⁴ *Baker v. Robinson*, 49 Ill., 299.

⁵ *Atchison, T. & S. F. R. R. Co. v. Feehan*, 149 Ill., 202; *Myers v.*

rule is that the witness must be given an opportunity to explain the statements made out of court.¹ After a witness denies having made the alleged statement, such statements when relating to matter in issue may be proved by other evidence, and while this is an apparent exception to the rule that statements of witnesses are inadmissible in evidence, yet it is not an exception because the statement is not evidence in the case, but only foundation for impeaching the witness.* Where such contradictory statements are shown, the jury will consider what force shall be given to the testimony of the witnesses, but where the statements are in direct contradiction, the jury should reject the evidence, unless it is corroborated by other testimony. The jury will disregard a witness' statements when it is believed he has sworn falsely.²

The general manner of impeaching a witness is to prove by other witnesses that his character for truth and veracity among his neighbors is so bad that he is unworthy of belief. And it seems that his reputation need not be confined to the time and place of his residence when the testimony is given, but may relate to a former time and in another neighborhood, the remoteness of which should be considered among other circumstances.⁴ The foundation for impeaching a witness by showing his bad reputation for truth and veracity has been reduced to a well known formula. The counsel introducing

Parks, 95 Ill., 408; Richardson v. Kelly, 85 Ill., 491; Bock v. Weigant, 5 Ill. App., 643; Quincy Horse Ry. Co. v. Gnuss, 137 Ill., 264; Aneals v. People, 134 Ill., 402; Chicago West Division Ry. Co. v. Ingraham, 131 Ill., 659; Brown v. Calumet River Ry. Co., 125 Ill., 600; Northwestern R. R. Co. v. Hack, 66 Ill., 238; Miner v. Phillips, 42 Ill., 123; Root v. Wood, 34 Ill., 293; Chicago & A. R. R. Co. v. Lammert, 19 Ill. App., 135.

¹ Morrison v. People, 52 Ill. App., 483.

² Butler v. Cornell, 148 Ill., 276; Chicago City Ry. Co. v. McLaughlin,

146 Ill., 353; Lake Erie & W. R. R. Co. v. Morain, 140 Ill., 117; Campbell v. Campbell, 138 Ill., 612; Western Manf. Mutual Ins. Co. v. Boughton, 136 Ill., 317; Chicago, R. I. & P. R. R. Co. v. Bell, Admr., 70 Ill., 102; Cook v. Hunt, 24 Ill., 535; Tobin v. The Chicago City Railway Co., 17 Ill. App., 82.

³ Chicago City Ry. Co. v. McLaughlin, 146 Ill., 353; Gullihier v. People, 82 Ill., 145; Hartford Life Ins. Co. v. Gray, 80 Ill., 28; Crabtree v. Hagenbaugh, 25 Ill., 233; Kerr v. Hodge, 39 Ill. App., 546.

⁴ Corgan v. Frew, 39 Ill., 31; Brown v. Luehrs, 1 Ill. App., 74.

an impeaching witness first asks "Do you know the general reputation of ----- among his neighbors for truth and veracity (in respect to the particular quality or conduct in question)?" If the witness answer this question affirmatively then counsel will ask, "What is that reputation, good or bad?" A witness may further state whether or not he would believe such person on oath; but this is not compulsory in our courts as in the English courts, and he should not be permitted to volunteer testimony regarding the witness sought to be impeached where such testimony is objected to.¹

It must be remembered that it is to the *general reputation* that the impeaching witness is required to testify, and not to particular facts. The inquiry must be confined to his general character for truth and veracity and the impeaching witness must be able to state what that character is. One is not permitted to testify to the character of another unless he knows the general character of such other person.²

A party may not discredit his own witness' general reputation by showing that his general reputation is so bad as to render him unworthy of credit;³ but where a witness has stated facts the party calling him may disprove such facts by other evidence and thereby discredit his testimony. In this case the impeachment of his credit is not direct but incidental and secondary only.⁴

§ 886. (b) Impeaching testimony not primary evidence.—

The testimony that is offered to impeach a witness can be applied to that purpose alone and cannot in any case be used as primary evidence of the facts stated.⁵

¹ The witness must not be asked to state, if he knows, the general reputation, etc.

² *Laclede Bank v. Keeler*, 109 Ill., 385; *Foult v. Eckert*, 61 Ill., 318; *Crabtree v. Hagenbaugh*, 25 Ill., 233; *Eason v. Chapman*, 21 Ill., 33; *Schattgen v. Holnback*, 52 Ill. App., 54.

³ *Dimick v. Downs*, 82 Ill., 570; *Crabtree v. Kile*, 21 Ill., 180.

⁴ *Rockwood v. Poundstone*, 38 Ill., 199.

⁵ *Rockwood v. Poundstone*, 38 Ill., 199.

⁶ *Howard v. Patrick*, 38 Mich., 795.

§ 887. (c) **Cross-examination of impeaching witness.**—An impeaching witness may not only be cross-examined as to his means of knowledge regarding the general reputation of the impeached witness for truth and veracity, the grounds for his unfavorable opinion, etc., etc.,¹ but his own reputation may be attacked in certain cases within the sound discretion of the trial Judge,² and his contradictory statements proved.³

XV. *Supporting Witnesses.*

§ 888. (a) When and how witness may be supported.	§ 890. Same—Number of supporting witnesses.
889. Same—Cross-examination of sustaining witnesses.	

§ 888. (a) **When and how witness may be supported.**—An impeached witness may be sustained in the following manner: When his general reputation for truth and veracity has been shown to be bad, other witnesses may be called from his neighborhood to show that such reputation is good (and that they would believe him under oath), but when a sustaining witness is called a like foundation must be laid in regard to them. They must swear that they know his general reputation for truth and veracity.⁴ If the sustaining witness testifies that he does not know the reputation for truth and veracity of the impeached witness, although he has lived in the neighborhood for years, he may be further asked *if he has ever heard it questioned.*⁵

A witness impeached by contradiction cannot, however, be supported by showing that he has, out of court, made statements corroborating those he has sworn to in his testimony.⁶

¹ Bates v. Barber, 4 Cush. (Mich.), 107; Hollywood v. Reed, 57 Mich., 235; People v. Mather, 4 Wend. (N. Y.), 229; Gulerette v. McKinley, 27 Hun (N. Y.), 320.

² Dimick v. Downs, 82 Ill., 570; Phillips v. Thorn, 84 Ind., 84; Stark v. People, 5 Denio (N. Y.), 106; Hollywood v. Reed, 57 Mich., 235.

³ State v. Lawlor, 28 Minn., 216; ante, § 884.

⁴ Cook v. Hunt, 24 Ill., 535; Com-

monwealth v. Ingraham, 7 Gray (Mass.), 146; Sloan v. Edwards, 61 Md., 189; Morse v. Palmer, 15 Pa. St., 51.

⁵ McLaughlin v. Salley, 46 Mich., 219; Lenox v. Faller, 39 Mich., 226.

⁶ Stolp v. Blair, 68 Ill., 541; State v. Hendrick, 32 Kans., 559; Herrick v. Smith, 13 Hun (N. Y.), 446; Hester v. Commonwealth, 85 Pa. St., 139.

Furthermore, the sustaining evidence must be applicable. A witness who has been impeached by showing contradictory statements cannot be supported by proving that his general reputation for truth and veracity is good.¹

§ 889. **Same — Cross-examination of sustaining witnesses.**—Witnesses called to sustain an impeached witness may be cross-examined according to the rules governing the cross-examination of other witnesses. No testimony is evidence unless there has been opportunity for cross-examination.²

§ 890. **Same—Number of supporting witnesses.**—It has been said that the number of sustaining witnesses after impeachment may be properly limited to the number of impeaching witnesses.³

XVI. *Inspection or View.*

§ 891. (a) Is in the nature of circum-		§ 893. (c) Inspection out of court.
stantial evidence.		
892. (b) Inspection in court.		

§ 891. (a) **Is in the nature of circumstantial evidence.**—An “inspection” or “view” in the reception of evidence is the substitution of the eye for the ear,⁴ and is to be regarded rather as a means of dispensing with evidence than evidence itself. That which the court or jury sees need not be proved. It is nevertheless invaluable as an ingredient of circumstantial evidence.⁵

§ 892. (b) **Inspection in court.**—The manner of securing the inspection of documents has been hereinbefore pointed out.⁶

¹ *Brown v. Moores*, 6 Gray (Mass.), 451; *People v. Olmstead*, 30 Mich., 431; *Frost v. McCarger*, 29 Barb. (N. Y.), 617; *Wertz v. May*, 21 Pa. St., 274.

Contra.—*Sweet v. Sherman*, 20 Vt., 23; *Clark v. Bond*, 29 Ind., 555; *Isley v. Dewey*, 71 N. C., 14; *Haley v. State*, 63 Ala., 83.

² *State v. People*, 85 N. Y., 390; *ante*, § 873.

³ *Hollywood v. Reed*, 57 Mich., 235.

⁴ *And. Law. Dic.*, “Inspection.”

⁵ 1 *Wharton's Ev.*, §§ 345-7.

⁶ *Ante*, § 850, *et seq.*

The inspection of the body of the person is seldom required in civil cases except in actions for personal injury in which it is permissible to allow the plaintiff, while testifying as a witness in his own behalf, to exhibit the injured part of his body for the purpose of showing the extent of his injuries, but while it is frequently resorted to in these cases, the court has no power to compel the person to submit to an inspection of his body.¹

§ 893. (c) **Inspection out of court.**—It is within the discretion of the trial court in civil cases to send the jury out to view the premises where an accident has occurred.² And in cases for the condemnation of land the statute has made special provision therefor, which need not be recited here.³ By the statute it is made the duty of the court to send the jury to examine the premises in such cases, but at what time in the progress of the trial they shall go rests wholly within the sound discretion of the court.⁴

A party dissatisfied with the action of the jury in inspecting premises must enter an exception thereto and assign the same as error in his bill of exceptions and thereby bring it to the attention of the court of review.⁵

XVII. *Objections to Evidence, and Exceptions to the Rulings Thereon.*

§ 894. (a) Purpose of the objection and exception—Definition.	§ 896. Same. 2. The ruling of the court.
895. Same. 1. The objection.	897. Same. 3. The exception.

§ 894. (a) **Purpose of the objection, and exception—Def-**

¹ Peoria D. & E. Ry. Co. v. Rice, 140 Ill., 237; Parker v. Ensloe, 102 Ill., 272; Hiller v. Sharon Springs, 28 Hun (N. Y.), 344; Hess v. Lowrey, 122 Ind., 225; Mulhado v. Brooklyn City Ry. Co., 30 N. Y., 370; Townsend v. Briggs, 99 Cal., 481.

² Chicago, B. & Q. R. R. Co. v. Burton, 53 Ill. App., 69; Chicago,

etc., Ry. Co. v. Leah, 41 Ill. App. 584; Elliott's Gen'l Pr., 687.

³ Rev. Stat., Chap. 24, ¶ 124, § 9 Ch. 47, ¶ 9, § 9; Culbertson v. Chicago, 111 Ill., 651; Tullis v. Henderson, 26 Ill., 442.

⁴ Galena & S. W. R. R. Co. v. Haslam, 73 Ill., 494.

⁵ Chicago, P. & St. L. Ry. Co. v. Leah, 152 Ill., 240.

inition.—During the progress of the trial, questions frequently arise as to the admissibility of evidence; these questions come within the province of the Judge for decision when his attention is called thereto by an “objection” made by the party affected thereby.’

If, when the Judge has ruled on any of these questions of law, either party is dissatisfied with such ruling and desires to have the same considered by a court of review, he must save the point by taking an “exception” which exception is entered by the reporter.’ The trial of the case will, however, proceed to verdict the same as if no objection had been made or exception taken.’

It is because the Supreme Court will not review questions of fact and will only review “errors of law” brought to its attention that an exception must be taken. The Supreme Court will review nothing but what is presented to it upon the face of the record of the proceedings had in the case theretofore. The ruling of the court upon matters of evidence and all other collateral matters are not made a part of the record except by entering an exception to such ruling and thereafter having it embodied in a bill of exceptions.’ In order that this may be done three things must occur at the trial, and at the time the question arises. These three things are:

1. The objection,
2. The ruling of the court, and
3. The saving of the exception.

§ 895. Same. 1. The objection.—It is a general rule that any objection, the subject-matter of which may be rendered unobjectionable by amendment, must be made at the time the cause for objection arises, and that in making the objection defects shall be specifically indicated by the objecting party, so that

¹ Rice v. Rice, 108 Ill., 199.

² See *post* “Bill of Exceptions;” Rev. Stat., Ch. 110, ¶ 60, § 59; ¶ 61, § 60.

³ 3 Bla. Com., 372; Steph. Pl., 88.

⁴ Grommes v. St. Paul Trust Co., 147 Ill., 684; Chicago, P. & St. L.

Ry. Co. v. Wolf, 137 Ill., 360; Dwelling House Ins. Co. v. Butterly, 133 Ill., 534; Merchants’ Desp. Trans. Co. v. Joesting, 89 Ill., 152; Reynolds v. Palmer & Hopper, 70 Ill., 288; Allen v. Nichols, Jr., 68 Ill., 250; Brush v. Seguin, 24 Ill., 254.

the other party may correct it.¹ This rule is particularly applicable to the introduction of evidence. If the form of the question or the manner in which evidence is introduced is objectionable, an objection thereto must be made at the time

¹ *General application of the rule.*

—An objection to the form of an action should be made at the first opportunity in order that the other party may amend it. *Citizens' Gas Light, etc., Co. v. Granger*, 118 Ill., 266.

An objection to the variance between the averments in the declaration and the proof must be made on the trial so that the error may be corrected by amendment. *McCormick Machine Co. v. Burandt*, 136 Ill., 170; *Chicago, R., etc., Ry. Co. v. Clough*, 134 Ill., 586; *Consolidated Coal Co. v. Wombacher*, 134 Ill., 57; *Wight Fire Proofing Co. v. Poczekai*, 130 Ill., 189; *Schoonmaker v. Doolittle*, 118 Ill., 605; *Horne v. Watton*, 117 Ill., 130; *Ladd v. Pigott*, 114 Ill., 647; *Alter v. Jaffrey*, 114 Ill., 470; *Pry v. Pry*, 109 Ill., 466; *Pennsylvania Co. v. Lonlan*, 101 Ill., 93. See also *Pittsburgh, Ft. W. & C. R. R. Co. v. Reich*, 101 Ill., 157; *Indianapolis & St. L. R. R. Co. v. Eates*, 96 Ill., 470; *Brannan v. Strauss*, 75 Ill., 234; *Nelson v. Smith*, 54 Ill. App., 345; *St. Louis Coal R. R. Co. v. Moore*, 14 Ill. App., 510; *Putt v. Duncan*, 2 Ill. App., 461.

An objection that the affidavit of claim is formally defective must be made in the trial court so that it may be corrected by amendment. *McKenzie v. Penfield*, 87 Ill., 38.

An objection to the introduction of a foreign statute in evidence because it is not set out in the pleadings must be made at the trial that the opposite party may have an opportunity to amend. *Louisville v. Shires*, 108 Ill., 617.

An objection to an affidavit of merits must be made before joining issue and going to trial upon the merits, by moving the court for judgment as in case for non-suit, or to strike the pleas from the files. *McWilliams v. Richland*, 16 Ill. App., 333.

An objection that proof is not made of the execution of an instrument must be made at the time the instrument is offered in evidence. *Lake v. Brown*, 116 Ill., 83.

The objection that a deed was not properly acknowledged must be made at the time the deed is offered in evidence that the execution of the instrument may be proven by the rules of the common law, that is by proving its execution by the signatures. *Osgood v. Blackmore*, 59 Ill., 261.

An objection that a sheriff's deed has no *placita* showing in what court it was rendered, must be made at the time the deed is offered in evidence in order that an opportunity may be afforded to cure the defect. *Cottingham v. Springer*, 88 Ill., 90.

The objection to an abstract of title offered as evidence must be made at the time it is offered. *Heinsen v. Lamb*, 117 Ill., 549.

An objection that a record of a judgment does not show all that is required must be made at the time the transcript is offered in evidence. *People v. Gray*, 72 Ill., 343.

An objection that the foundation for the admission of evidence has not been properly laid must be made at the time the evidence is sought

and before the question is answered, ' in order that it may be corrected. Furthermore, the objection in such cases must be specific; that is to say, it must indicate accurately wherein the objection lies so that the adversary will know what it is necessary for him to correct in case the court sustains the objection. A general objection, *i. e.*, a mere objection to the admission of such testimony, is not sufficient.' If a specific objection to evidence is not made at the time when the objection can be obviated by further proof it cannot avail as ground for reversing the judgment.'

A specific objection should specify every objectionable feature of the evidence sought to be offered or of the manner in

to be introduced that the omission may be corrected. *Stookey v. Stookey*, 89 Ill., 40.

An objection to the admission of secondary evidence, when primary evidence might have been offered, must be made at the time such evidence is sought to be introduced. *Moore v. Wright*, 90 Ill., 470.

The objection that a wife is incompetent to testify must be urged at the time the adversary seeks to call her as a witness. *R. J. Gunning Co. v. Cusack*, 50 Ill. App., 290.

An objection that a city ordinance offered in evidence was not shown to be duly passed and published must be specifically made at the time the ordinance is sought to be introduced. *Boyle v. Village of Bradford*, 90 Ill., 416.

When rule does not apply.—An objection that the note on which the action is brought is not due need not be raised by plea in abatement. The party suing thereon must show an indebtedness due at the time of the bringing of the action or he cannot recover. *McCoy v. Babcock*, 1 Ill. App., 415.

¹ Counsel should not be permitted, either intentionally or negligently,

to allow questions to be answered, and then to interpose objections in those instances in which the answers are deemed harmful. *Tucker v. Burkitt*, 49 Ill. App., 278.

² *Chicago, P. & St. L. Ry. Co. v. Nix*, 137 Ill., 141; *Chicago & Eastern Ry. Co. v. Holland*, 122 Ill., 461; *First Nat. Bank v. Dunbar*, 118 Ill., 625; *Bressler v. People*, 117 Ill., 422; *Sanderson v. Town of La Salle*, 117 Ill., 171; *The Supreme Counsel, etc., v. Curd*, 111 Ill., 284; *Knight v. Sherman*, 105 Ill., 49; *Walsh v. Wright*, 101 Ill., 178; *Gillett v. Booth*, 95 Ill., 183; *Martin v. Culliver*, 87 Ill., 49; *Clevenger v. Dunaway*, 84 Ill., 367; *Wright v. Smith*, 82 Ill., 527; *Galena & So. Wis. R. R. Co. v. Birkbeck*, 70 Ill., 208; *Jones v. McQuirk*, 51 Ill., 382; *Hanford v. Obrecht*, 49 Ill., 146; *Gillespie v. Smith*, 29 Ill., 473; *Sargeant v. Kellogg*, 5 Gilm. (Ill.), 273; *Coddington v. Hoblit*, 49 Ill. App., 66; *Boyer v. Yates City*, 47 Ill. App., 115; *Western Union Tel. Co. v. Hope*, 11 Ill. App., 289; *Schroeder v. Walsh*, 10 Ill. App., 38; *Board of Education v. Taft*, 7 Ill. App., 571.

³ *Stone v. Great Western Oil Co.*, 41 Ill., 85.

which it is sought to be offered, because a specific objection is a waiver of all objections based upon other facts not specified or relied on; for in fact an objection not specified is waived.¹

Waiver of objection.—Where an objection to evidence is such that it might be obviated by further proof or amendment, and the objection is not urged at the time the evidence is offered, such objection will be deemed to have been waived. This is because the law does not permit a party to sit quietly by and let incompetent evidence be given to the jury, or evidence in an improper manner, without objection and then urge the same as error in a court of review. A case will not be reversed for objectionable evidence which might have been rendered unobjectionable had the opposite party not negligently failed to offer an objection. It is too late to object for the first time in a court of review.²

A general objection will be sufficient where the evidence sought to be introduced cannot, under any circumstance, be

¹ *Terre, Haute & I. R. R. Co. v. Voelker*, 129 Ill., 540; *Garrick v. Chamberlain*, 97 Ill., 620.

² *McLaughlin v. Hinds*, 151 Ill., 403; *Consolidated Coal Co. v. Peers*, 150 Ill., 344; *Helmuth v. Bell*, 150 Ill., 263; *Whitehead v. Hall*, 148 Ill., 253; *Kelly v. City of Chicago*, 148 Ill., 90; *Chicago, etc., R. R. Co. v. Wedel*, 144 Ill., 9; *Chicago, B. & Q. R. R. Co. v. Dickson*, 143 Ill., 368; *County of Du Page v. Comrs. of Highways*, 142 Ill., 607; *Ransom v. McCurley*, 140 Ill., 626; *Weber v. Mick*, 131 Ill., 520; *Stone & Lime Co. v. City of Kankakee*, 128 Ill., 173; *Endsley v. Johns*, 120 Ill., 469; *Chicago W. Div. Ry. Co. v. Lambert*, 119 Ill., 251; *Hanna v. Hanna*, 110 Ill., 53; *Honore v. Wilshire*, 109 Ill., 103; *Montague v. Self*, 106 Ill., 49; *Warren v. Warren*, 105 Ill., 538; *Driggers v. Bell*, 94 Ill., 223; *Carbine v. Pringle*, 90 Ill., 302; *Schill v. Reisdorf*, 88 Ill., 411;

Wickenkamp v. Wickenkamp, 77 Ill., 92; *Littiech v. Mitchell*, 73 Ill., 603; *Herrington v. McCollum*, 73 Ill., 477; *Wilhelm v. People*, 72 Ill., 468; *Board of Education v. Greenbaum & Sons*, 39 Ill., 609; *Holbrook v. Coney*, 25 Ill., 543; *Peoria & Oquawka R. R. Co. v. Neill*, 16 Ill., 269; *Webb v. Alton & Marine Fire Ins. Co.*, 5 Gilman (Ill.), 223; *Gillham v. State Bank*, 2 Scam. (Ill.), 245; *Johnston v. Brown*, 51 Ill. App., 549; *Strubel v. Hake*, 14 Ill. App., 546.

Rule applicable to depositions.—Any objection to evidence offered in taking depositions which might be obviated by amendment must be urged at the time and the objections specifically stated or it will be deemed to have been waived. Such an objection cannot be urged at the trial. *Louisville v. Shires*, 108 Ill., 617. See note next page.

made unobjectionable. In such a case a specific objection is not required, because it would be useless, and the law never requires that to be done which would be unavailing if done.¹ General objections then do not go to any amendable defect, but to the competency, pertinency, relevancy, or materiality of the evidence offered.² When the evidence is incompetent in any event or is objectionable for any other cause which cannot be removed by other evidence, a general objection is sufficient.³ An objection to evidence must be urged by a party to be prejudiced thereby. It cannot be urged by one party for the interest of others who do not complain.⁴

Objections to incurable evidence is not waived by not objecting to it; that is to say, any defect which is objectionable *generally* as above shown, may be urged after the evidence is introduced. The reason for the rule is that not being amendable, the opposite party is not injured by delay in urging the objection.⁵

The sufficiency of evidence to prove the issues may be questioned at any time and in all courts.⁶

§ 896. Same. 2. The ruling of the court.—After the objection has been made there must be a ruling by the trial Judge on the question of law raised by the objection, for if there be no *ruling* the court above will have nothing to review.⁷ However, the failure of a trial Judge to rule definitely upon the objection will not deprive the party of the

¹ Sidwell v. Schumacher, 99 Ill., 426.

² Crawford v. Chicago, etc., R. R. Co., 112 Ill., 314; Wrought Iron Bridge Co. v. Com'rs of Highways, 101 Ill., 518; Wolcott v. Gibbs, 97 Ill., 118; Tracy v. People, 97 Ill., 101; Wilson v. King, 83 Ill., 232; Gordon v. Goodell, 34 Ill., 429; Gammon v. Huse, 9 Ill. App., 557.

³ Hardin v. Forsythe, 99 Ill., 313; Henry v. Hall, 13 Ill. App., 343.

⁴ Campbell v. Campbell, 138 Ill., 612; Shoudy v. School Directors, 32

Ill., 299; Pardon v. Dwire, 23 Ill., 572.

⁵ Kelsey v. Snyder, 118 Ill., 544.

The incompetency of a witness need not be urged by objection at the time of the taking of depositions. Such an objection may be made on the hearing. Kelsey v. Snyder, 118 Ill., 544.

⁶ Elston v. Kennicott, 52 Ill., 272.

⁷ Kleinschmidt v. McAndrews, 117 U. S., 282; People v. Barker, 60 Mich., 278; People v. Murray, 52 Mich., 289.

benefit of his exception. The silence of the Judge will be construed as admitting such matters *against* the objection.¹

§ 897. Same. 3. The exception.—Following the overruling of an objection, the party who feels himself aggrieved must give formal notice that he intends to claim a benefit of his request or “objection” in future proceedings. This is done by *taking an exception*, which is merely saying:

“I will take an exception to the ruling of the court,” “I take an exception,” or “I except.” This exception is entered by the reporter.

The exception is of little or no value in the trial court, its chief purpose being to reserve the question for review on writ of error.²

It is a general rule (applicable to evidence as well as other matters), that in every case where an objection must first be made in the court of original jurisdiction that an “exception” must be there taken; no question is presented to the court of review for consideration unless the record shows that an exception was taken. In fact no error can be assigned for the consideration of the court of review save on an exception entered. If no exception is entered, the objection will be deemed to have been waived.³

Furthermore an exception must not only be entered, but it must be preserved in the record by the bill of exceptions prepared for the presentation of errors to the consideration of

¹ *Corning v. Wooding*, 46 Mich., 44; *Young v. Detroit, G. H. & M. Ry. Co.*, 56 Mich., 430.

² *United States v. Breitling*, 20 How. (U. S.), 252.

³ *City of Bloomington v. Legg*, Admr., 131 Ill., 9; *East St. Louis Electric R. R. Co. v. Cauley*, 148 Ill., 490; *Village of Jefferson v. Chapman*, 127 Ill., 438; *Mount v. Scholes*, 120 Ill., 394; *Robbins v. Roth*, 95 Ill., 464; *Allen v. Payne*, 45 Ill., 339; *Winslow v. Newlan*, 45 Ill.,

145; *Miner v. Phillips*, 42 Ill., 123; *Board of Education v. Greenbaum & Sons*, 39 Ill., 609; *Metcalf v. Edmiston*, 25 Ill., 392; *Mathews v. Hamilton*, 23 Ill., 470; *Chicago, M. & St. P. R. R. Co. v. Kendall*, 49 Ill. App., 398; *Anglo-American Packing Co. v. Baier*, 20 Ill. App., 376.

Where the error is once waived by failing to have an exception entered it is purely discretionary with the court as to a reconsideration of its action. *Hill v. Harding*, 93 Ill., 77.

the supreme court or otherwise.¹ An exception will not be presumed to have been taken merely because the Judge has signed the bill of exceptions. The fact that it was taken must be made to appear.²

The exception as preserved in the record should be specific and show by which party it is made, and when it relates to the admission of evidence, whether such exception was taken to the remarks of the Judge in respect to the admissibility of evidence, or in his refusal to allow the evidence, or in his allowing objectionable evidence, or allowing evidence to be offered in an objectionable manner.³ The exception is made specific by its relation to the specific objection and the ruling of the court thereon which preceded it.

Exception can only be urged by a party prejudiced by the ruling of the court.⁴ This and other matters relating to exceptions and bills of exceptions will be hereinafter shown.⁵

XVIII. *Striking Out and Withdrawiny Evidence.*

§ 898. (a) Power to strike out.

899. (b) Striking out objectionable evidence.

900. (c) Nature of motion to strike out entire evidence.

901. (d) Effect of striking out entire evidence—Power of court.

§ 902. (e) Curing error by striking out or readmitting evidence.

903. (f) Right to withdraw evidence.

§ 898. (a) **Power to strike out.**—The trial Judge has, at any stage of the trial, the *discretionary power* to exclude improperly admitted evidence or to admit evidence subject to exceptions.⁶ This power may be exercised at any time before the

¹ East St. Louis Electric Co. v. Stout, 150 Ill., 9; Chicago, P. & St. Louis Ry. Co. v. Wolf, 137 Ill., 360; Eastman v. People, 93 Ill., 112; Deitrich v. Waldron, 90 Ill., 115; Tucker v. Burkitt, 49 Ill. App., 278; State Bank of Tonawanda v. Dawson, 49 Ill. App., 256.

² Dickhut v. Durrell, 11 Ill., 72.

The question whether an exception was in fact taken at the trial is to be determined alone by

the trial Judge. People v. Anthony, 25 Ill. App., 532.

³ Wickenkamp v. Wickenkamp, 77 Ill., 92; Dickhut v. Durrell, 11 Ill., 72.

⁴ Tucker v. Burkitt, 49 Ill. App., 278.

⁵ Post, "Bill of exceptions."

⁶ Maurice v. Warden, 54 Md., 233; Parker v. Smith, 6 Cal., 105; Montfort v. Rowland, 38 N. J. Eq., 181; Harbaugh v. Cycott, 33 Mich., 241.

cause is finally submitted to the jury.¹ The trial Judge can always take time to consider the evidence introduced, and when he finds error in its admission he can correct the error by removing the testimony from the case and cautioning the jury against giving it any weight or consideration in their deliberations.²

A court may exclude evidence which is merely cumulative, after a fact has been sufficiently proved.³ But if evidence is excluded because of irrelevancy the irrelevancy must be clear.⁴

§ 899. (b) **Striking out objectionable evidence.**—When testimony is admitted without objection and it afterward appears to be inadmissible, the proper course for counsel to pursue is to ask the court to instruct the jury to disregard it, or in other words, to move the court to “strike it out.”⁵ For, as above stated, without an objection being made to the ruling of the court no exception can be taken, and without a motion to strike out such objectionable evidence there will be no ruling of court thereon and there can be no relief except evidence in rebuttal.

If evidence is stricken out which ought to remain, the party offering such evidence should except thereto and take advantage of the error by bill of exceptions.⁶ If testimony is not responsive to the question asked a motion to strike it out should be made at the earliest opportunity.⁷

Evidence which is competent for any purpose whatever cannot be stricken out; but if it is competent only for one purpose the adverse party will be entitled to have it limited to the purpose for which it is proper, by an instruction to the jury to that effect.⁸

¹ *Selkirk v. Cobb*, 13 Gray (Mass.), 313; *Judge v. Stone*, 44 N. H., 593.

² *Dykes v. Wyman*, 63 Mich., 236; *Imperial Fire Ins. Co. v. Shirmer*, 96 Ill., 580.

³ *Clement v. Brown*, 30 Ill., 43.

As to number of witnesses necessary to prove an undisputed fact, see *ante*, § 845.

⁴ *Granger v. Warrington*, 3 Gilm. (Ill.), 299.

⁵ *Gillmore v. Pittsburgh, etc., Ry. Co.*, 174 Pa. St., 275.

⁶ *Chicago, etc., R. R. Co. v. Eininger*, 114 Ill., 79; *Reynolds v. Phillips*, 13 Ill. App., 557.

⁷ *Tucker v. Burkitt*, 49 Ill. App., 278.

⁸ *Jamison v. People*, 145 Ill., 257.

Evidence which has been stricken out cannot be considered in favor of either party. The theory of the law is that it will be considered never to have been offered.¹

§ 900. (c) Nature of motion to strike out entire evidence.—A motion to exclude the entire evidence from the jury, or a motion to instruct the jury to find *for* a party *against* whom evidence has been offered, is in the nature of a demurrer to evidence, and, like a demurrer, admits not only all the facts proved, but also what it tends to prove; but such a motion is not subject to the technicalities required in demurrer to evidence, and no judgment will be necessarily rendered against a defendant who moves to strike out all of plaintiff's evidence if such motion is denied.²

§ 901. (d) Effect of striking out entire evidence—Power of court.—The exclusion of the entire evidence from the jury is in effect an instruction in the nature of a nonsuit and it would seem that the practice should not be indulged. If evidence tends to prove an issue in the case it will be error to exclude it even though in the opinion of the court it may not be sufficient to authorize a verdict. It is the province of the jury to determine the sufficiency of the evidence and such province should not be invaded by the court.³ It is only when there is no evidence tending to support the alleged cause of action, or when by construing the evidence most strongly in the plaintiff's favor it fails to establish a right to recover, that the evidence should be taken from the jury and a verdict

¹ Hersey v. Westover, 11 Ill. App., 197

² Bartelot v. International Bank, 119 Ill., 259; Frazer v. Howe, 106 Ill., 563; Lawrence v. Mutual Life Ins. Co. of N. Y., 5 Ill. App., 280.

If a plaintiff fails to give evidence of a fact essential to his right of action (or where such fact is not disputed) the defendant may take advantage of such omission by simply presenting the court with an instruction which he asks given to

the jury that the entire evidence be excluded or an instruction directing the jury to find for him, and the same may be done both ways. East St. Louis v. Flynn, 119 Ill., 200; Bartelot v. International Bank, 119 Ill., 259.

³ Grimes v. Hilliary, 150 Ill., 141; Crowley v. Crowley, 80 Ill., 469; Merricks v. Davis, 65 Ill., 319; Smith v. Gillett, 50 Ill., 290; Poleman v. Johnson, 84 Ill., 269.

directed. In such a case, however, it becomes the duty of the court to charge the jury that there is no evidence to support the allegations of the plaintiff and that for want of such proof they must find for the defendant. The only thing the court can determine is the fact whether there is or is not evidence tending to prove the fact affirmed. If there is evidence it must go to the jury.¹

§ 902. (e) Curing error by striking out or readmitting evidence.—If improper testimony has been admitted, the resulting error will be cured by the court thereafter striking out such objectionable evidence.²

Likewise where evidence has been improperly stricken out and is thereafter readmitted, the error will be cured where it does not appear that the same could not be as well introduced after the exclusion as before.³

Furthermore where a court has once refused to strike out certain evidence which should of right be stricken out, and the same is thereafter excluded by the court, the party moving therefor has no ground for complaint.⁴

§ 903. (f) Right to withdraw evidence.—It rests within the sound discretion of the trial Judge to permit evidence to be withdrawn or stricken out, especially where to do so will be harmless; but if a party has introduced evidence against the objection and exception of the other party, he cannot as a matter of right thereafter, have it withdrawn or stricken out against the will of the other party. If, however, the court in its discretion permits such evidence to be withdrawn the opposite party can save an exception and assign the same for error.⁵ The withdrawal of evidence may not cure the original

¹ *Poleman v. Johnson*, 84 Ill., 269; *Frazer v. Howe*, 106 Ill., 563; *Smith v. Nevin*, 89 Ill., 192; *Martin v. Chambers*, 84 Ill., 579.

² *Chicago & A. R. R. Co. v. Fietnam*, 123 Ill., 518.

³ *Wabash, St. L. & P. Ry. Co. v. McDougall*, 126 Ill., 111.

⁴ *Weber Wagon Co. v. Kehl*, 139 Ill., 744.

⁵ 1 *Thomp. on Trials*, § 722; *Elliot's Gen'l Pr.*, § 593; *Clinton v. Rowland*, 24 Barb. (N. Y.), 634; *Furst v. Second Avenue R. R. Co.*, 72 N. Y., 542; *Decker v. Bryant*, 7 Barb. (N. Y.), 182; *Boone v.*

error in admitting it and it is generally necessary for the court to also instruct the jury to disregard the evidence that has been withdrawn.¹

Notwithstanding the evidence may be withdrawn and the jury instructed not to regard it, yet if it appears that the opposite party was prejudiced by the improper admission of the evidence struck out or withdrawn it will be sufficient error to procure a reversal.²

XIX. *Reopening Case After Evidence All In.*

§ 904. **Discretionary with the court.**—After both parties have introduced all their evidence it yet rests within the discretion of the court, wisely exercised, to permit the case to be reopened for the admission of new or further evidence, or to allow an admission made in the course of a trial to be withdrawn. This permission to reopen the case and produce further evidence may be granted after the argument of counsel has been begun or even after it is closed. In fact it may be permitted at any time before verdict, but not thereafter. Such further introduction must, however, work no injury to the opposing party and if evidence in chief is so introduced, cross-examination and evidence in defense must be allowed. It will be error to permit one party to introduce further evidence without the knowledge of the other party.³

Purnell, 20 Md., 607; Boyd v. State, 17 Ga., 194; Gray v. Gray, 3 Litt. (Ky.), 465.

¹ Wright v. Gillespie, 43 Mo. App., 244; Hillstad v. Hostetter, 46 Minn., 398; Dillingham v. Russell, 73 Tex., 47; Waterman v. Chicago, etc., Ry. Co., 82 Wis., 613; Rooney v. Milwaukee, etc., Co., 65 Wis., 397; People v. Wallace, 89 Cal., 158.

² Howe, etc., Co. v. Rosine, 87 Ill., 105; Smith v. Kinkaid, 1 Ill. App., 620; McAllister v. Detroit Free Press, 85 Mich., 453; Erbin v. Lorillard, 19 N. Y., 299; Pringle v. Leverich, 97 N. Y., 181.

³ City of Sandwich v. Dolan, 141 Ill., 430; Tucker v. People, 122 Ill., 583; Mosher v. Rogers, 117 Ill., 446; Chamberlin v. Chamberlin, 116 Ill., 480; Collins v. People, 98 Ill., 584; City of Elgin v. Renwick, 86 Ill., 498; Goodrich v. City of Minonk, 62 Ill., 121; Sprague v. Craig, 51 Ill., 289; Comstock v. Purple, 49 Ill., 160; Hunt v. Weir, 29 Ill., 83; Bloom v. Goodner, 1 Ill. (Breese), 63; Wilborn v. Odell, 29 Ill., 456; Patrick v. Perryman, 52 Ill. App., 514; Mauzy v. Kinzel, 19 Ill. App., 571; Munford v. Miller, 7 Ill. App., 62; Windheim v. Ohlendorf, 3 Ill. App., 436.

XX. *Election of Counts.*

§ 905. **When to be made.**—Where the pleading states the same substantial cause of action in different forms or counts and there has been no election before offering evidence, as to which count the plaintiff would rely upon, and evidence has been offered which applies to both, the court may permit a party to elect upon which count he will rely, or may permit him then to change an election previously made.¹

XXI. *Argument of Counsel.*

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| <p>§ 906. (a) Argument of counsel is a matter of right.</p> <p>907. (b) Scope of the argument.</p> <p>908. Same—How improper argument availed of as error.</p> | <p>909. (c) Order of making the argument.</p> |
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§ 906. (a) **Argument of counsel is a matter of right.**—A party to a civil action has a right to be heard either by himself or by counsel, not only on the testimony of his witnesses, but also in the argument of his case. The argument of a cause is as much a part of the trial as the hearing of the evidence. No matter how weak or inconclusive the case may be, if it is enough to present a disputed question of fact upon which he is entitled to a verdict of the jury, he has a right to be present, has a right to have the Judge present, and the argument of his counsel presenting the case to the jury. This is not a matter of discretion on the part of the court, but is an absolute right to every party to the suit.²

However, it seems that where there is no disputed question, the evidence being all on one side of the case, the court may deny the right to *argument*, for the reason that there is nothing to argue.³

The trial Judge has power to limit the time to be devoted

¹ Roberts v. Leslie, 48 N. Y. Super. 378; Meredith v. People, 84 Ill., 479; (Jones & S.), 46; McCannan v. McDermid, 62 Ill., 468. Douglas v. Hill, 29 Kans., 527.

³ Harrison v. Park, 1 J. J. Marsh. (Ky.). 170; Nedig v. Cole, 13 Neb., 39.

² Thompson v. People, 144 Ill., 39.

to the argument of counsel where the same is not unreasonably restricted. It will be no ground for reversal, especially where no exception is taken to the action of the Judge in that regard.¹

Permitting too great latitude to the argument of counsel, as the commenting upon matters not raised by the evidence, is as much a ground of error as the restriction of the argument within too narrow limits.²

§ 907. (b) Scope of the argument.—The general rule regarding the argument of counsel is that it must be confined to the facts brought out by the evidence. It will therefore be error for counsel to comment upon facts pertinent to the issue which have not been brought out in the evidence, provided objection is made and exception is taken by the opposite party. The argument should be confined to a statement of the facts offered in evidence, with comments thereon and may extend to any legitimate inferences arising from all the evidence in the case, even though it be to accuse a witness of a commission of a crime. Reasonable freedom to debate an illustration will be allowed. The trial Judge has power to limit the argument, so long as favoritism and prejudice is not shown and neither party injured. Either party deeming himself to be injured by the argument of opposite counsel can ask the court to restrict such argument and if not satisfied by the ruling of the Judge, may, upon exception, assign the same for error to a court of review.³

In civil cases the jury are not the judges of the law as they are in criminal cases, and therefore it is the duty of the court to instruct the jury in regard to the law applicable in the case,

¹ Monmouth Mining & Mfg. Co. v. Erling, 148 Ill., 521; Meredith v. People, 84 Ill., 479; White v. People, 90 Ill., 117.

² Mayo v. Wright, 63 Mich., 32; Cartwright v. Clopton, 25 Mich., 285.

³ East St. Louis Connecting Ry. Co. v. O'Hara, 150 Ill., 580; Chicago, B. & Q. R. R. Co. v. Perkins, 125

Ill., 127; Hennies v. Vogel, 87 Ill., 242; Phelix v. Scharnwaber, 119 Ill., 445; Woe v. People, 49 Ill., 410; McDonald v. People, 126 Ill., 150; Austin v. People, 102 Ill., 261; Bullinger v. People, 95 Ill., 394; Cartier v. Troy Lumber Co., 35 Ill. App., 449; Freeman v. Dempsey, 41 Ill. App., 554.

and counsel will not be permitted to read the law to the jury in civil cases and comment thereon.¹

Counsel will not be permitted to procure the jurors to make calculations of amounts, or to make memoranda during the argument of the case to them. They may do so at their own instance if they choose, but cannot be directed or procured so to do by counsel.²

§ 908. Same—How improper argument availed of as error.—It is the duty of the court, without waiting for an objection, to restrain counsel from undue latitude in their argument to the jury; but where the opposite counsel deems the Judge to be too lenient in this regard, he can object to the manner or extent of the argument and procure a ruling of the Judge thereon. Whichever party the ruling of the Judge is against, may, if he deems himself to be prejudiced, have an exception entered and assign the same for error; but although remarks may be improper or even culpable in themselves, they will afford no ground for reversal of the case, unless they work substantial injury. If the remarks were entirely superfluous and uncalled for they will be treated as surplusage, but if they work injury to the party they will constitute sufficient error to obtain a reversal. Without objection and exception, however, the judgment will not be reversed, because of improper remarks in the argument of counsel.³ It is good prac-

¹ Wohlford v. People, 148 Ill., 296; City of Chicago v. McGiven, 78 Ill., 347; Tuller v. Talbot, 23 Ill., 357; Nash v. Burns, 85 Ill. App., 296.

² Lake Erie & W. R. R. Co. v. Middleton, 142 Ill., 550; Indiana & St. Louis R. R. Co. v. Miller, 71 Ill., 463.

³ Vane v. City of Evanston, 150 Ill., 616; Monmouth Mining & Manf. Co. v. Erling, 148 Ill., 521; Grand Lodge A. O. U. W. v. Belcham, 145 Ill., 308; Chicago City Ry. Co. v. Van Vleck, 143 Ill., 480; Joliet Street Ry. Co. v. Call, 143 Ill., 177; City of Chicago v. Leseth, 142 Ill.,

642; Smith v. People, 142 Ill., 117; North Chicago Street Ry. Co. v. Cotton, 140 Ill., 486; Marder, Luce & Co. v. Leary, 137 Ill., 819; Kennedy Bros. v. Sullivan, 136 Ill., 94; Raggio v. People, 135 Ill., 533; Chicago City Ry. Co. v. Pelletier, 134 Ill., 120; Holloway v. Johnson, 129 Ill., 367; Ochs v. People, 124 Ill., 399; Chicago & A. R. R. Co. v. Dillon, 123 Ill., 570; Henry v. Centralia & Chester R. R. Co., 121 Ill., 264; Felix v. Scharnweber, 119 Ill., 445; Chicago, etc., R. R. Co. v. Johnson, 116 Ill., 206; Hennies v. Vogel, 87 Ill., 242; Chase v. City of

tice, where a counsel has taken in his argument a position that is not warranted by the pleading and evidence, for opposite party to request the Judge to instruct the jury upon such point, and thereby have the erroneous statements corrected. Where such a proceeding is competent it would seem to be preferable to taking the matter up for review on bill of exceptions.'

§ 909. (c) **Order of making the argument.**—The order of making the closing argument usually follows the order of making the opening statement and offering the evidence; that is to say, the counsel of the party upon whom is the burden of proving the affirmative usually opens the argument to the jury, after which the counsel for the defense will reply. The general practice is then to allow the first arguing counsel to make further argument and close.' This being the practice, the counsel for the party having the affirmative to prove usually reserves for the closing argument the best points which he intends to make. Where there is more than one counsel for such party the argument is often divided, one—usually the junior—making the opening and the other the closing argument.'

Chicago, 20 Ill. App., 274; Chicago & A. R. R. Co. v. Bragonier, 13 Ill. App., 467.

¹ Mayo v. Wright, 63 Mich. 32.

² Ante, §§ 810, 814.

³ McReynolds, v. Burlington, 106 Ill., 152; Williams v. Shup, 12 Ill. App., 454; Grand Rapids, etc., R. R. Co. v. Martin, 41 Mich., 667.

⁴ An ingenious counsel once sought

to cut off the advantage to be gained by the plaintiff's closing argument by refusing to reply to his opening argument, it was held in such case that this could not be done and that it is the duty of the trial Judge to so regulate the argument as to give counsel the opportunity to fairly present their case. Barden v. Briscow, 36 Mich., 254.

XXII. *Province of the Court and Jury.*

§ 910. Proposition stated.

911. (a) Questions of law for the court.

912. Same — Suggestions of what are questions of law.

913. (b) Questions of fact for the jury.

914. Same — Suggestions of what are questions of fact.

§ 915. (c) Mixed questions of law and fact — Determination thereof.

916. (d) Conflicting evidence weighed by jury.

917. (e) Jury limited to facts proved.

918. (f) What documents to be taken to the jury room.

§ 910. **Proposition stated.**—As a preliminary proposition it is stated that (a) “questions of law are for the decision of the court” and that (b) “questions of fact are for the determination of the jury.”¹ When applied to evidence it is stated by our own Supreme Court that it is the province of the court to determine whether the evidence is admissible and the province of the jury to determine its weight and what, if anything, it proves.²

§ 911. (a) **Questions of law for the court.**—It has been aptly said that all effort in judicial administration expends itself in two directions: (1) In ascertaining the ultimate or constitutive facts on which the rights of the parties depend, and (2) In applying the law to such facts.

In cases at law the jury ascertain the facts and the Judge applies conclusions of law to them. The Judge and the jury are respectively independent in determining questions of law and fact and neither can invade the province of the other. The facts having been ascertained by the jury, the Judge then applies the conclusions of law thereto, and this becomes the judgment of the court.³

§ 912. **Same—Suggestions of what are questions of law.**—Such questions as the following are questions of law which the court must decide; the court must decide upon the com-

¹ Coke on Litt., 155, 156.

² Stacy v. Cobbs, 36 Ill., 349.

³ 1 Thompson on Trials, 1015.

petency of witnesses and of evidence;¹ it must decide upon the sufficiency of an answer of a witness to a question put to him;² it must decide upon the relevancy and admissibility of evidence;³ it must construe the pleadings;⁴ it must decide whether or not an instrument has been executed,⁵ whether or not an instrument has been sealed,⁶ and whether or not an instrument has been lost.⁷ What is "due care" to be exercised by the plaintiff must be decided by the court.⁸ And it must decide whether or not there *is* evidence upon a given point or whether the evidence establishes a cause of action.⁹

§ 913. (b) **Questions of fact for the jury.**—It is the province of the jury to decide upon all questions of fact, and this province cannot be usurped by the court. The jury must, in civil cases, accept the law from the court, for it is only in criminal cases that a jury may judge of both the fact and the law. In civil cases the jury must be governed by the interpretation of the law as the court instructs them. They are simply to interpret and determine questions of fact when there is *some* evidence on which they can make such determination. Furthermore their determination thereon will not be reviewed.¹⁰ Questions of law only are reviewable in a court of error.¹¹

§ 914. **Same—Suggestions of what are questions of fact.**—The credibility of witnesses and the weight to be given to testimony are questions of fact to be determined by the jury. In other words whether or not a witness will be believed and

¹ De Land v. Dixon, etc., 111 Ill., 323; Ault v. Rawson, 14 Ill., 484.

² Chicago City Ry. Co. v. McLaughlin, 146 Ill., 353.

³ Birmingham Fire Ins. Co. v. Pulver, 126 Ill., 329; Karnes v. B. & E. R. R. Co., 89 Ill., 269; Miller v. Metzger, 16 Ill., 390.

⁴ Wallace v. Curtiss, 36 Ill., 156.

⁵ Flynn v. Hathaway, 65 Ill., 462.

⁶ Schwartz v. Herrenkind, 26 Ill., 208.

⁷ O'Neil v. O'Neil, 123 Ill., 861.

⁸ Stratton v. Central City R. R. Co., 95 Ill., 25.

⁹ Chicago, etc. v. Warner, 108 Ill., 538; Poleman v. Johnson, 84 Ill., 269; Indianapolis & St. Louis R. R. Co. v. Estes, 96 Ill., 470.

¹⁰ Herman v. Glass, 52 Ill. App., 625; Town of De Soto v. Buckles, 40 Ill. App., 85.

¹¹ See *post*, "Bill of Exceptions" and "Writ of Error."

to what extent, and whether the evidence is sufficient to prove the existence of a fact, are questions peculiarly within the province of the jury which cannot be determined by the court, and when determined by the jury, such determination will be accepted as final.¹

Whether or not due care has been exercised by the plaintiff is a question of fact;² that is to say, negligence is a question of fact and its existence is for the jury to determine.³ Whether a servant is guilty of negligence is a question of fact.⁴ Who are fellow servants is a question of fact.⁵ Fraud and circumvention are questions of fact.⁶ Whether or not a railroad is operated to a certain point is a question of fact.⁷ The sufficiency of evidence to prove an averment and whether or not there is sufficient evidence to warrant the inference of an implied promise are questions of fact which must be determined by the jury.⁸

§ 915. (c) **Mixed questions of law and fact—Determination thereof.**—When the matter in controversy is a mixed question of law and fact the court will instruct the jury as to the law bearing upon the subject and the jury must apply it

¹ As to the credibility or truthfulness, see *Birmingham Fire Ins. Co. v. Pulver*, 126 Ill., 329; *Massey v. Farmers', etc.*, 104 Ill., 327; *Hartford Life Ins. Co. v. Gray*, 80 Ill., 28; *Lowry v. Orr*, 1 Gilm. (Ill.), 70; *Ault v. Rawson*, 14 Ill., 484; *Singer Mfg. Co. v. Price*, 26 Ill. App., 415; *Mississippi & Ohio R. R. Co. v. Harmes*, 52 Ill. App., 649.

As to weight or sufficiency, see *Long v. Little*, 119 Ill., 600; *Chicago, etc., v. Robinson*, 106 Ill., 142; *Pittsburg, etc., R. R. Co. v. Reich*, 101 Ill., 157; *Hartford Life Ins. Co. v. Gray*, 80 Ill., 28; *Paton v. Stewart*, 78 Ill., 481; *Andreas v. Ketchum*, 77 Ill., 377; *Davenport v. Springer*, 63 Ill., 278; *Chicago, B. & Q. R. R. Co. v. Dickson*, 68 Ill., 151; *Chicago City Ry. Co. v. Young*, 62 Ill., 238; *Chittenden v. Evans*, 41 Ill., 251;

Martin v. Morelock, 32 Ill., 485; *Johnson v. Moulton*, 1 Scam. (Ill.), 532; *Bonney v. Weir & Craig Mfg. Co.*, 51 Ill. App., 380; *Borwell v. Schultz*, 50 Ill. App., 161; *Sharp v. Babcock*, 49 Ill. App., 404.

² *Stratton v. Central City H. R. Co.*, 95 Ill., 25.

³ *Pennsylvania Co. v. Conlan*, 101 Ill., 93; *St. Louis Brewing Ass'n v. Hamilton*, 41 Ill. App., 461; *Cleveland C., C. & St. L. Ry. Co. v. Baddeley*, 52 Ill. App., 94.

⁴ *Missouri Furnace Co. v. Abend*, 107 Ill., 44.

⁵ *Chicago, etc., v. Moranda*, 108 Ill., 576.

⁶ *Shrimpton & Sons v. Dunaway*, 52 Ill. App., 448.

⁷ *Ogden v. Kirby*, 79 Ill., 556.

⁸ *Tascott v. Grace*, 12 Ill. App., 639.

accordingly and of themselves to the questions of fact.¹ For example, probable cause is a mixed question of law and fact in which the jury must determine the existence of the circumstances alleged, and the court must determine whether they amount to probable cause.² In an alleged libel, also, it is for the court to decide whether the publication is *capable of the meaning ascribed to it* by an *innuendo*, and it is for the jury to determine whether such meaning was in fact ascribed.³ Reasonable time is likewise a mixed question of law and fact; but where the facts in any case are undisputed, then it becomes purely a question of law for the decision of the court.⁴ A court may instruct the jury what facts are necessary to sustain an issue, but it is for the jury alone to determine whether such facts have been established by proof.⁵ A court in this State cannot find the facts and direct a jury how to find its verdict.⁶ If there is any evidence whatever (and of this the court is to judge) its weight or sufficiency must be left to the determination of the jury upon proper instructions as to the questions of law.⁷

§ 916. (d) Conflicting evidence to be weighed by jury.—

Where the evidence upon any question of fact is conflicting it is the duty of the jury to reconcile it if possible, but if not reconcilable they must then weigh it and reject such portions as they deem to be unworthy of belief. The court has no right to remark upon the weight of the evidence, nor to take from the jury the determination of questions of fact, but any remarks upon the weight of evidence will not be ground for reversal, because of error, unless the same are excepted to or preserved in a bill of exceptions.⁸

¹ Bagley v. Grand Lodge of A. O. U. W., 131 Ill., 498; Cook v. Scott, 1 Gilm. (Ill.), 333.

² Roy v. Goings, 6 Ill. App., 140.

³ Hays v. Mathers, 15 Ill. App., 30.

⁴ Chicago, R. I. & P. R. R. Co. v. Boyce, 73 Ill., 510.

⁵ Orne v. Cook, 31 Ill., 238.

⁶ Baker v. Michigan S. & N. I. R. R. Co. 42 Ill., 73.

⁷ Hutt v. Bruckman, 55 Ill., 441;

Belcher v. Van Duzen, 37 Ill., 281;

Frazure v. Zimmerly, 25 Ill., 202.

⁸ Tedens v. Sanitary District, 149

Ill., 87; Heinsen v. Lamb, 117 Ill.,

549; Davis v. Hoepfner, 44 Ill., 406;

Carpenter v. Ambrosom, 20 Ill., 170;

Brandt v. McEntree, 53 Ill. App.,

467; City of Abingdon v. McCrew,

§ 917. (e) **Jury limited to facts proved.**—The jury, in arriving at its determination, must rely upon the facts introduced in evidence. It cannot go outside of the case for the purpose of getting facts upon which to base a verdict.¹ But this does not mean that the jury is obliged to accept a witness' statement or the testimony as given. As above stated,² the jury is to determine the credibility and weight of the evidence and if it is believed that a witness has exaggerated, it is not only the right but the duty of the jury to disregard the testimony of such witness in so far as it is unjustly exaggerated.³ In testing evidence the jury must depend upon their general knowledge as intelligent men and render a verdict according to the knowledge and judgment derived from experience, observation and reflection.⁴

§ 918. **What documents to be taken by jury on retiring.**—Under the common law the jury was not permitted to take any documents offered in evidence with it to the jury room except by the consent of the parties, but by force of the statute in this State all papers read in evidence, other than depositions, may be carried from the bar by the jury.⁵ It is the duty of the court to see that the rights of the parties are protected in this matter and if there is undue leniency a party can enter an objection and preserve the same upon the record. Any objection, however, must be taken in apt time. It cannot be urged for the first time in a court of review.⁶

49 Ill. App., 355. As to taking case from jury, see *post*, §§ 919, 923.

¹ Stampofski v. Steffens, 79 Ill., 303.

² *Ante*, § 913.

³ Kiernan v. Chicago, S. E. & C. Ry. Co., 123 Ill., 188.

⁴ Kitzynger v. Sanborn, 70 Ill., 146.

⁵ Rev. Stat., Ch. 110, ¶ 56, § 55.

⁶ Avery v. Moore, 133 Ill., 74; Hatfield v. Cheaney, 76 Ill., 488; O'Neal v. Calhoun, 67 Ill., 219; Cox v. Streisser, 62 Ill., 383.

XXIII. *Taking the Case from the Jury, i. e., Directing a Verdict; Demurring to Evidence; Moving for Nonsuit.*

§ 919. (a) When the case to be taken from the jury.

920. (b) How case taken from the jury.

921. (c) Effect of taking case from jury.

§ 922. (d) Directing a verdict.

923. (e) How plaintiff may defeat defendant's motion.

§ 919. (a) **When the case to be taken from the jury.**—When requested so to do, it is the duty of the trial Judge, before submitting the case to the jury, to decide, as a preliminary question of law, whether there is any evidence on which the jury can properly found a verdict for the party on whom the burden of proof rests, and if there is no evidence, then it is the duty of the court to withdraw the case from the jury. When, upon considering the testimony offered on behalf of the plaintiff, in its most favorable light, there is no evidence tending to support his alleged cause of action—and it is the province of the Judge to determine whether or not there is any such evidence,¹ then it is the duty of the court to direct a verdict for the plaintiff.²

§ 920. (b) **How case taken from the jury.**—In practice a case may be taken effectually away from the jury in three different ways, each having the same effect. The defendant may move for a nonsuit; he may demur to the evidence, or he may ask the court to instruct the jury to find for the defendant. By either demurring to the evidence, moving to exclude it,³ or asking an instruction to find for the defendant, a question of law is raised to be decided by the court. This is whether there is evidence tending to prove the cause of action averred by the plaintiff. This question of law must of course be determined by the court.⁴

¹ *Ante*, §§ 911, 912.

² *Frazer v. Howe*, 106 Ill., 563; *Smith v. Nevin*, 89 Ill., 192; *Poleman v. Johnson*, 84 Ill., 269; *Martin v. Chambers*, 84 Ill., 575; *Sippiger v. Covenant Mut. Benefit Ass'n of*

Ill., 20 Ill. App., 595; *Waller v. Carter*, 8 Ill. App., 511.

³ *Ante*, §§ 899, 900.

⁴ *Illinois Central R. R. Co. v. Larson*, 326; *Cothran v. Ellis*, 125 Ill., 496; *Doane v. Lockwood*, 115 Ill.,

§ 921. (c) **Effect of taking case from the jury.**—The effect of demurring to the evidence (or what is equivalent, moving for a nonsuit, or asking the jury to be instructed for the defendant) like any other demurrer admits the truth of whatever evidence has been introduced and also of what it tends to prove, or the conclusions of fact which the jury may fairly draw from the same.¹ Furthermore where a defendant demurs to the plaintiff's evidence he waives any evidence which may have been introduced tending to support his defense. He stands upon the evidence adduced by the plaintiff and

490; *Abend Case*, 111 Ill., 202; *Pennsylvania Co. v. Conlan*, 101 Ill., 93; *Scates case*, 90 Ill., 586; *Holmes case*, 94 Ill., 439.

If the defendant does not raise a question of law by either of these means, but goes to the jury upon the facts, no question of law is preserved in the record. *Illinois Central R. R. Co. v. Larson*, 152 Ill., 326; *Cothran v. Ellis*, 125 Ill., 496; *Abend case*, 111 Ill., 202; *Holmes case*, 94 Ill., 439; *Scates case*, 90 Ill., 586.

And if he raises a question of law by demurrer or otherwise and the court rules against him he can except and take the matter up for review as in other cases. *Rothschild v. Bruscke*, 131 Ill., 265.

Practice on demurrer to evidence.—A demurrer to evidence must be in writing. It is not sufficient for the record to show merely that there was a demurrer and joinder in demurrer. The demurrer must state facts and not merely evidence tending to prove them and every fact and conclusion which the evidence tends to prove must be stated by the demurrer. *Creach v. Taylor*, 2 Scam. (Ill.), 248; *Gillham v. State Bank*, 2 Scam. (Ill.), 248; *Dormandy v. State Bank*, 2 Scam. (Ill.), 236; *Morris v. Indianapolis St. L. R. R.*

Co., 10 Ill. App., 389. Either party may demur to the evidence of the other whether it be written or parol. If the evidence be written the adverse party demurring thereto may oblige the party offering the evidence to join in the demurrer, and if the testimony be by parol there must be a joinder in demurrer and if the parol evidence be loose or indeterminate or circumstantial, every fact and conclusion which the testimony conduced to prove must be distinctly admitted before a joinder can be demanded.

A demurrer to evidence is entered upon the minutes of the court and either party may then move to assign it for argument. *Indianapolis & St. L. R. R. Co. v. Link*, 10 Ill. App., 292; 2 *Tidd's Pr.*, 865; 2 *Swan's Pr.*, 898.

A demurrer to evidence is not a "pleading" and does not work an estoppel. It is a part of the trial and may be ignored on another trial and the issues contested. *Mitchell v. Bannon*, 10 Ill. App., 340.

¹ *Valtez v. Ohio & Mississippi Ry. Co.*, 85 Ill., 500; *Phillips v. Dickerson*, 85 Ill., 11; *Fenn v. Toledo, Peoria & Wabash Ry. Co.*, 59 Ill., 349; *Morris v. Indianapolis & St. L. R. R. Co.*, 10 Ill. App., 389.

calls for a judgment of the court whether or not such evidence is sufficient to sustain the plaintiff's cause of action.¹

§ 922. (d) **Directing a verdict.**—The most general practice, when the defendant deems the evidence of the plaintiff to be insufficient to sustain his cause of action, is to move that the jury be directed to return a verdict for the defendant. It is only where there is no evidence *tending* to prove the plaintiff's cause of action (and it is the province of the Judge to determine whether there is or is not such evidence) that the court has power to direct a verdict. The court cannot weigh evidence. It can merely determine the existence or non-existence of evidence, and in determining that question, every inference which the jury might legitimately have drawn from the testimony must be regarded as admitted. If evidence exists which tends to prove the plaintiff's case the motion must be denied and the case submitted to the jury. The reason why the court may take the case from the jury and direct a verdict for the defendant is that there being no evidence tending to support the averments in the plaintiff's pleading, a judgment entered for the plaintiff would necessarily be so erroneous as to be set aside by a court of review.²

¹ Pratt v. Stone, 10 Ill. App., 633.

² Grommes v. St. P. Trust Co., 147 Ill., 634; Eddy v. Gage, 147 Ill., 162; Gartside Coal Co. v. Turk, 147 Ill., 120; People v. Seelye, 146 Ill., 189; Ames & Frost Co. v. Strachurski, 145 Ill., 192; Stock Quotation Tel. Co. v. Chicago Board of Trade, 144 Ill., 370; Arnold v. Bournique, 144 Ill., 133; Wisconsin Central R. R. Co. v. Ross, 142 Ill., 9; Joliet, A. & N. Ry. Co. v. Velie, 140 Ill., 59; Weber Wagon Co. v. Kehl, 139 Ill., 644; Lake Shore & M. S. Ry. Co. v. Bodemer, 139 Ill., 596; Ambler v. Whipple, 139 Ill., 311; Collar v. Patterson, 137 Ill., 403; Sack v. Dolese, 137 Ill., 129; Purdy v. Hall, 134 Ill., 298; Hanchett v. Ives, 133 Ill., 332; Craig v. Miller, 133 Ill., 300;

Roden v. Chicago & G. T. Ry. Co., 133 Ill., 72; Hall v. First Nat. Bank of Emporia, 133 Ill., 234; Chicago, St. L. & P. R. R. Co. v. Gross, 133 Ill., 37; Pennsylvania Co. v. Ellett, 132 Ill., 654; Huschle v. Morris, 131 Ill., 587; Wight Fire Proofing Co. v. Povzekal, 130 Ill., 139; Anthony v. Wheeler, 130 Ill., 123; Holloway v. Johnson, 129 Ill., 367; Chicago & A. R. R. Co. v. Adler, 129 Ill., 335; Anderson v. McCormick, 129 Ill., 303; Hodges v. Bearse, 129 Ill., 87; Chicago & N. W. Ry. Co. v. Snyder, 128 Ill., 655; Village of Auburn v. Goodwin, 128 Ill., 57; Hamburg-American Packet Co. v. Gattman, 127 Ill., 598; People's Fire Ins. Co. v. Pulver, 127 Ill., 246; People v. People's Ins. Exchange, 126 Ill., 466;

When a motion that the jury be directed to find for the defendant is overruled and an exception thereto is entered and the subject taken up for review, the only question presented to the court above is whether or not there was evidence tending to prove the plaintiff's alleged cause of action; that is to say, evidence from which, if credited, it might in legal contemplation be reasonably inferred the facts affirmed did exist.¹ If, however, the defendant moves at the close of the plaintiff's evidence that a verdict be directed and the motion is overruled, after which the defendant introduces evidence in defense and thereafter fails to renew his motion or ask that the evidence be excluded from the jury, the question whether as a matter of law there is evidence to establish the plaintiff's cause will not arise on the record, for the plaintiff's case may have been strengthened by the evidence of the defendant and that of the plaintiff in rebuttal.²

It is immaterial on which side the evidence is introduced. If there is evidence which tends to support the plaintiff's case the court cannot direct a verdict, but must submit the matter to the determination of the jury.³

§ 923. (e) How plaintiff may defeat defendant's motion.

—The defendant's motion that a verdict be directed (or what is equivalent, a motion for a nonsuit or demurrer to evidence), even though interposed on a sufficient ground may be defeated by the plaintiff exercising his common law right of submitting to a voluntary nonsuit,⁴ or by getting leave of the

Cothran v. Ellis, 125 Ill., 496; Chicago, M. & St. P. Ry. Co. v. Krueger, 124 Ill., 457; Lake Shore & M. S. R. R. Co. v. Brown, 123 Ill., 162; Dartelott v. Int. Nat. Bank, 119 Ill., 259; Pynchon v. Day, 118 Ill., 9; Whitford v. Drexel, 118 Ill., 600; Simmons v. Chicago, etc., 110 Ill., 340; Chicago, R. I. & P. Ry. Co. v. Lewis, 109 Ill., 120; Cook v. Norwood, 106 Ill., 558; Harrigan v. C. & I. Ry. Co., 53 Ill. App., 344; Greenwich Ins. Co. v. Raab, 11 Ill. App., 636.

¹ Illinois Central R. R. Co. v. Nowicki, 148 Ill., 29.

² Chicago City Ry. Co. v. Van Vleck, 143 Ill., 480; Harris v. Shebek, 151 Ill., 287.

³ Pullman Palace Car Co. v. Laack, 143 Ill., 242.

⁴ Harris v. Bean, 46 Ia., 118; Pleasant v. Fant, 23 Wall., 116. This must be done before the jury retires from the bar. Rev. Stat., Ch. 110, ¶ 50, § 49.

court to withdraw a juror.¹ Either of these methods will prevent a final determination of the case and leave the plaintiff entitled to a new trial.

Furthermore if the plaintiff is prepared to do so he has a right to reopen the case and give further evidence.²

XXIV. *Instructing (Charging) the Jury.*

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| <p>§ 924. (a) Purpose of instructions.
 925. (b) Request for instructions.
 926. (c) Allowing or refusing instructions — Marking — Modifying.
 927. (d) Instructions must be in writing.
 928. (e) Instructions must state rules of law only.
 929. (f) Requisites of an instruction.
 930. Same — Not to assume facts not proven.
 931. Same—When great strictness necessary.
 932. (g) Form of an instruction.
 933. (h) Instruction need not be repeated.
 934. (i) Instruction directing a verdict.</p> | <p>§ 935. Same—Directing a verdict for the plaintiff.
 936. Same—Directing a verdict for the defendant.
 937. (j) How the charge to the jury will be construed.
 938. (k) Erroneous instruction — "Error without prejudice no ground for reversal."
 939. (l) Errors cured by instruction.
 940. (m) Written instructions to be read to the jury.
 941. (n) Exceptions to instructions —How entered.
 942. (o) Instructions taken to jury room.</p> |
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§ 924. (a) **Purpose of instructions.**—Since the jury are not the judges of the law in civil cases it is the duty of the court to instruct the jury in that regard. The purpose of the instructions is to convey to the minds of the jury correct principles of law applicable to the evidence which has been placed before them in the case on trial and no more. An instruction as contemplated by the law is an announcement by the court of the rules applicable to the particular case, which rules it is the duty of the jury to apply to the facts which they must find from the evidence in the case.³

¹ Van Sycles v. Perry, 3 Robt., 621.

² Hunt v. Maybee, 27 N. Y., 266;
 May v. Hanson, 5 Cal., 360; Wadsworth v. Thompson, 18 Ga., 709;
 Larman v. Huey, 12 B. Mon. (Ky.), 436.

³ Illinois Central R. R. Co. v. Wheeler, 50 Ill. App., 205; First National Bank of Lanark v. Eitenmiller, 14 Ill. App., 22.

Remarks by the Judge during the progress of the trial, while not considered in the nature of "instructions," yet are matters of no little effect and a court should be guarded in this respect. Remarks made by a Judge calculated to prejudice a party to the suit are grounds for reversal of the judgment rendered, and remarks made to the jury which are calculated to hasten their agreement upon a verdict, although the same may be well meant, are wholly uncalled for and will, where the facts in the case are sharply contested, be ground for reversal of the judgment.¹

§ 925. (b) **Request for instructions.**—It is not only the privilege but the duty of a court to instruct the jury in questions of law, when they are necessary to be applied in the application of the facts to the finding of a verdict.² The parties to an action likewise have a right to ask the court to instruct the jury as to the law applicable to the facts in the case, but not without limitation. The right cannot be abused.³ The right of a party, however, to prepare written instructions and to ask the court to give them to the jury does not deprive the court of the power to give instructions which he himself has prepared, but if the instructions he has prepared does not embody the substance of proper instructions asked by counsel he should also give those prepared by counsel.⁴

The neglect of counsel to ask that the jury be instructed will be treated as a waiver of any error committed by the court in giving or refusing instructions.⁵

§ 926. (c) **Allowing or refusing instructions—Marking—Modifying.**—When instructions are asked which the Judge

¹ Farnham v. Farnham, 73 Ill., 497; Mittel v. City of Chicago, 9 Ill. App., 534.

² Roy v. Goings, 112 Ill., 656; Stemps v. Kelley, 22 Ill., 140.

The court should of its own motion, or, on request, explain to the jury the meaning of terms not in common use and define words and phrases with which they are not

familiar when essential to the interpretation of a contract or other matter in issue. Schmidt v. Sennott, 103 Ill., 160.

³ Fisher v. Stevens, 16 Ill., 397.

⁴ City of Chicago v. Moore, 139 Ill., 201.

⁵ Illinois Central R. R. Co. v. O'Keefe, 49 Ill. App., 320.

approves he shall write in the margin thereof the word "given," and when he disapproves of the instruction asked he shall in the margin thereof write the word "refused;" and he shall in no case after instructions are given, qualify, modify, or in any manner explain the same to the jury otherwise than in writing.¹

Instructions embodying abstract and unnecessary propositions of law may properly be refused.² But where an instruction accurately states correct propositions of law applicable to the issues and evidence, the same cannot, without error, be refused,³ unless the same proposition be substantially duplicated in another instruction given to the jury.⁴ The court has a perfect right to refuse to give the instructions asked by counsel and prepare instructions of its own, provided those asked are substantially embodied in those given, and if such is not the case the party asking the instruction must have an exception entered or he cannot assign the same for error.⁵ When a court declines to give proper instructions asked by the parties and prepares written instructions of its own, such instructions must fairly state to the jury all the legal questions involved in the case and it must appear that no injury has

¹ Rev. Stat., Chap. 110, ¶ 54, § 53; *Wenona Coal Co. v. Holmquist*, 152 Ill., 581; *Tobin v. People*, 101 Ill., 121; *McKenzie v. Remington*, 79 Ill., 388.

² *Illinois Central R. R. Co. v. Larson*, 152 Ill., 326; *Germania Fire Ins. Co. v. Hick*, 125 Ill., 361; *Rupley v. Daggett*, 74 Ill., 351; *Little v. Munson*, 54 Ill. App., 437.

The mere fact, however, that an instruction states abstract propositions of law not predicated upon the evidence will not be ground for reversal of a judgment, unless it has misled the jury. *Chicago, B. & Q. R. R. Co. v. Dickson*, 143 Ill., 368.

³ *Bennett v. Connelly*, 103 Ill., 50;

Bartlett v. Board of Education, 59 Ill., 364.

An instruction may contain a correct proposition of law, and yet if stated augmentatively it will be properly refused. *Burns v. People*, 126 Ill., 282. See *post*, § 929. "Requisites of Instructions." It does not follow that because an instruction contains a correct proposition of law it shall be given. *City of Chicago v. Moore*, 139 Ill., 201.

⁴ *Field v. Crawford*, 146 Ill., 186; *Twining v. Martin*, 65 Ill., 157; *O'Reilly v. Fitzgerald*, 40 Ill., 310; *Chicago & N. W. Ry. Co. v. Dunleavy*, 27 Ill. App., 438.

⁵ *Bromley v. Goodwin*, 95 Ill., 118.

been done by a refusal to give instructions asked by the party against whom judgment was rendered.¹

It is not error for the court to modify an instruction so long as the sense or effect of it is not changed. If the modification made could not possibly have misled the jury then no reversible error has been committed.²

§ 927. (d) Instructions must be in writing.—It is provided by the statute that no Judge shall instruct a jury in any civil case unless such instructions are reduced to writing.³

Nevertheless this rule only applies to instructions which purport to lay down some rule of law and does not apply to merely directing the jury in the form of their verdict. This may be done orally.⁴ And *by agreement of the parties*, the Judge may orally instruct the jury on the whole case. If either party object such objection must be specifically stated and relied upon by exception thereto.⁵

Furthermore, the statutory rule is not applicable to the statement of the Judge in confining counsel in their argument to what is deemed to be the rules of law governing the case.⁶

§ 928. (e) Instructions must state rules of law only.—The written instructions given by the court to the jury must not invade the province of the jury by directing it what weight shall be given to certain testimony, nor by indicating what inferences are to be drawn from evidence. The instructions must correctly state propositions of law only which are applicable to the case and define the rights of the parties. The jury must be left to determine the inferences to be drawn from testimony, the weight to be given to evidence and the

¹ North Chicago Street Ry. Co. v. Louis, 138 Ill., 9.

² Chicago, etc., R. R. Co. v. Benzenheimer, 116 Ill., 226; Kreigh v. Sherman, 105 Ill., 49; Chicago, M. & St. P. Ry. Co. v. Snyder, 27 Ill. App., 476.

³ Rev. Stat., Ch. 110, ¶ 53, § 52.

⁴ Illinois Central R. R. Co. v. Wheeler, 149 Ill., 525.

⁵ Bates v. Ball, 72 Ill., 109; Gaynor v. Pease Furnace Co., 51 Ill. App., 292; Illinois Central R. R. Co. v. Wheeler, 50 Ill. App., 205; City of Abingdon v. Meadows, 28 Ill. App., 442; Cincinnati, L. & C. R. R. Co. v. Ducharme, 4 Ill. App., 179.

⁶ O'Hara v. King, 52 Ill., 304.

existence or nonexistence of the facts alleged by the pleadings in the case as deduced from the evidence and whether or not there is a preponderance of evidence on the part of the plaintiff. The jury must not, in civil cases, be left to interpret the law. They must be accurately instructed in regard to it, for if they are misled in that regard such error will be ground for reversal in a court of review.¹

An instruction submitting a question of law to the jury, though erroneous, will not be ground for reversal if, notwithstanding such instruction, the jury has given a correct answer and rendered a just and proper verdict.²

§ 929. (f) **Requisites of an instruction.**—Instructions must not only be in writing,³ but must be clear, precise, accurate, and, when taken together, must be sufficient. They should be drawn in the fewest and plainest words without repetition and in a consecutive and orderly manner in order that they be not misleading, for an instruction that is misleading is erroneous.⁴ Instructions should be as few and as simple

¹ Rev. Stat., Chap. 110, ¶ 52, § 51; *Wenona Coal Co. v. Holmquist*, 152 Ill., 581; *City of Chicago v. Moore*, 139 Ill., 201; *Louisville, etc. v. Shires*, 108 Ill., 617; *Phenix v. Cartner*, 108 Ill., 207; *Chicago v. Warner*, 108 Ill., 538; *Schmidt v. Sinnott*, 103 Ill., 160; *Chichester v. Whiteleather*, 51 Ill., 259; *Chicago and E. Ry. Co. v. Holland*, 122 Ill., 461; *Village of Fairbury v. Rogers*, 98 Ill., 554; *Richmond v. Roberts*, 98 Ill., 472; *England v. Selby*, 93 Ill., 340; *City of Aurora v. Pennington*, 92 Ill., 564; *Skiles v. Caruthers*, 88 Ill., 458; *Henderson v. Henderson*, 88 Ill., 248; *Ludwig v. Sager*, 84 Ill., 99; *Gilbert v. Bone*, 78 Ill., 341; *Roach v. People*, 77 Ill., 25; *Gowen v. Kehoe*, 71 Ill., 66; *Mitchell, Admr. v. Town of Fond du Lac*, 61 Ill., 174; *Collins v. Waters*, 54 Ill., 485; *Chapman v. Cawrey*, 50 Ill., 519; *Ashlock v. Wilder*, 50 Ill., 169;

House v. Wilder, 47 Ill., 510; *Illinois Central R. R. Co. v. Swearingen*, 47 Ill., 206; *Myers v. Walker*, 31 Ill., 353; *Humphreys v. Collier and Powell*, 1 Ill. (Breese), 297; *McLead v. Sharp*, 53 Ill. App., 406; *West Chicago St. R. R. Co. v. Groshon*, 51 Ill. App., 463; *Beidler v. Fish*, 14 Ill. App., 624; *Beidler v. Fish*, 14 Ill. App., 29; *American Ins. Co. of Chicago v. Crawford*, 7 Ill. App., 29; *Hartley v. Lybarger*, 3 Ill. App., 524; *Village of Warren v. Wright*, 3 Ill. App., 602; *Holly v. Augustine*, 2 Ill. App., 108; *Chicago, B. & Q. R. Co. v. Boger*, 1 Ill. App., 473.

² *Consolidated Coal Co. v. Shaffer*, 135 Ill., 210.

³ *Ante*, § 926.

⁴ *City of Sterling v. Merrill*, 124 Ill., 522; *American Ins. Co. v. Crawford*, 89 Ill., 63; *City of Freeport v. Isbell*, 83 Ill., 440; *Guardian M. L. Ins. Co. v. Hogan*, 80 Ill., 35;

as possible and the practice of giving all the law applicable to the case in one instruction is advisable where the same can be done without tending to mislead or confuse the jury.¹ However, separate and distinct propositions of law should not be blended at the expense of simplicity and clearness.² An instruction should not be prolix and argumentative as that would tend to mislead the jury and defeat the ends of justice.³ It must not indicate the opinion of the court as to the weight of evidence or credibility of witnesses as that would calculate to influence the jury's finding.⁴

An instruction must relate to material matters put in issue by the pleadings and not merely to matters supplementary. It must be germane to the case and relate to facts therein.⁵

Adams v. Smith, 58 Ill., 417; Aurora Ins. Co. v. Eddy, 55 Ill., 213; Metzger v. Huntington, 51 Ill. App., 377; Graham v. Eiszner, 28 Ill. App., 269; Bauchwitz v. Tyman, 11 Ill. App., 186; Hunter v. Harris, 29 Ill. App., 200; Covert v. Nolan, 10 Ill. App., 629; Keyes v. Fuller, 9 Ill. App., 528; Flanerty v. McCormick, 7 Ill. App., 411.

¹ Hanchett v. Kimbark, 118 Ill., 121; Springdale Cemetery Ass'n v. Smith, 24 Ill., 430.

² Chicago, etc., v. Johnson, 103 Ill., 512.

³ Chicago, M. & St. P. R'y Co. v. O'Sullivan, 143 Ill., 48; Chicago, M. & St. P. Ry. Co. v. Kreuger, 124 Ill., 45; Chicago, B. & Q. R. R. Co. v. Warner, 123 Ill., 38; Phenix v. Cartner, 108 Ill., 207; Elston & W. G. R. Co. v. People, 96 Ill., 584; Thorp v. Goewey, Admr., 85 Ill., 611; Ludwig v. Sager, 84 Ill., 99; Rockford Ins. Co. v. Nelson, 75 Ill., 548; Thompson v. Force, 65 Ill., 370; Chapman v. Cowrey, 50 Ill., 512; Chittenden v. Evans, 48 Ill., 52.

⁴ Langdon v. People, 133 Ill., 382; Swan v. People, 98 Ill., 610; Elston

& W. G. R. Co. v. People, 96 Ill., 584; Moore v. Wright, 90 Ill., 470; Reynolds v. Geenenbaum, 80 Ill., 416; Farme v. Badger, 79 Ill., 441; Skelly v. Boland, 78 Ill., 438; Andreas v. Ketcham, 77 Ill., 377; Wright v. Brosseau, 73 Ill., 381; Town of Havana v. Biggs, 58 Ill., 433; Great Western R. R. Co. v. Hansk, 25 Ill., 241.

⁵ Village of Jefferson v. Chapman, 127 Ill., 438; Chicago & A. Ry. Co. v. Bragonier, 119 Ill., 51; Chicago W. Division Ry. Co. v. Lambert, 119 Ill., 255; Village of Sheridan v. Hibbard, 119 Ill., 307; International Bank v. Ferris, 118 Ill., 465; Peoria, etc., R. R. Co. v. Clayburg, 107 Ill., 644; Eagle Packet Co. v. Fefries, 94 Ill., 598; Miller v. Balthasser, 78 Ill., 302; Hewett v. Johnson, 72 Ill., 513; St. Louis & S. E. Ry. Co. v. Britz, 72 Ill., 256; Beseler v. Stephani, 71 Ill., 400; Chicago W. D. R. R. Co. v. Hughes, 69 Ill., 170; Wallace v. Curtiss, 36 Ill., 156; Rockford Ins. Co. v. Nelson, 65 Ill., 415; Mitchell, Admr., v. Town of Fond du Lac, 61 Ill., 174; O'Brien v. Palmer, 49 Ill., 72; Illinois Central R. R. Co. v. McKee, 43 Ill., 119;

It must be based upon the theory of the case which is supported by evidence and must not be based upon a hypothetical state of facts which there is no evidence to sustain. An instruction based upon a mere abstraction should be denied.¹

Dunlap v. Clark, 25 Ill. App., 573;
Sullivan v. Dee, 8 Ill. App., 263;
Knowlton v. Fritz, 5 Ill. App., 217.

An instruction which relates neither to the pleadings nor the evidence, will be erroneous. East St. Louis P. & P. Co. v. Hightower, 93 Ill., 139:-

¹ Chicago West Div. Ry. Co. v. Ingraham, 131 Ill., 659; Plumb v. Campbell, 129 Ill., 101; Pennsylvania R. R. Co. v. Connell, 127 Ill., 419; Kellogg v. Boyden, 126 Ill., 378; McGinnis v. Fernandes, 126 Ill., 228; City of Sterling v. Merrill, 124 Ill., 522; Calumet River Ry. Co. v. Moore, 124 Ill., 329; Sanders v. People, 124 Ill., 218; Pennsylvania Co. v. Marshall, 119 Ill., 399; Thompson, v. Duff, 119 Ill., 226; Chicago & N. W. Ry. v. Snyder, 117 Ill., 376; Bressler v. People, 117 Ill., 422; Hogue v. People, 117 Ill., 291; Mosher v. Rogers, 117 Ill., 446; United States Rolling Stock Co. v. Wilder, 116 Ill., 100; Hannibal v. Martin, 111 Ill., 219; Chicago, R. I. & P. Ry. Co. v. Lewis, 109 Ill., 120; Moore v. People, 108 Ill., 484; Selleck v. Selleck, 107 Ill., 389; Missouri Furnace Co. v. Abend, 107 Ill., 44; Mitchell, v. Milholland, 106 Ill., 175; Jacksonville v. Walsh, 106 Ill., 253; Eames v. Rend, 105 Ill., 506; Wabash, etc., v. Shacklet, 105 Ill., 364; Chicago, etc., v. Mills, 105 Ill., 63; Bank of Montreal v. Page, 98 Ill., 109; People v. Belt, 97 Ill., 462; Germania Fire Ins. Co. v. McKee, 94 Ill., 494; Chicago, B. & Q. Ry. Co. v. Sykes, 96 Ill., 162; Hubner v. Feige, 90 Ill., 208; Howe S. M. Co. v. Layman, 88 Ill., 39;

Wray v. Chicago, B. & Q. R. R. Co., 86 Ill., 424; City of Freeport v. Isbell, 83 Ill., 440; Bradley v. Parks, 83 Ill., 169; Plummer v. Rigdon, 78 Ill., 222; Andreas v. Ketcham, 77 Ill., 377; Murphy v. Larson, 77 Ill., 172; American v. Rimpert, 75 Ill., 228; Pittsburg, etc., Ry. Co., v. Powers, 74 Ill., 341; Indiana & St. L. R. R. Co. v. Miller, 71 Ill., 463; Badger v. Batavia Paper Mfg. Co., 70 Ill., 302; Illinois Central R. R. Co. v. Benton, 69 Ill., 174; Pollard v. People, 69 Ill., 148; Chicago, B. & Q. R. R. Co. v. Lee, Admx., 68 Ill., 576; Lowe v. Massey, 62 Ill., 47; Holden v. Hulburd, 61 Ill., 280; Cotton v. Holliday, 59 Ill., 176; Chicago, B. & Q. Ry. v. Gregory, 58 Ill., 272; St. Louis, etc., Ry. Co. v. Manley, 58 Ill., 300; Toledo, etc., Ry. Co. v. Ingraham, 58 Ill., 120; Cossitt v. Hobbs, 56 Ill., 231; Goodwin v. Durham, 56 Ill., 239; Holcomb v. Davis, 56 Ill., 413; Piner v. Cooper, 55 Ill., 391; Weaver v. Rylander, 55 Ill., 529; Sprague, Warner & Co., v. Hazenwinkle, 53 Ill., 419; Parker v. Fergus, 52 Ill., 419; Chicago, R. I. & P. R. R. Co. v. Otto, 52 Ill., 416; Illinois Cent. Ry. Co. v. Weldon, 52 Ill., 290; Chapman v. Cowrey, 50 Ill., 512; Baker v. Robinson, 49 Ill., 299; Ashlock v. Linder, 50 Ill., 169; Hassett v. Johnson, 48 Ill., 68; Chicago & N. W. R. R. Co. v. Swett, 45 Ill., 197; Hite v. Blandford, 45 Ill., 9; County Court of Calhoun County v. Buck, 27 Ill., 440; Songer v. Wilson, 52 Ill. App., 117; City of Sumner v. Scaggs, 52 Ill. App., 551; Borwell v. Schultz, 50 Ill. App., 161; Finnell v. Walker,

But if there is any evidence, however slight, it may be the basis of an instruction.' Furthermore, where an instruction, or instructions, purports the whole case it or they must be based upon the whole of the evidence adduced by all of the parties. The court cannot select particular portions of the testimony, instruct the jury thereon and ignore the other portions of the case. Such a course would be sufficiently erroneous to obtain a reversal in a court of review when the same was properly preserved by exception and assigned for error in bill of exceptions.' And it is equally essential that an instruction should not go beyond the evidence in the case and instruct the jury on a hypothetical case supposed to have been made by irrelevant testimony. Such an instruction would be reversible error.' The jury must be restricted to the case made out by legitimate evidence.'

§ 930. Same—Not to assume facts not proven.—The court in giving an instruction must not assume the existence of a controverted fact, for that is within the province of the jury to determine from the evidence in the case.' The jury

48 Ill. App., 331; Trustees of Lincoln University v. Hepley, 28 Ill. App., 629; Sargeant v. Marshall, 28 Ill. App., 177; Bensley v. Brockway, 27 Ill. App., 410; Beidler v. Fish, 14 Ill. App., 29; Covert v. Nolan, 10 Ill. App., 629; McNay v. Stratton, 9 Ill. App., 215.

¹ Chicago, etc., R. R. Co., v. Bugenheimer, 116 Ill., 226.

² Lake Shore & M. S. Ry. Co. v. Bodemer, 139 Ill., 596; Craig v. Miller, 133 Ill., 300; Lake Shore & M. S. Ry. Co. v. Brown, 123 Ill., 162; Chicago, R. I. & Q. Ry. Co. v. Avery, 109 Ill., 314; City of Chicago v. Schmidt, etc., 107 Ill., 186; Chicago, B. & Q. Ry. Co. v. Sykes, 96 Ill., 162; Graves v. Colwell, 90 Ill., 612; Moore v. Wright, 90 Ill., 470; Chesny v. Meadows, 90 Ill., 430; Martin v. Johnson, 89 Ill., 537; Cal-

laghan v. Myers, 89 Ill., 566; Evans v. George, 80 Ill., 51; Ogden v. Kirby, 79 Ill., 556; Frame v. Badger, 79 Ill., 441; Hewett v. Johnson, 72 Ill., 513; Homes v. Hale, 71 Ill., 552; Van Horn v. Burroughs, 62 Ill., 388, Chicago & N. W. Ry. Co. v. Diehl, 52 Ill., 441; Chittenden v. Evans, 41 Ill., 251; Hovey v. Thompson & Co., 37 Ill., 538; Hill v. Ward, 2 Gilm. (Ill.), 235; Eugene Glass Co. v. Martin, 54 Ill. App., 288; Avery v. Swords, 28 Ill. App., 202; Lapp v. Pinover, 27 Ill. App., 169; Lewis v. Barber, 21 Ill. App., 638; Hinsdale Doyle Granite Co. v. Armstrong, 6 Ill. App., 315; Wright v. Bell, 5 Ill. App., 352.

³ Evans v. George, 80 Ill., 51; Leach v. Nichols, 55 Ill., 273.

⁴ Martin v. Johnson, 89 Ill., 537.

⁵ Langdon v. People, 133 Ill., 382;

must not be instructed as to what conclusions they shall draw,¹ but the instruction may assume the existence of an undisputed fact.² And may instruct the jury as to the legal effect of evidence admitted.³ And may inform the jury that a certain state of facts constitutes negligence, without encroaching upon the province of the jury.⁴ And may direct the attention of the jury to circumstances to be considered in determining the existence of certain facts;⁵ but it must not caution the jury as to the giving of undue weight to the testimony of certain witnesses or party influenced by certain circumstances. Such matters are wholly within the province of the jury which must not be invaded by the court.⁶

§ 931. Same—When great strictness necessary.—In a case in which the evidence is closely conflicting or evenly balanced, it is particularly requisite that the instructions given by the court to the jury should be accurate and clear, so as to enable the jury to arrive at a correct conclusion. Nothing

Hinckley v. Horazdowsky, 133 Ill., 359; Lake Shore & M. S. R. R. Co. v. Brown, 123 Ill., 162; Chicago, B. & Q. R. R. Co. v. Warner, 123 Ill., 38; Carpenter v. First Nat. Bank, 119 Ill., 352; Chicago & A. R. R. Co. v. Bragonier, 119 Ill., 51; Chicago, St. L. & P. Ry. Co. v. Hutchinson, 120 Ill., 587; Hank v. Brownell, 120 Ill., 161; City of Elgin v. Beckwith, 118 Ill., 367; Chicago & E. I. Ry. Co. v. O'Connor, 118 Ill., 586; St. Louis v. Kirby, 104 Ill., 345; Village of Harren v. Wight, 103 Ill., 298; Harris v. Connell, 80 Ill., 54; Martin v. Johnson, 89 Ill., 539; Logg v. People, 92 Ill., 598; Thorp v. Geowey, 85 Ill., 612; Kirby v. Wilson, 98 Ill., 240; Chicago, W. D. Ry. Co. v. Mills, 91 Ill., 39; Graves v. Colwell, 90 Ill., 612; Chicago, B. & Q. Ry. Co. v. Harwood, 90 Ill., 425; Callaghan v. Myers, 89 Ill., 566; Gohn v. Doerle, 85 Ill., 514; City of Chicago v. Bixby, 84 Ill., 82; Cusick v. Camp-

bell, 68 Ill., 508; Wolcott v. Heath, 78 Ill., 433; Barrelett v. Belgard, 71 Ill., 280; Olsen v. Upsahl, 69 Ill., 273; Mitchison v. Cross, 58 Ill., 366; Durham v. Goodwin, 54 Ill., 469; Hassett v. Johnson, 48 Ill., 63; Clement v. McConnell, 14 Ill., 154; Walsh v. Aylsworth, 46 Ill. App., 516; Village of Warren v. Wright, 3 Ill. App., 602.

¹ Graff v. Simmons, 58 Ill., 440; La Pointe v. O'Toole, 44 Ill. App., 43.

² City of Chicago v. Moore, 139 Ill., 201; Wallace v. De Young, 98 Ill., 638; Illinois Central R. R. Co. v. Hammer, 85 Ill., 526.

³ Stribling v. Prettyman, 57 Ill., 371.

⁴ Toledo, Peoria & Warsaw Ry. Co. v. Bray, 57 Ill., 514; Norton v. Volzke, 54 Ill. App., 545.

⁵ Snell v. Cottingham, 72 Ill., 124.

⁶ Frizell v. Cole, 29 Ill., 465.

should be permitted to reach the jury which will be inclined to mislead it in the application of the law, or to influence their verdict. This is particularly true in actions, the cause of which is based upon negligence.¹

§ 932. (g) **Form of an instruction.**—In drawing an instruction, in a case in which there is evidence to go to the jury, the court (or counsel) pre-supposes a state of facts based upon some theory of the case as raised by the pleadings and evidence leaving the jury to judge whether such state of facts does or does not exist and directs them that in such case they shall find in the manner indicated by the instruction. It is a common practice to begin an instruction by saying:

"The court instructs the jury that if they believe from the evidence that (stating here the theory of the case) they must find (or assess the damages, as the case may be) for the plaintiff (or defendant, as may be)." Subsequent instructions are then begun by the words: "The court further instructs," etc. This form of instruction does not tend to mislead the jury, but leaves them to their well established right and duty to come to a fixed conclusion from the evidence in the case and then apply the law as they are directed by the instruction based upon the state of facts which they deem to be proved.²

¹ Gifford v. People, 148 Ill., 173; Toledo, St. L. & K. C. R. R. Co. v. Cline, 135 Ill., 41; Craig v. Miller, 133 Ill., 300; Wilbur v. Wilbur, 129 Ill., 392; Holloway v. Johnson, 129 Ill., 367; Swan v. People, 98 Ill., 610; Stratton v. The Central City H. R. Co., 95 Ill., 25; Ruff v. Jarrett, 94 Ill., 475; Phillips v. Roberts, 90 Ill., 492; American Ins. Co. of Chicago v. Crawford, 89 Ill., 62; Toledo, W. & W. Ry. Co. v. Grable, Admr., 88 Ill., 440; Toledo, W. & W. Ry. Co. v. Moore, Admx., 77 Ill., 217; Chicago, M. & St. P. Ry. Co. v. Mason, 27 Ill. App., 450; Town of Geneva v. Peterson, 21 Ill. App., 454; Kadish v. Bullen, 10 Ill. App.,

506; Tantom v. Tantom, 5 Ill. App., 598; Neuerberg v. Gaultier, 4 Ill. App., 348.

² Pennsylvania Co. v. Sloan, 125 Ill., 72; Calumet River Ry. Co. v. Moore, 124 Ill., 329; Richmond v. Roberts, 98 Ill., 473; Bartlett v. Board of Education, 59 Ill., 364.

An instruction to the jury to disregard false testimony by a witness should recite "that if the jury find that a witness has *knowingly* or *wilfully* sworn falsely as to any material fact it is at liberty to disregard his *whole* testimony, except where corroborated by other competent evidence." The words "*knowingly*" or "*wilfully*" are necessary

It has been pronounced an unwise practice to select some expression of the Supreme Court in some other case and formulate it into an instruction, and the court should refuse to give an instruction the language of which is not applicable to the facts of the case being tried.¹ The language of the statute may be given in an instruction to the jury in a suit to enforce a statutory liability. If the adverse party desire a construction of the language used he must ask the court for an instruction for that purpose, or any objection thereto will be deemed to have been waived.² There is no error, on the rehearing of a case, to submit an instruction given at the former trial where the same is applicable to some theory based upon the evidence offered on the present trial. Nor will it be erroneous to copy an instruction largely from the opinion of the court in passing upon the merits at the first trial, if the evidence on the present trial is so nearly the same as not to change the rule of law governing the case.³

Counsel in drawing instructions and submitting them to the court should be careful to have them in proper form, for while the court has power to amend the instructions so requested to be given, yet he is not under any obligation so to do. Counsel take their chances of having the instructions which they present to the court given to the jury, or refused, as presented.⁴

§ 933. (h) Instruction need not be repeated.—All that is required in instructing the jury is that it be clearly instructed

in order that the *whole* of the testimony shall be disregarded, for the rule depends upon the motive of the witness in making such statement. *Quinn v. Rawson*, 5 Ill. App., 130. As to what will not be a variance between an instruction and the declaration on which the suit is founded in an action based upon the giving of false testimony, see *Bell v. Senneff*, 83 Ill., 122.

¹ *Smoke Consuming Co. v. Lyford*, 123 Ill., 300.

² *Town of Fox v. Town of Kendall*, 97 Ill., 73.

³ *Kirby v. Wilson*, 98 Ill., 240.

An instruction given on a former trial between the same parties on a *different form of action*, cannot, however, be given to the jury in the present case. *Harris v. Miner*, 28 Ill., 135.

⁴ *Rolfe v. Rich*, 46 Ill. App., 406; *Coney v. Pepperdine*, 48 Ill. App., 403.

on the principles of law applicable to the case as made by the pleadings and evidence. Therefore where the jury has been so directed by one or more instructions, it is no error to refuse an instruction which embodies nothing more than what has been already given in substance. An instruction need not be repeated, although the form of the different instructions be different, yet if in substance they are the same, one is sufficient if it be so plainly and clearly drawn as not to mislead any ordinary jury. The court may properly refuse to repeat the statements of principles of law to the jury. Refusing to repeat an instruction is not error because it works no injury.¹

§ 934. (i) **Instruction directing a verdict.**—As hereinbefore more particularly shown, where there is no evidence whatever tending to prove an issue, the jury should be so instructed and they be directed to find a particular verdict specified by the court.² An instruction taking the case from the jury and directing it how to find when there is any evi-

¹ Atchison, T. & S. F. R. R. Co. v. Feehan, 149 Ill., 202; Gifford v. People, 148 Ill., 173; Dunham Towing and Wrecking Co. v. Dandelin, 143 Ill., 409; Lake Erie & Western R. R. Co. v. Middleton, 142 Ill., 550; Weber Wagon Co. v. Kehl, 139 Ill., 644; City of Chicago v. Moore, 139 Ill., 201; Perrin v. Parker, 126 Ill., 201; City of Sterling v. Merrill, 124 Ill., 522; Chicago, M. & St. P. Ry. Co. v. Prueger, 124 Ill., 457; Concordia Cemetery Ass'n v. Minn. & N. W. R. R. Co., 121 Ill., 199; Pennsylvania Co. v. Marshall, 119 Ill., 399; Baird v. Trustees of Schools, 106 Ill., 657; City of Bloomington v. Purdue, 99 Ill., 329; Richmond v. Roberts, 98 Ill., 472; County of Platte v. Goodell, 97 Ill., 84; Bulliner v. People, 95 Ill., 394; Boylston v. Bain, 90 Ill., 283; Gizler v. Witzel, 82 Ill., 322; Illinois Central R. R. Co. v. Goddard, Admr., 72 Ill., 568; Toledo, W. &

W. Ry. Co. v. Lockhart, 71 Ill., 627; Jones v. Jones, 71 Ill., 562; Northern L. Packet Co. v. Binninger, 70 Ill., 571; Chicago & N. W. R. W. Co. v. Button, 68 Ill., 409; Chicago, R. I. & P. Ry. Co. v. Reidy, 66 Ill., 43; Davis v. Wilson, 65 Ill., 525; Rockford Ins. v. Nelson, 65 Ill., 415; Bourne v. Stout, 62 Ill., 261; City of Aurora v. Gillett, 56 Ill., 132; Kuhnen v. Blitz, 56 Ill., 171; Cossitt v. Hobbs, 56 Ill., 231; Henneberry v. Morse, 56 Ill., 394; Calhoun v. O'Neal, 53 Ill., 354; Chapman v. Cawrey, 50 Ill., 512; Baker v. Robinson, 49 Ill., 299; Weyhrich v. Foster, 48 Ill., 115; City of Chicago v. Smith, 48 Ill., 107; McKichan v. McBean, 45 Ill., 228; Doth v. Smith, 41 Ill., 314; Mason v. Jones, 36 Ill., 212; Little v. Munson, 54 Ill. App., 437; Illinois Agricultural Co. v. Cranston, 21 Ill. App., 174.

² Ante, § 919; Alexander v. Town of Mt. Sterling, 71 Ill., 366.

dence, be it never so slight, is erroneous, and so is an instruction based upon a theory for which there is no evidence to support.¹ A court should never take a case from the jury by instructing it to find a particular verdict, unless the testimony is so conclusive in character as to compel it in the exercise of a sound legal discretion to set aside a verdict that might be returned in opposition to the instruction given.²

§ 935. Same—Directing a verdict for the plaintiff.—

Where the facts introduced by the plaintiff's pleading and proof are admitted by the defendant, it is proper for the court to instruct the jury to find for the plaintiff, and where there is no direct admission on the part of the defendant, and the only evidence that is adduced is on the part of the plaintiff, it is proper for the court to instruct the jury that if they believe the evidence on the part of the plaintiff they must find for him. Furthermore, if an instruction is given in such general terms as that if the jury believe the plaintiff has made out his case as laid in his declaration they must find for the plaintiff is not open to objection. It does not make the jury the judge of the effect of the pleadings, but merely empowers it to determine whether the proof sustains the issues made by the pleadings and this is clearly within their province.³ An instruction is proper which states that if the jury find from the evidence the defendant guilty as charged in the declaration, then the plaintiff is entitled to recover, and instructing them to find the measure of damages in such case.⁴ And although it only contains the words "that if under the evidence and the instructions of the court, they find the defend-

¹ *Cleveland, C. & St. L. Ry. Co. v. Baddeley*, 150 Ill., 328; *Chicago & N. W. Ry. Co. v. Snyder*, 117 Ill., 376; *Bitter v. Saathoff*, 98 Ill., 266; *Chicago, B. & Q. Ry. Co. v. Sykes*, 96 Ill., 162; *Protection Life Ins. Co. v. Dill*, 91 Ill., 174; *Van Duzor v. Allen*, 90 Ill., 499; *Chicago, B. & Q. R. R. v. Payne*, 59 Ill., 534; *Deshler v. Beers*, 32 Ill., 368; *Riedle v. Mulhausen*, 20 Ill. App., 68.

² *Lake Shore & M. S. Ry. Co. v. Johnson*, 135 Ill., 641.

³ *Monroe v. Snow*, 131 Ill., 126; *Ohio & Mississippi R. R. Co. v. Porter*, 92 Ill., 437; *Hubner v. Feieg*, 90 Ill., 208; *Caveney v. Weiller*, 90 Ill., 158; *Spannagle v. C. & A. R. R. Co.*, 31 Ill. App., 460; *Leman v. Best*, 30 Ill. App., 323.

⁴ *Chicago, B. & Q. Ry. Co. v. Payne*, 59 Ill., 534.

ant guilty then," etc., giving the element of damages they may consider, the words "as charged in the declaration" will be implied by the language actually used.¹ But an instruction to find for the plaintiff in case the facts stated in either of three counts are deemed to be proved, is erroneous when two of the counts are defective.² Furthermore, an instruction which directs the jury that the plaintiff cannot recover unless the proof shows that he was in the exercise of proper care, is erroneous because it submits a question of law for the court, which he must decide for the jury and then leave the jury to find from the evidence whether or not the plaintiff was in the exercise of such care.³ An instruction to the jury that if it finds from the evidence that the negligence on the part of the plaintiff was slight as compared with that on the part of the defendant, they must find for the plaintiff, is no longer proper, since the rule of comparative negligence has been abrogated.⁴ And the plaintiff must have been in the exercise of due care and must not, by his negligence, have contributed to the injury sustained.⁵

§ 936. Same—Directing a verdict for the defendant.—

Where it is clear that the evidence offered on behalf of the plaintiff fails to make out a *prima facie* case when considered in its most favorable sense, it is proper for the defendant to ask and for the court to instruct the jury to find for the defendant.⁶ But where there is evidence tending to establish plaintiff's right to recover, the court cannot invade the province of the jury to instruct them to find for the defendant.⁷ In any

¹ Tudor Iron Works v. Weber, 129 Ill., 535.

² Grand Tower Mfg. & Tr. Co. v. Ullman, 89 Ill., 244.

³ Stratton v. Central City H. R. Co., 95 Ill., 25. See also *ante*, § 911, "Questions of Law for the Court."

⁴ *Ante*, § 223.

⁵ See *ante*, § 224.

⁶ People v. Madison County, 125 Ill., 384; Bryant v. Gallup, 111 Ill., 487; Abend v. Terre Haute, etc.,

111 Ill., 202; Alexander v. Cunningham, 111 Ill., 511; Ayers v. City of Chicago, 111 Ill., 406; Stumps v. Kefley, 22 Ill., 140; Tefft v. Ashbaugh, 13 Ill., 602; Hoffman v. Reichert, 31 Ill. App., 558. See *ante*, § 919, Taking case from jury.

⁷ Miller v. Pence, 131 Ill., 122; Guerdon v. Corbett, 87 Ill., 272; Canning v. McMillan, 55 Ill. App., 236; Stier v. Harms, 54 Ill. App.,

case, however, it will be proper for the defendant to ask, and the court to instruct the jury, that if it finds that a certain material fact is not proved by the plaintiff, it must return a verdict for the defendant.¹ It is likewise proper in an action seeking to recover damages for an injury to the person of the plaintiff caused by the negligence of the defendant, where it is not made to appear by the plaintiff's evidence that he was in the exercise of ordinary care for his personal safety, nor that the defendant had done anything making risks more hazardous than they ordinarily were, to instruct the jury to find a verdict for the defendant.²

A motion asking the court to instruct the jury to return a verdict for the defendant on the ground that the plaintiff has not shown a cause of action is in the nature of a demurrer to evidence and will be tested by the rules applicable thereto.³

§ 937 (j) How the charge to the jury will be construed.—Every instruction given to a jury will be construed in the light of the evidence on which it was based. Different paragraphs of the same instruction will be read in connection with each other and if together they state the law correctly, it will be a proper instruction. Furthermore where the charge to the jury contains several instructions they will be construed as a whole and although one may be slightly defective, yet if all taken together constitute a true statement of the law not inconsistent or misleading, it will be considered as a proper charge. But the instructions contained in the charge must be harmonious and not contradictory.⁴

§ 938. (k) Erroneous instruction—“Error without prejudice no ground for reversal.”—Prejudicial error in regard

526; *East St. Louis Connecting Ry. Co. v. Shannon*, 52 Ill. App., 420.

¹ *Phillips v. Dickerson*, 85 Ill., 11; *Laird v. Warren*, 92 Ill., 204; *Deshler v. Beers*, 32 Ill., 368.

² *Clark v. Wabash R. R. Co.*, 52 Ill. App., 104.

³ *Ante*, § 922; *Pratt v. Stone*, 10 Ill. App., 633.

⁴ *Wenona Coal Co. v. Holmquist*,

152 Ill., 581; *East St. L. Con. Ry. Co. v. Enright*, 152 Ill., 246; *Hannibal, etc., v. Martin*, 111 Ill., 219; *Chicago, etc., v. Mills*, 105 Ill., 63; *Worden v. Salter*, 90 Ill., 160; *Northern L. Packet Co., v. Binninger*, 70 Ill., 572; *City of Abingdon v. Meadows*, 28 Ill. App., 442; *Sargeant v. Marshall*, 28 Ill. App., 177.

to instructions will cause the verdict to be set aside and a new trial granted; that is to say if an improper instruction is given to, or a proper instruction withheld from, the jury it is ground for new trial.' But if the only error committed in regard to instructions is in favor of the party raising the objection it will not be considered. It is a maxim of the law that "error without prejudice is no ground for reversal." Where the judgment rendered is clearly right, regardless of an improper instruction, or the omission of a proper instruction, there will be no reversal. An erroneous instruction which could not have misled the jury, or an instruction based upon incompetent evidence, which did not mislead the jury, or an instruction on mere abstract principles of law, will not be considered by a court of review, because, although erroneous, the error was harmless. Error to be ground for reversal must have been such as to have influenced the verdict to the injury of the party complaining thereof.'

¹ Higgins v. Lee, 16 Ill., 495.

² O'Hara v. Chicago, M. & St. P. R. R. Co., 139 Ill., 151; City of Springfield v. Dalby, 139 Ill., 34; Chicago, P. & St. L. Ry. Co., v. Blume, 137 Ill., 448; Waldron v. Alexander, 136 Ill., 550; Penn Mutual Life Ins. Co. v. Keach, 134 Ill., 583; Avery v. Moore, 133 Ill., 74; People's Fire Ins. Co. v. Pulver, 127 Ill., 247; Fisher v. Benehoff, 121 Ill., 426; Brant v. Gallup, 111 Ill., 487; Grier v. Puterbaugh, 108 Ill., 602; Lockwood v. Doane, 107 Ill., 235; Village of Fairbury v. Rogers, 98 Ill., 554; Kirby v. Wilson, 98 Ill., 240; Alexander v. People, 96 Ill., 96; Robbins v. Roth, 95 Ill., 464; Peeples v. McKee, 92 Ill., 397; Chicago, B. & Q. R. R. Co. v. Dickson, 88 Ill., 431; Adams v. Russell, 85 Ill., 284; Roth v. Eppy, 80 Ill., 283; Holcomb v. People, 79 Ill., 409; McKenzie v. Remington, 79 Ill., 388; Smith v. Binder, 75 Ill., 492; The Sterling Bridge Co. v. Baker, 75 Ill., 139; Meyer v. Temme,

Guardian, etc., 72 Ill., 574; Jones v. Chicago & I. R. R. Co., 68 Ill., 380; Mix v. Osby, 62 Ill., 193; Fuller v. Little, 61 Ill., 21; Adams v. Smith, 58 Ill., 417; Lawrence v. Hagerman, 56 Ill., 68; City of Champaign v. Patterson, 50 Ill., 51; Watson v. Woolverton, 41 Ill., 241; Curtis v. Sage, 35 Ill., 22; Norton v. Volzke, 54 Ill. App., 545; Dueber Watch Case Co. v. Young, 54 Ill. App., 383; East St. Louis Con. Ry. Co. v. Allen, 54 Ill. App., 32; McConnell v. Kibbe, 33 Ill., 177; Coursen v. Ely, 37 Ill., 338; Boynton v. Holmes, 38 Ill., 59; Root v. Curtis, 38 Ill., 192; Potter v. Potter, 41 Ill., 80; Clark v. Pageter, 45 Ill., 185; Pahlmeen v. King, 49 Ill., 266; Rankin v. Taylor, 49 Ill., 451; DeClercq v. Mungin, 46 Ill., 112; Simmons v. Nelson, 48 Ill. App., 520; Coykendall v. Gradle & Stortz, 46 Ill. App., 270; Birmingham Fire Ins. Co. v. Pulver, 27 Ill. App., 17; Fowler v. Peterson, 25 Ill. App., 81; Sells v. The Sandwich Mfg. Co., 21

Furthermore, one party cannot complain of an erroneous instruction on behalf of his adversary, where a similar one has been given at his own request. He will not be heard to complain of a wrong principle which he has encouraged the court in stating to the jury.¹ Nor can a party complain where the court gives an instruction which is substantially the same as the one asked.² Nor can he complain that a modification of an instruction is too favorable to him.³

A court has power of its own motion to give instructions which will modify or supersede the ones requested and if such instruction as given correctly states the legal principles pertinent and proper to be considered with the facts in the case, the party cannot be heard to complain that the instruction asked was not given.⁴ A party is only entitled to have the jury instructed with accuracy and clearness in the law applicable to the case as made by the pleading and evidence.⁵

§ 939. (1) **Errors cured by instruction.**—Error in the admission of improper evidence may sometimes be cured by a proper instruction directing the jury to disregard such evidence; but the admission of improper evidence is not always cured by an instruction that the jury disregard it, for where the evidence is well calculated to make a strong impression upon the jury, that impression may not be entirely removed by striking it out or instructing the jury to disregard it. Whether the admission of improper evidence will be cured by an instruction to disregard it, depends upon whether the court of review can see that under the circumstances of the particu-

Ill. App., 56; *Lafollette v. McCarthy*, 18 Ill. App., 87; *Rosenheim v. Field*, 12 Ill. App., 302; *Glenn v. Kays*, 1 Ill. App., 430; *Orr v. Jason*, 1 Ill. App., 439; *Forbes v. Jason*, 6 Ill. App., 395.

¹ *Snyder v. Snyder*, 142 Ill., 60; *Keeler v. Herr*, 54 Ill. App., 468.

² *Littleton v. Moses*, a man of color, 1 Ill. (Breese), 393; *Town of De Soto v. Buckles*, 40 Ill. App., 85.

³ *Harris v. McCasland*, 29 Ill. App., 430.

⁴ *Pennsylvania Co. v. Rudel*, 100 Ill., 603; *Manrose v. Parker*, 90 Ill. 581; *Meyer v. Meade*, 83 Ill., 19; *Brant v. Gallup*, 111 Ill., 487.

The modifications made should not be shown, but if shown the error will be immaterial. *Manrose v. Parker*, 90 Ill., 581.

⁵ *City of Chicago v. Moore*, 189 Ill., 201.

lar case the improper item of evidence has by the instruction been divested of its power to work harm; if it has, the error has been cured; if it has not, a new trial will be ordered.¹

In like manner if an erroneous instruction has been given it may be cured by the giving of a proper instruction, but whether or not such error is cured depends upon whether the court of review can see, everything being considered, that the jury was not misled and that a proper verdict was rendered.² Where it is impossible for the Supreme Court to say that the jury did not follow the erroneous instruction, the error cannot be said to be cured.³

An erroneous instruction tending to mislead a jury will be deprived of its power to work a reversal if by the jury's answers to special interrogatories it is shown exclusively that the jury was not misled by such instruction.⁴

All the instructions given in a case will be, by the court of review, considered as a series. What have been refused as well as what have been given will be considered in order to determine whether the court has committed an error in refusing an instruction, and all that have been given will be con-

¹ Hanewacker v. Ferman, 152 Ill., 321; Chicago, M. & St. P. R. R. Co. v. Kendall, 49 Ill. App., 398; Peck v. Cooper, 13 Ill. App., 27; Dencer v. Parsons, 8 Ill. App., 625; Cumins v. Leighton, 9 Ill. App., 186.

² Toledo, St. L. & K. C. R. R. Co. v. Bailey, 145 Ill., 159; City of Elgin v. Joslyn, 136 Ill., 525; Chicago West Division Ry. Co. v. Ingraham, 131 Ill., 659; Chicago & A. R. R. Co. v. Fietsam, 123 Ill., 518; Chicago, etc., R. R. Co. v. Johnson, 116 Ill., 206; Wabash, etc., v. Rector, 104 Ill., 296; Jarrard v. Harper, 42 Ill., 457; Illinois Cent. Ry. Co. v. Swearingen, 47 Ill., 206; Cleveland C. C. & St. L. Ry. Co. v. Baddeley, 52 Ill. App., 94; Illinois C. R. R. Co. v. Gilbert, 51 Ill. App., 404; Demme & Dierkes Furniture Co. v. McCabe, 49 Ill. App., 453; Sweet v. Leach, 6

Ill. App., 212; Gale v. Rector, 5 Ill. App., 481; Daggett v. Ream 5 Ill. App., 174; Ottawa, O. & F. R. V. R. R. Co. v. McMath, 4 Ill. App., 356.

³ Stone & Lime Co. v. City of Kankakee, 128 Ill., 173; Piner v. Cover, 55 Ill., 391; Durham v. Goodwin, 54 Ill. App., 469; Stowell v. Deagle, 79 Ill., 525.

An instruction which is erroneous because of being too general in its application will be corrected by another instruction limiting its application when it is probable that when taken together the jury was not misled. City of Chicago v. McDonough, 112 Ill., 85; Kendall v. Brown, 86 Ill., 387.

⁴ Tucker v. Champaign County Agr. Board, 52 Ill. App., 316.

sidered together in order to determine whether the jury has been misled by improper instructions. If, on the whole, substantial justice has been done, the verdict will not be disturbed.¹

§ 940. (m) Written instructions to be read to the jury.—After the instructions are prepared in writing by the court or by counsel for the parties, and approved by the court, the same are read to the jury before it retires to the jury room to find its verdict. It is within the power of the trial Judge to modify an instruction, even after it has been read to the jury if after being modified it is again read to the jury omitting the parts that have been erased.²

It is presumed that an instruction is understood by a jury in the sense in which the language of the instruction would commonly impress the mind.³

§ 941. (n) Exceptions to instructions—How entered.—Objections to instructions must be urged in the trial court. They cannot be read for the first time in a court of review. Exceptions to the giving or refusing of any instruction may be entered at any time before the entry of final judgment in the case. It must be made to appear by the bill of exceptions that an exception was taken to an instruction at the time such instruction was given, but by the prevalent practice an exception is not taken to an instruction at the time such instruction is read to the jury, but is urged as a ground for a new trial at the time a motion is made therefor and is thereafter incorporated into the bill of exceptions as if such exception had been taken at the time the objectionable instruction was given to the jury.⁴ It must be made to appear that an

¹ St. Louis, A. & T. H. R. R. Co. v. Barrett, 52 Ill. App., 510; Webber v. Indiana Nat. Bank, 49 Ill. App., 336.

² Wells v. Ipperson, 49 Ill. App., 580.

³ Massachusetts Mut., etc., Co. v. Robinson, 98 Ill., 324.

⁴ Rev. Stat., Chap. 110, ¶ 54, § 53;

Illinois C. R. R. Co. v. Modglin, 85 Ill., 481; Toledo, P. & W. R. R. Co. v. Parker, 73 Ill., 526; Strickfadden v. Ziprick, 49 Ill., 286; Illinois Cent. R. R. Co. v. Garish, 39 Ill., 370; Burkett v. Bond, 12 Ill., 87; Hill v. Ward, 2 Gilm. (Ill.), 285; Overman & Cook v. Consolidated Coal Co., 51 Ill. App., 289; Murray v. Gibson, 21

exception was taken to an instruction in the court below, or the question of its correctness cannot be considered by the court of review.¹ However, an exception once taken will be sufficient to procure a review even though such exception to the instruction was not specified as ground for a new trial.² The appellate court will not consider an exception to an instruction, unless such exception properly appears in the abstract.³ The instruction must also appear in the bill of exceptions. A copy of it in the transcript of the record is not sufficient.⁴

A general exception to a series of instructions is like a demurrer to a declaration. It goes to all the instructions and if any one of them is good the exception will be unavailing to procure a new trial on the ground of any that are erroneous.⁵

§ 942. (o) Instructions taken to jury room.—The instructions as given shall be taken by the jury in their retirement, and returned by them, with their verdict, into court.⁶

Ill. App., 488; Atchison. T. & S. F. R. R. Co. v. Feehan, 47 Ill. App., 66.

A party cannot except to the refusal of a court to give an instruction unless such party has himself asked that the instruction be given. Bailey v. Campbell, 1 Scam. (Ill.), 47.

Furthermore, the refusal will not be considered by a court of review unless omission to give it was excepted to. McPherson v. Hall, 44 Ill., 264.

An exception to an instruction may be either to the *matter* of the instruction or to the *manner* in which it is given. Giddings v. McCumber, 51 Ill. App., 373.

¹ Phillips v. Abbott, 52 Ill. App., 328.

² Smith v. Hall, 37 Ill. App., 28.

³ St. Louis, A. & T. H. R. R. Co. v. Will, 53 Ill. App., 649; German Ins. Co. v. Johnson, 52 Ill. App., 585; Mueller v. Newell, 29 Ill. App., 192; Harris v. Rose, 26 Ill. App., 237.

⁴ Liverpool, London & Globe Ins. Co. v. Sanders, 26 Ill. App., 559.

⁵ Hayward v. Catton, 1 Ill. App., 577.

Evidence must be preserved in the record or the court of review will be unable to determine whether the instructions were calculated to mislead the jury or not. Peoria, etc., R. R. Co. v. Barnum, 107 Ill., 160.

⁶ Rev. Stat., Chap. 110, ¶ 55, § 54.

XXV. *Conduct of the Jury—General Verdict.*

§ 943. (a) Conduct of the jury.

944. (b) The general verdict.

945. Same—Sealed verdict.

946. (c) Return of the jury—Stat-
ing the verdict—Form.

947. (d) Polling the jury.

948. (e) Recording the verdict—
Correcting form—Power
of jury to reform.§ 949. (f) Conclusiveness of the ver-
dict.950. Same—Errors cured by
verdict.

§ 943. (a) **Conduct of the jury.**—After the jury is charged it either gives its verdict without leaving the box or it retires from the bar, in custody of an officer, to deliberate. The members of the jury are generally kept together and (unless by permission of the court) without refreshments, until they are all unanimously agreed, or until there is no reasonable probability of their agreeing by further confinement. They are not allowed to speak with any person in relation to the subject-matter of the pending verdict nor can they receive any fresh evidence in private;¹ but they may return into court to hear any evidence of which they are in doubt, or to ask any questions of or further instructions from the court.² Nor will any member of the court be allowed to communicate with the jury privately respecting the charge.³

While the jury is out it is the duty of the jurors to continue together, until they return into court, or at least until they have agreed upon the verdict;⁴ but after the jury has agreed upon its verdict the mere separation of the jury, unless there be some suspicious abuse (and the slightest is sufficient), will not avoid the verdict, especially where the jury, before it separates, seal up the verdict, and afterwards come into court and deliver it so sealed up.⁵

¹ 3 Bla. Com. 375; 1 Arch. Pr. 197, 198.

² *Smith v. Eames*, 3 Scam. (Ill.), 76; *Blockley v. Sheldon*, 7 Johns. (N. Y.), 32; *Merrills v. Shaw*, 9 Cow. (N. Y.), 67.

³ *Martin v. Merelock*, 32 Ill., 485.

⁴ *Smith v. Thompson*, 1 Cow. (N. Y.), 221.

⁵ *Ex parte Hill*, 3 Cow. (N. Y.), 355; *Roberts v. Failis*, 1 Cow. (N. Y.), 238; *Smith v. Thompson*, 1 Cow. (N. Y.), 221.

If the jurors eat and drink at the expense of the party for whom they thereafter find, it will render the verdict void.¹ And even though the verdict has been agreed upon and sealed, the taking of such liberties is condemned when the verdict has not been returned.²

§ 944. (b) **The general verdict.**—It is a prerequisite of verdict whether general or special, that it must embody a finding upon all the issues made in the pleadings.³ Verdict should be returned in open court that parties and their counsel may have an opportunity of being present when the verdict is rendered and may except thereto, if desired.⁴

By force of statute in this State a general verdict in an action in which several counts are contained in the declaration will not be set aside or reversed if any one of the counts are good.⁵ It will be presumed, in the absence of a showing to the contrary, that sufficient evidence was offered under the good count to sustain it.⁶ But this is not the common law rule. The jury should return a verdict on each count for unless they do so, it, it cannot be known to which count the judgment applies and if some of the counts are bad a general verdict will not generally be sustained. It is the duty of the court in such case to send the jury back and require it to find on each count.⁷

¹ Coke Litt., 227; Wilson v. Abrahams, 1 Hill (N. Y.), 207.

² McLaughlin v. Hines, 47 Ill. App., 598.

As to impeaching a verdict, see post, § 949.

The jury cannot agree by verdict upon general average.—A judgment was held to be void which was rendered upon a verdict agreed upon by the jurors, each marking upon a slip of paper the amount to which he deemed the plaintiff was entitled, the entire amount marked upon the several slips then being divided by (12) the number of jurors. Illinois Cent. R. Co. v. Able, 59 Ill., 131.

³ 1 Thomp. on Trials, § 2639; Semple v. Hailman, 3 Gilm. (Ill.) 131; Nelson v. Bowen, 15 Ill. App., 477; Moore v. Moore, 67 Tex., 293; People v. Doseberg, 17 Mich., 135.

But that judgment on such verdict will not be reversed, see Nelson v. Bowen, 15 Ill. App., 477.

⁴ Chicago v. Rogers, 61 Ill., 188; Thompson & M. on Juries, 338; Elliott's Gen'l Pr., 936.

⁵ Snyder v. Gaither, 3 Scam. (Ill.), 91; Rev. Stat., Ch. 110, ¶ 58, § 57.

⁶ Peoria, etc., Ins. Co. v. Whitehill, 25 Ill., 466; Anderson v. Semple, 2 Gilm. (Ill.), 455.

⁷ 2 Thompson on Trials, 2640.

Furthermore where there are several issues or counts the jury may find for the plaintiff on some of the counts and for the defendant for the rest.¹ And whenever it is desired by either of the parties, the court will direct the jury to find for the plaintiff or defendant specially upon each count and issue and, if the action be slander or libel, upon each set of words and each issue.²

§ 945. **Same—Sealed verdict.**—When there is likely to be a prolonged delay after the jury has agreed upon a verdict, before such verdict can be received by the court, the jury should be allowed to seal up their verdict and file it with the Clerk. There is no difference between a verdict which is brought in sealed and one which is delivered orally by the foreman, and if the jury has been directed to seal its verdict and separate it does not dispense with the necessity of the jury being personally in attendance in court when the verdict is opened. No verdict can be received until the jurors are in their places and until the court is open, so that the parties or counsel may be present if they choose.³

§ 946. (c) **Return of the jury—Stating the verdict—Form.**—When the jury has agreed upon its verdict it may, if it choose, reduce the same to writing and each member of the jury may sign it or the verdict may be given to the court by the foreman *viva voce*.⁴ There is no fixed rule in this regard; but in any event the finding does not become a *verdict* until it is announced and received by the court, and, until it is recorded, the jury have control over it and may change it or authorize the court to do so, either in matter of form or substance. After the jury has agreed upon the verdict it returns and takes its place in court. No verdict can be returned without the jury is in its place. After the jury has taken its place in court the names of the members are then called and

¹ 1 Arch. Pl., 213.

² *Diogt v. Tanner*, 20 Wend. (N. Y.), 190; 1 Swan's Pr., 555n.

³ *City of Chicago v. Rogers*, 61 Ill., 168; *Martil v. Morelock*, 32 Ill., 485;

McLaughlin v. Hinds, 47 Ill. App., 598; *Crotty v. Wyatt*, 3 Ill. App., 388.

⁴ Rev. Stat. Ch. 110, ¶ 57, § 56.

if all are present they are asked by the Clerk if they have agreed upon a verdict and if so for whom they find. If the verdict has been reduced to writing it is presented to the court; if the verdict is an oral one the foreman of the jury then pronounces the verdict in the presence of the jurors, which is either general or special. The general verdict (which is the usual one) is then delivered *viva voce* by the foreman announcing that the jury finds for the plaintiff or for the defendant and if for the plaintiff, in actions for damages, stating the amount of damages that have been found. The general verdict may be in the following words:

"We, the jury, find the issues for the plaintiff ----- dollars damages," or "We, the jury, find the issues for the plaintiff and fix his damages at ----- dollars," or "We, the jury, find the issues for the defendant," or "We find for the defendant."¹

In a case involving several issues set forth in several distinct counts a general verdict will be sufficient if the evidence sustains any one of the counts.² But in a case where there are several counts the jury may, if it choose, announce its verdict thus:

"We, the jury, find the issues for the plaintiff on the (first, third and fifth) issues and fix his damages at ----- dollars; and we find for the defendant on the (second and fourth) issues." No particular form of words is, however, required. It is the substance that is regarded and not the form.

The court controls the *form* and may revise it and reject anything that may be surplusage or may instruct the jury to return and reform its verdict.³

¹ As to finding the issues "for the plaintiff" without assessing the damages, see *Hall v. First Nat. Bank of Emporia*, 133 Ill., 234.

² *Pennsylvania Co. v. Backes*, 133 Ill., 255; *ante*, § 944.

³ *Hirth v. Lynch*, 96 Ill., 409; *Illinois C. R. Co. v. Wheeler*, 149 Ill., 525; *Wiggins v. City of Chicago*, 68 Ill., 372; *Shelton v. Franklin*, 68 Ill., 333; *Hartford F. Ins. Co. v.*

Vanduzor, 49 Ill., 489; *Hanford v. Obrecht*, 49 Ill., 146; *O'Brien v. Palmer*, 49 Ill., 72; *James v. Morey*, 44 Ill., 352; *Wilborn v. Odell*, 29 Ill., 456; *Hadlock v. Hadlock*, 22 Ill., 384; *Gross v. Sloan*, 54 Ill. App., 202; *Wells v. Ipperson*, 48 Ill. App., 581; *Crotty v. Wyatt*, 8 Ill. App., 388.

The verdict in an action of debt must find the debt as well as the

All that is required in a general verdict is that the intention of the jury should be clear and show what the finding of the jury really is upon the issues in the case. It will not be rendered fatally defective by incorrect spelling or grammatical mistakes. A verdict for the "plaintiff" or the "defendant" is sufficient to support a judgment, although there may be several plaintiffs or several defendants who have tendered the same issue.¹

A verdict which is announced orally need not be stated with any formal precision. If the intention of a jury is certain and clear it will be sufficient.²

It is proper for the court to send the jury back to correct their verdict where the one returned is so informal and insufficient as not to determine the rights of the parties. When a jury is sent back for this purpose it should be instructed how to correct its verdict.³

§ 947. (d) **Polling the jury.**—After the verdict of the jury has been announced, and before it is recorded, either party has an absolute right (unless the verdict has been directed by the court),⁴ to have the jury "polled;" that is, to have the names of the persons composing the jury called separately and each man required separately to declare his verdict. This can be done at any time before the verdict is recorded, unless the right to poll the jury has been waived.⁵

damages. *Bobind v. Swisher*, 66 Ill., 586; *Ross v. Taylor*, 63 Ill., 215.

But in a trial of issues in abatement a finding for the plaintiff is alone sufficient, damages not being a matter in issue. *Metzger v. Huntington*, 51 Ill. App., 377.

As to the requisites of a verdict in ejectment, see *Patterson v. Hubbard*, 30 Ill., 201.

¹ *Gross v. Sloan*, 54 Ill. App., 202; *Draft v. Drew*, 14 Ill. App., 266; *State v. Bean*, 3 Blackf. (Ind.), 222; *Diehl v. Evans*, 1 Searg. & R. (Pa.), 367; *Stearn v. Barrett*, 1 Mason, 153; *State v. Mason*, 40 La. Ann., 751.

² *Jarrard v. Harper*, 42 Ill., 457.

³ *Smith v. Williams*, 22 Ill., 357; *Flinn v. Barlow*, 16 Ill., 39.

⁴ *McLaren v. Indianapolis*, etc. Ry. Co., 83 Ind., 319; *Donohue v. Indiana*, etc., Ry. Co., 87 Mich., 13.

⁵ *Bond v. Wood*, 69 Ill., 282; *Bates v. Williams*, 43 Ill., 494; *Martin v. Morelock*, 32 Ill., 485; *Labor v. Koplin*, 4 N. Y., 547; *Warner v. New York Cent. Ry.*, 52 N. Y., 437; *Steele v. Etheridge*, 15 Minn., 503; *Martin v. Morelock*, 32 Mich., 485; *Doyle v. United States*, 11 Biss., 106; *Blockley v. Sheldon*, 7 Johns. (N. Y.), 32; *Bunn v. Hoyt*, 3 Johns. (N.

The object of polling the jury is to ascertain if the verdict announced is that of the jurors, and the question asked of each juror after calling him by name is generally in these words: "*Was this and is this now your verdict?*" The question "is this your verdict against each of the defendants" has been held to be erroneous.¹ And the question "is this your verdict and are you still satisfied with it" has been properly excluded.²

The juror has a right to dissent from the verdict whether oral or in writing or sealed, at any time before it is recorded and before the jury has been discharged. If a juror dissent on being polled the court should send the jury back for further deliberation.³

§ 948. (e) **Recording the verdict — Correcting form — Power of jury to reform.**—A verdict is not final until it is pronounced and recorded.⁴ But after a verdict is recorded in an action where circumstances, although not amounting to a demonstration, yet are sufficient to authorize a finding upon a question of fact upon the theory of one of the parties to the suit, such party must stand as an end of litigation.⁵

When the verdict is received in court it is put in proper form upon the record by the Clerk under the direction of the court in the presence of the jury.⁶ But after the jury has been discharged a defect in the verdict cannot be corrected

Y.), 255; Fox v. Smith, 3 Cow. (N. Y.), 23; Douglass v. Tousey, 2 Wend. (N. Y.), 352.

¹ Labor v. Koplin, 4 N. Y., 547.

² Bowen v. Bowen, 74 Ind., 470.

³ Bunn v. Hoyt, 3 Johns. (N. Y.), 255; Douglass v. Tousey, 2 Wend., 352; Weeks v. Hart, 24 Hun (N. Y.), 181; Warner v. N. Y. C. Ry. Co., 52 N. Y., 437.

⁴ Martin v. Morelock, 32 Ill., 485.

⁵ Louisville, Evansville & St. L. Con. R. R. Co. v. McCullom, 54 Ill. App., 69.

⁶ Illinois C. R. R. Co. v. Wheeler, 149 Ill., 525; Godfreidson v. People, 88 Ill., 284; Suver v. O'Riley, 80 Ill., 104; Brown v. Rounsavell, 78 Ill., 589; City of Pekin v. Winkle, 77 Ill., 56; Long v. Linn, 71 Ill., 152; Bodine v. Swisher, etc., 66 Ill., 536; Faulk v. Kellums, 54 Ill., 189; Boynton v. Phelps, 52 Ill., 210; Chittenden v. Evans, 48 Ill., 52; Osgood v. McConnell, 32 Ill., 74; Caswell v. Cooper, 18 Ill., 532; Cook v. Scott, 1 Gilm. (Ill.), 333; Poppers v. International Bank, 10 Ill. App., 531.

unless the jury is recalled for that purpose.¹ A verdict, although it may have been agreed upon, yet it is within the control of the jury and may be changed at any time before it is received in court and recorded. And until that time the jury may reconsider and reform their verdict or ask that it be done, or the court may, of its own motion, direct the jury to return to the jury room and reconsider its verdict where one of the jurors has expressed his dissatisfaction with the verdict theretofore agreed upon. The fact that the verdict is sealed will not change the rule.² The *recorded* verdict is presumed to be the final expression of the mind of the jury and will control, although there be a variance between it and the writing returned by the jury into court. But after the jury have announced their verdict, have been discharged, and have separated, they cannot be recalled to alter or amend it.³

If either party is dissatisfied with the form of verdict and desires to except to it he must do so before final judgment is entered or during the term in which it is entered. He will not be heard to object for the first time in a court of review. This exception may be entered like an exception to evidence or it may be by filing points in writing to support a motion for a new trial particularly specifying the grounds of such motion. When this is done the final judgment is thereupon stayed until such motion can be heard by the court.⁴

Entry of verdict nunc pro tunc.—Where the Clerk omits,

¹ Bissell v. Ryan, 23 Ill., 566; Wilcoxon v. Roby, 3 Gilm. (Ill.), 475.

² Consolidated Coal Co. v. Maehl, 130 Ill., 551; Williams v. People, 44 Ill., 478; Martin v. Morelock, 32 Ill., 485.

³ Griffin v. Larned, 111 Ill., 432; Lambert v. Borden, 10 Ill. App., 648; Leftwich v. Day, 32 Minn., 512.

⁴ Rev. Stat., Chap. 110, ¶ 57, § 56; Moss v. Village of Oakland, 88 Ill., 109; Sherman v. Skinner, 83 Ill., 584; Long v. Linn, 71 Ill., 152; Wells v. Ipperson, 48 Ill. App., 580; Knowlton v. Fritz, 5 Ill. App., 217.

Only the party who deems himself to be prejudiced may object to a verdict.—The defendant cannot complain that the verdict against him is less than it should have been. McKinzie v. Stretch, 53 Ill. App., 184.

Verdict not set aside for defective count.—Whenever an entire verdict shall be given on several counts, the same shall not be set aside or reversed on the ground of any defective count, if one or more of the counts in the declaration be sufficient to sustain the verdict. Rev. Stat., Chap. 110, ¶ 58, § 57.

for some days, to perform his duty in entering a part or the whole of a verdict in record the court has power to order it to be entered *nunc pro tunc* and enter judgment upon it during the term.¹

§ 949. (f) **Conclusiveness of the verdict.**—The verdict and judgment are the conclusions of the law from the facts proven. 'The verdict of a jury is a finality under the law unless the same is against the weight of the evidence or is the result of error of law which the court has committed during the progress of the trial.' Every presumption will be entertained in favor of a general verdict. The finding of a jury is presumed to be correct in the absence of a plain showing to the contrary. Where several issues have been presented and contested and a general verdict given, it will be presumed that all of the issues were found in favor of the prevailing party. And it is yet doubtful whether such presumption can be repeated by proof. The Supreme Court will not question the correctness of a verdict, unless the bill of exceptions shows the whole of the evidence presented on the issue at the trial.²

A verdict is not, however, decisive of any fact where the instructions given to the jury are directly in conflict with each other as where one instruction plainly stated that the plaintiff was entitled to recover and the other that he was not entitled to recover.³

A verdict rendered against the "defendants" is only effective against the persons against whom the suit is then actually pending. If the suit has been dismissed against one of two defendants, the fact that the verdict is rendered against the

¹ O'Keefe v. Kellogg, 15 Ill., 347.

² No presumption will be entertained in favor of a special verdict. See *post*, § 956.

³ Barnes v. Rembarz, 150 Ill., 193; Rhodes v. City of Metropolis, 144 Ill., 580; Jaeger v. Dieden, 73 Ill., 612; Parker v. Fisher, 39 Ill., 164; St. Louis, A. & T. H. R. R. Co. v. Will, 53 Ill. App., 649; McDonald v.

Watson, 51 Ill. App., 208; Wieland v. Oberne, 20 Ill. App., 118.

A finding by the court, on trial without a jury, is given the same effect as the verdict of a jury and is equally as conclusive upon all controverted questions of fact. Travers v. Wormer, 13 Ill. App., 39.

⁴ Toledo W. & W. Ry. Co. v. Morgan, 72 Ill., 155.

“defendants” does not make such verdict effective against the one not then a defendant in the suit. The verdict will be good against the owner, however, and the use of the word defendants against the word defendant will be deemed to be a mere clerical error.¹

Where both a general verdict and special verdict is rendered which are inconsistent with each other, the special verdict will prevail.²

The verdict of a jury cannot be impeached either by statements or affidavits of jurors or outside parties, except where a juror swears that he never consented to the verdict, but the affidavits of jurors will be received in support of their verdict.³

§ 950. Same—Errors cured by verdict.—After a verdict is rendered upon a declaration which sets forth a cause of action or a title, any imperfections or irregularities in such declaration will be cured by the verdict and the judgment thereon will be as effective and final as if such matter had been faultlessly stated in the declaration. It is only such errors or omissions as are apparent on the face of the proceedings and which affect the jurisdiction of the court, making it impossible for a court to render binding judgment thereon, that will not be cured by the verdict.⁴ This subject has, however, received more particular treatment in the former volume of this work to which reference is here made.⁵

¹ Hubner v. Feige, 90 Ill., 208.

² See *post*, § 956.

³ Peck v. Brewer, 48 Ill., 55; Allison v. People, 45 Ill., 37; Smith v. Eames, 3 Scam. (Ill.), 76; Artz v. Robertson, 50 Ill. App., 27; Lechleiter v. Broehl, 17 Ill. App., 490.

⁴ Atchison, T. & S. F. R. R. Co. v. Frehan, 149 Ill., 202; Lake Erie & W. R. R. Co. v. Wills, 140 Ill., 614; Shreffler v. Nadelhoffer, 133 Ill., 536; Chicago & E. I. R. R. Co.

v. Hines, 132 Ill., 161; Rothschild v. Bruscke, 131 Ill., 265; Ladd v. Pigott, 114 Ill., 647; McLean Coal Co. v. Long, 91 Ill., 617; Barker v. Koozier, 80 Ill., 205; Commercial Ins. Co. v. Treasury Bank, 61 Ill., 482; Lusk v. Cassell, 25 Ill., 191; Libby, McNeil & Libby v. Scherman, 50 Ill. App., 123; Abrahams v. Jones, 20 Ill. App., 83; King v. Sea, 6 Ill. App., 189.

⁵ *Ante*, Vol. I, “Amendments,” § 750.

XXVI. *Special Verdict.*

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| <p>951. (a) Distinction between general and special verdict.</p> <p>952. (b) Origin and nature of special verdict.</p> <p>953. (c) Jury may of its own motion find special verdict—Either party may require it to find specially on material questions.</p> <p>954. (d) Exceptions to special questions.</p> | <p>§ 955. (e) Taking advantage of failure to return special verdict.</p> <p>956. (f) Effect of inconsistency between general or special verdict.</p> <p>957. (g) Taking advantage of erroneous return of special verdict.</p> |
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§ 951. (a) **Distinction between general and special verdict.**
—The distinction between a “general verdict and a “special verdict” is this:

In a “general verdict” *the jury pronounces generally upon all the issues*, either for the plaintiff or the defendant,¹ while in a “special verdict” they render a *special finding of facts*, which is shown *in their answers to questions submitted to them in writing.*²

§ 952. (b) **Origin and nature of special verdict.**—The practice of rendering special verdicts was begun by force of an English statute more than six centuries ago,³ which directed that the jury should state the naked facts as they found them to be proved and pray the advice of the court thereon, concluding conditionally that if upon the whole matter the court should be of the opinion that the plaintiff had cause of action they find for the plaintiff; if otherwise, then for the defendant.⁴ It is still of the very essence of a special verdict that the jury shall find the facts on which the court is to pronounce the judgment according to law, and the court is confined to the facts so found.⁵

When a special verdict is entered upon the record nothing is open for revision in a court of review except the questions

¹ *Ante*, §§ 944-6.

² *And. Law Dict.; Kentucky Civil Code*, § 326.

³ 13 *Edw. I* (A. D. 1286), Ch. 30.

⁴ 3 *Bla. Com.*, 377; *Collins v. Reilly*, 104 U. S., 324.

⁵ *Buckley v. Great Western Ry. Co.*, 18 *Mich.*, 121.

of law inferentially arising upon the facts stated. The purpose and effect of a special verdict is that, like a bill of exceptions, it enlarges the record by incorporating the *facts* of the case;¹ and it is the *facts* that must be found by a special verdict and not the evidence of the facts.²

§ 953. (c) Jury may of its own motion find special verdict—Either party may require it to find specially on material questions.—The jury may, at its pleasure, in any civil case, find either a general or special verdict; and in any case in which it renders a general verdict the court *may* require it, and at the request of any party to the suit the court *must* require the jury to find specially upon any material question or questions of fact which shall be stated to them in writing.³ But the court may properly refuse to submit immaterial questions, or questions which merely relate to evidentiary facts.⁴ The court need not submit to counsel the special questions on which it intends to require the jury to find.⁵

This statute is merely declaratory of the common law,⁶ as stated in the preceding section.⁷ It is wholly a matter within the discretion of the court to require the jury to find a special verdict, when no request is made by a party to the suit, but when a party submits his questions in writing at the proper time then it is obligatory upon the court to submit such questions, if material, to the jury.

No special verdict should be asked upon immaterial and

¹ *Suydam v. Williamson*, 20 How. (U. S.), 432; *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S., 501.

² *Vincent and Bertrand v. Morrison*, 1 Ill. (Breese), 227.

³ *Rev. Stat.*, Chap. 110, ¶ 58a, § 1.

⁴ *Western Stone Co. v. Wahlen*, 151 Ill., 472; *City of Flora v. Naney*, 136 Ill., 45; *Consolidated Coal Co. v. Schaffer*, 135 Ill., 210; *Chicago, R. I. & P. Ry. Co. v. Clough*, 134 Ill., 586; *Penn. Mutual Life Ins. Co. v. Keach*, 134 Ill., 583; *Consolidated Coal Co. v. Maehl*, 130 Ill., 551; *Cleveland C. & St. L. R. R. Co. v. Monks*, 52

Ill. App., 627; *McMahon v. Sankey*, 35 Ill. App., 342.

When questions submitted.—These questions of fact shall be submitted, by the party requiring the same, to the adverse party before the commencement of the argument to the jury. *Rev. Stat.*, Ch. 110, ¶ 58a, § 1; *McMahon v. Sankey*, 133 Ill., 636.

⁵ *Chicago, B. & Q. R. R. Co. v. Burton*, 53 Ill. App., 69.

⁶ *Chicago & N. W. Ry. Co. v. Dunleavy*, 129 Ill., 132.

⁷ *Ante*, § 952.

inconclusive questions,' and where special questions are asked which involve evidentiary facts the court may properly modify such interrogatories so as to omit such facts.'

The practice of propounding an unreasonable number of interrogatories to the jury is condemned.' Special questions should be single, direct, plain, and material to the case and should call for a direct answer, and an answer upon a view of the whole case. It is not proper to seek the conclusion of the jury upon a specified partial view of the facts. When proper questions are asked of the jury it is the duty of the jury to respond thereto and if it fails to respond counsel should call the attention of the trial court to that fact and ask that the jury be sent back to answer them. The jury cannot be required, however, to find on matters which are not in issue, because such a finding would have no legal effect or validity, and the law does not require that to be done which would be unavailing if done.'

§ 954. (d) **Exceptions to special questions.**—If the court refuse to submit a material question of fact to the jury, when requested by a party in the manner provided by law, such party may take an exception thereto, and the refusal to submit such question will be reviewed on appeal or error, as a ruling on a question of law. Furthermore, if a question is submitted, which a party deems to be prejudicial to him, he may take an exception thereto and procure a review of the ruling of the court in like manner.'

§ 955. (e) **Taking advantage of failure to return special verdict.**—When a jury fails to return a special verdict, after it has been requested so to do by the court by means of special questions submitted to it, either on the court's own motion or at the request of the party, and return a general

¹ Toledo, W. & W. Ry. Co. v. Maxfield, 72 Ill., 95; Barnes v. Hammon, 71 Ill., 609; Chicago, B. & Q. R. R. Co. v. Van Patton, 74 Ill., 91; Kane v. Footh, 70 Ill., 587; Bayles v. Burgard, 48 Ill. App., 372.

² Ingalls v. Allen, 144 Ill., 535.

³ Chicago & N. W. Ry. Co. v. Bouck, 33 Ill. App., 123.

⁴ L. Wolf Mfg. Co. v. Wilson, 152 Ill., 9; Gross v. Sloan, 54 Ill. App., 202; Forester & Funkhauser v. Guard, etc., Co., 1 Ill. (Breese), 74.

⁵ Rev. Stat., Ch. 110, ¶ 58b, § 2.

verdict instead, the proper course for counsel to pursue is to move the court to send the jury back to respond to the special questions. If this be done a prejudicial error has been committed and reversal of the judgment may be procured in a court of review upon an exception properly taken, but if the general verdict be just and right the judgment will not be reversed. Error without prejudice is no ground for reversal.¹

§ 956. (f) Effect of inconsistency between general and special verdict.—The purpose of special verdict (answer to special questions) being to incorporate the *facts* into the record, in order that the same may be brought to the attention of a court of review, it follows as a logical sequence that when a general verdict is returned and the answers to special questions show the *facts* to be inconsistent with the general verdict, a judgment rendered upon the general verdict would be reversed. Therefore it is provided by statute that when a special finding of fact is inconsistent with the general verdict the former shall control the latter and the court may render judgment accordingly.² The finding upon special interrogatories submitted to the jury is conclusive. But in order that the special finding should enable the court to render judgment against the general verdict, such finding must be on a controlling fact, for if the special finding merely shows facts which tend to prove a matter which would not as a matter of law necessarily control the general verdict, such verdict need not be overruled and the court may properly refuse to resubmit the questions to the jury for more direct answers.³

It is the duty of the court, when the jury's answers to

¹ St Louis & S. E. Ry. Co. v. Dorman, 72 Ill., 504; Ingalls v. Allen, 43 Ill. App., 624.

² Rev. Stat., Chap. 110, ¶ 58c, § 3; Gammon v. Huse, 100 Ill., 234; St. Louis & S. E. Ry. Co. v. Britz, 72 Ill., 256; East St. Louis Con. Ry. Co. v. Gehring, 54 Ill. App., 35.

³ City of Elgin v. Joslyn, 136 Ill., 525; Chicago, B. & Q. R. R. Co. v. Greenfield, 53 Ill. App., 424; East

St. Louis Con. Ry. Co. v. O'Hara, 49 Ill. App., 282; Stein v. Chicago & Grand Trunk Ry. Co., 41 Ill. App., 38.

What is or is not an inconsistency. In an action to recover damages for a personal injury resulting from negligence the jury found a general verdict for the plaintiff. The answer of the jury to the question: "Could the plaintiff, by reasonable atten-

special questions are inconsistent with the general verdict rendered, to construe the special finding of the jury as a whole. If the special verdict is not then found to be inconsistent with the general verdict, the latter should not be disturbed merely because some of the special findings are inconsistent with it.¹

In determining whether there is or is not a material inconsistency between the general verdict and the special finding, every presumption will be indulged in favor of the general verdict, while no presumption will be entertained in favor of a special verdict. It is only when the general verdict and special findings, being so considered, are irreconcilable, that the court will be warranted in setting aside the general verdict and rendering judgment according to the special finding of fact.²

§ 957. (g) Taking advantage of erroneous return of special verdict.—If the finding of the jury is not responsive to the special questions asked of it, counsel dissatisfied therewith should object to the receiving of such verdict and ask the court to direct the jury to return and find specifically on all matters on which their finding is then insufficient. If no such motion is made or exception taken, the party will waive his right so to do, and will not thereafter be heard to com-

tion, or the exercise of ordinary prudence, have known that it was dangerous to use a stick in the machine in the manner testified to by himself?" was "yes." It was held this answer tended to show that the plaintiff had failed to exercise ordinary care, but that it was not conclusive therein, because there might have been other evidence before the jury tending to relieve the plaintiff's act of such negligence as to preclude a recovery. *Barnes v. Rembarz*, 150 Ill., 192.

Notice.—It is believed that inasmuch as the rule of comparative negligence does not now obtain in this State that such an instance as

the above would now justify a judgment contrary to the general verdict.

Further as to what is not an inconsistent special finding, see *Lake Shore & M. S. Ry. Co. v. Johnson*, 135 Ill., 641; *Quick v. I. & St. L. Ry. Co.*, 130 Ill., 334; *T. H. & I. R. R. Co. v. Voelker*, 129 Ill., 540; *Dimick, Admr., v. Chicago & N. W. Ry. Co.*, 80 Ill., 338; *Dieter v. Smith*, 70 Ill., 168; *Pahlman v. Taylor*, 75 Ill., 629; *Simmons v. Nelson*, 48 Ill. App., 520.

¹ *Chicago & A. R. R. Co. v. Murray*, 71 Ill., 601.

² *Barnes v. Rembarz*, 150 Ill., 193.

plain.¹ It is, however, only within the power of the party who asks special questions to object to the special finding thereon. One who fails to ask special questions waives his right in this regard and cannot complain that the jury has omitted to do that which his adversary has asked.²

When counsel deems that the special finding of the jury on questions which he has asked are not supported by the evidence, he should move for a new trial and assign such finding as a ground therefor.³

XXVII. *Finding on trial by court.*

§ 958 (a) On propositions of law presented.

959 (b) Exceptions to finding by court.

§ 960 (c) Two ways only of correcting a finding by the court.

§ 958. (a) **On propositions of law presented.**—That counsel may prevent the court from an erroneous application of the law to the facts in a case which it has been agreed by both parties may be tried by the court the statute provides that upon such trial either party may, within such time as the court may require, submit to the court written propositions to be held as law in the decision of the case. Upon these submitted propositions the court shall write “refused” or “held” as he shall be of opinion is the law, or modify the same.⁴

A proposition calling for the opinion of the court upon a question of fact may be properly refused. It is only upon questions of law, and questions of law applicable to facts which there has been evidence tending to prove, that a finding may be asked. The evidence to warrant such a proposition need not be preponderating. A proposition of law having any evidence to support it should be given when asked.⁵

¹ Bagley v. Grand Lodge of A. O. U. W., 131 Ill., 498; Ingalls v. Allen, 144 Ill., 535.

² Bagley v. Grand Lodge of A. O. U. W., 131 Ill., 498.

³ Avery v. Moore, 133 Ill., 74.

⁴ Rev. Stat. Chap. 110, ¶ 42 § 41; Merrimac Paper Co. v. Savings

Bank, 129 Ill., 296; Bank of Michigan City v. Haskell, 124 Ill., 587; Fitch v. Johnson, 104 Ill., 111; Tibballs v. Libby, 97 Ill., 552.

⁵ Field v. Crawford, 146 Ill., 136; County of La Salle v. Michigan, 143 Ill., 321; St. Louis & C. R. R. Co. v. East St. L. Con. Ry. Co., 139 Ill.,

§ 959. (b) **Exceptions to finding by court.**—Either party deeming himself to be prejudiced by the finding of the court on questions of law submitted to it on the trial of matters of fact, may except to such finding in the same manner as exceptions are taken to other rulings of the court.

When excepted to and incorporated into the bill of exceptions, the propositions of law and the rulings of the court thereon are thereby made matter of record upon which the court of review must pass judgment.¹

An exception may likewise be taken to the refusal of the court to find on a proposition of law submitted. A like rule applies as in the refusal of instructions asked.² If the proposition of law "refused" is substantially embraced in one "held" there will be no error in refusing to give the former.³

§ 960. (c) **Two ways only of correcting a finding by the court.**—There are only two ways of correcting a finding of the court when by agreement of the parties both matters of law and fact are tried by the court. One of these is by objecting to the evidence and saving exceptions to the rulings of the court thereon, and the second by submitting written propositions of law to be "held" or "refused" by the court, which written propositions bring the matter properly before a court of review. The rulings of the court on the law will be presumed to have been correctly made and judgment will be affirmed in that regard where no propositions of law have been submitted.⁴

401; *Cothron v. Ellis*, 107 Ill., 413; *Sexton v. City of Chicago*, 107 Ill., 323.

¹ Rev. Stat., Ch. 110, ¶ 42, § 41; *Christy v. Stafford*, 123 Ill., 463; *Merrimac Paper Co. v. Savings Bank*, 129 Ill., 296; *Tibballs v. Libby*, 97 Ill., 552.

² *Ante*, § 941.

³ *Knowles v. Knowles*, 128 Ill.,

110; *Home Ins. Co. v. Bethel*, 142 Ill., 537.

⁴ *Home Ins. Co. v. Bethel*, 142 Ill., 537; *National bank v. LeMoine*, 127 Ill., 253; *Schlessinger v. Keecker*, 131 Ill., 104; *Kilderhouse v. Hall*, 116 Ill., 147; *Wrought Iron Bridge Co. v. Com'rs of Highways*, 101 Ill., 518.

PART VIII.

PROCEEDINGS AFTER THE TRIAL.

PROCEEDINGS AFTER THE TRIAL.

ARTICLE I.

PROCEDURE BY UNSUCCESSFUL PARTY.

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| <p>§ 961. What defeated party may do after verdict and before judgment.</p> <p>962. (a) Motion for <i>venire facias de novo</i>.</p> <p>963. (b) Motion for repleader.</p> <p>964. (c) Motion for new trial—When and how to be made—Form.</p> <p>965. Same—Grounds for the motion enumerated.</p> <p>966. Same. 1. Want of proper jury.</p> <p>967. Same. 2. Misbehavior of the prevailing party.</p> <p>968. Same. 3. Misconduct of the jury.</p> <p>969. Same. 4. The absence of a party, his counsel, or a witness.</p> <p>970. Same. 5. Surprise.</p> <p>971. Same. 6. Newly discovered evidence.</p> <p>972. Same. 7. Excessiveness of damages.</p> <p>973. Same. 8. Smallness of the damages.</p> <p>974. Same. 9. Misdirection of court, and the admission or rejection of testimony.</p> | <p>§ 975. Same. 10. That the verdict is against the law or the evidence.</p> <p>976. Same—Hearing of the motion for a new trial—Ruling—Exception.</p> <p>977. Same—Costs.</p> <p>978. Same—Number of new trials granted.</p> <p>979. (d) Motion in arrest of judgment—Nature.</p> <p>980. Same—When motion to be made.</p> <p>981. Same—How the motion shall be made.</p> <p>982. Same—Exceptions, when unnecessary.</p> <p>983. Same—Effect of granting motion in arrest of judgment.</p> <p>984. (e) Motion for judgment <i>non obstante veredicto</i>.</p> <p>985. Same—When the motion shall be made.</p> <p>986. (f) Motion for judgment on special finding.</p> |
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§ 961. What defeated party may do after verdict and before judgment.—After the termination of the trial proper and the entry of the verdict or finding of the jury there are six proceedings for which the unsuccessful party may move the court. They are: (a) to award a *venire facias de novo*; (b)

to award a repleader; (c) to grant a new trial; (d) to arrest the judgment; (e) to give judgment *non obstante veredicto* and (f) to enter judgment on the special findings of fact, notwithstanding the general verdict, when there are such findings, and the same are inconsistent with the general verdict.¹

§ 962. (a) **Motion for venire facias de novo.**—A motion that the court cause another jury to come and try the case anew should precede a motion for a new trial,² and will only be granted for some defect appearing upon the face of the record. At the common law a *venire facias do novo* may be granted: (1) when the jury are improperly chosen, or there is any irregularity in returning them, or a challenge is improperly allowed; (2) When the jurors have improperly conducted themselves, and (3) when the verdict, whether general or special, is imperfect by reason of some uncertainty or ambiguity, or by finding less than the whole matter put in issue, or by not assessing damages.³ To warrant the granting of a *venire de novo* for a defective verdict, such verdict must be so uncertain, ambiguous, or defective that no judgment can be rendered thereon.⁴ And it will not be awarded because of a failure to assess the damages where the same have been so stated that a computation is required to ascertain the damages awarded.⁵

While the award of a *venire facias de novo* is granted upon entirely different grounds than a new trial, yet it accomplishes the same final result.⁶

A motion should specify, with reasonable certainty, the grounds on which it is based, and if the court overrules the motion an exception should be taken at the time, and the same assigned for error in a bill of exceptions.⁷

¹ Steph. Pl. 94; Smith on Actions at Law, 153; Elliott's Gen'l. Pr., § 984.

² Jenkins v. Parkhill, 25 Ind., 473.

³ 2 Tidd's Pr., 922.

⁴ Wiggins v. City of Chicago, 68 Ill., 372.

⁵ Clapp v. Martin, 33 Ill. App., 438.

One of the grounds for obtaining

a *venire facias de novo* at common law is now without effect in this State, because a general verdict is not here erroneous, because of a defective count or counts in the declaration. *Ante*, § 475 *et seq*; Rev. Stat. Chap. 110, ¶ 58, § 57.

⁶ Peed v. Brenneman, 72 Ind., 288

⁷ 2 Elliot's Gen'l Pr., § 985.

When a *venire de novo* is awarded the party succeeding is entitled only to the costs of the second trial.¹

§ 963. (b) **Motion for repleader.**—A repleader is awarded on the form or manner of pleadings and not upon the merits,² and is seldom granted because other more effective remedies usually exist, and it has been said that a repleader will not be granted if complete justice can be otherwise obtained.³

A repleader seems to be the proper proceeding where it appears that, in the course of pleading, the parties have raised an issue so immaterial, or have so mistaken the true question in the case, that a verdict upon the issue raised will not decide the cause one way or the other.⁴

§ 964. (c) **Motion for new trial—When and how to be made—Form.**⁵

The purpose of a motion for a new trial is to preserve the

¹ 2 Tidd's Pr., 923.

² Bellows v. Shannon, 2 Hill (N. Y.), 86.

³ Goodburne v. Bowman, 9 Bing., 532; Havens v. Bush, 2 Johns. (N. Y.), 387; Eaton v. Strong, 7 Mass., 312.

⁴ Steph. Pl., 199; Gould's Pl., 510.

⁵ *New trials in ejectment* are controlled by special statute, and the rules here stated are inapplicable. The statute provides that "at any time within one year after a judgment, either upon default or verdict, in an action of ejectment, the party against whom it is rendered, his heirs or assigns, upon the payment of all costs recovered therein, shall be entitled to have judgment vacated, and a new trial granted in the cause. If the costs are paid and the motion therefor is filed in vacation, upon notice thereof being given to the adverse party, or his agent or attorney, or the officer having any writ issued upon such judgment, all further proceed-

ings thereon shall be stayed till otherwise ordered by the court." Rev. Stat., Chap. 45, ¶ 35, § 35.

Second New Trial.—The court, upon subsequent application, made within one year after the rendering of the second judgment in said cause, if satisfied that justice will therefore be prompted and the rights of the parties more satisfactorily ascertained and established, may vacate the judgment and grant another new trial; but no more than two new trials shall be granted to the same party under this section. Rev. Stat., Chap. 45, ¶ 35, § 35; Setzke v. Setzke, 121 Ill., 30; Pugh v. Reat, 107 Ill., 440; Lowe v. Foulke, 103 Ill., 58; Rountree v. Talbot, 89 Ill., 246; Chamberlain v. McCarty, 63 Ill., 262; Aholtz v. Durfee, 21 Ill. App., 144.

New trial discretionary with court when.—The first new trial in ejectment is a matter of right, but the second new trial rests within the sound discretion of the court.

questions on the record, or grounds urged therefor, in order that the same may be assigned for error and brought to the attention of a court of review. A motion for a new trial is only necessary, however, where the case has been tried by a jury. If it has been tried by a court without a jury a motion for a new trial is unnecessary to preserve the questions arising upon the record. An exception entered to the finding and judgment of the court will raise the question.¹ Upon a motion for a new trial being overruled, an exception must then be entered thereto, or an exception must be entered to the judgment of the court, and the grounds alleged for a new trial must be incorporated into the bill of exceptions. For if the grounds alleged are not preserved in the bill of exceptions a court of review cannot ascertain whether or not the court erred in overruling the motion.²

It is provided by the statute that when either party may wish to move for a new trial he shall, before final judgment be entered or during the term it is entered, by himself or counsel, file the points in writing, particularly specifying the grounds for such motion, and final judgment shall thereupon be stayed until such motion can be heard by the court.³ The entry of a motion for a new trial operates to stay the final judgment until the motion can be heard, and it is immaterial whether the motion is considered and determined during that term or some subsequent term.⁴ A party complaining that his motion for a new trial has been disregarded must show that he has been diligent in moving for the same. The motion must appear to have been made before the judgment was entered or during the term at which it was entered.⁵

Vance v. Schuyler, 1 Gilm. (Ill.), 160.

¹ Sands v. Wacaser, 149 Ill., 530; Mahoney v. Davis, 44 Ill., 288; Village of Hyde Park v. Cornell, 4 Ill. App., 602.

² Consolidated Coal Co. v. Schaffer, 135 Ill., 210; Seibel v. Vaughan, 69 Ill., 257; Boyle v. Levings, 28 Ill., 314; Dickhut v. Durrell, 11 Ill., 72; Vanderbilt v. Johnson, 3 Scam.

(Ill.), 48; City of Mt. Vernon v. Satterfield, 53 Ill. App., 39; Dignan v. Gilbert, 43 Ill. App., 536; Waidner v. Pauly, 37 Ill. App., 278; Bernhard v. Brown, 31 Ill. App., 395.

³ Rev. Stat., Ch. 110, ¶ 57, § 56.

⁴ Hearson v. Graudine, 87 Ill., 115.

⁵ Heyer v. Alexander, 108 Ill., 385; Chicago & N. W. Ry. Co. v. Dimick, 96 Ill., 42; Ottawa, O. & F. R. V. Ry. Co. v. McMath, 91 Ill., 104;

While the statute provides that the party making the motion for the new trial shall "file the points in writing, particularly specifying the grounds of such motion," yet where such motion is submitted without them, and no objection is made thereto, the written statement of the grounds will be treated as waived and the omission cannot be urged in a court of review.¹

A motion for a new trial is properly made before the Judge who presided at the trial, but when made before a Judge of the court (other than the trial Judge) he may rightfully decide the motion, if no objection or motion for continuance is interposed.²

A party having interposed a motion for a new trial may withdraw it, although it may have been confessed by the adversary.³

NO. 364. FORM OF MOTION FOR NEW TRIAL.

IN THE COURT OF COUNTY.
 A B
 vs. }
 C D } Assumpsit (or as may be).

The defendant C D, by his attorney V W, now comes and moves the court to set aside the verdict and to grant a new trial in this cause for the following reasons:

(State any of the grounds enumerated which may be desired in the manner here indicated).

1. That the court admitted improper evidence on the part of the plaintiff at the trial, in that (*here specify with such particularity that a court of review may be able to see whether or not the evidence was proper*).

2. That the court refused to admit proper evidence on the part of the defendant at the trial, in that (*here specify with like particularity*).

3. The court at the request of the plaintiff improperly instructed the jury by submitting instructions numbers one, three, five, and six.

4. That the verdict is against the law and the evidence in the case.

V W
 Attorney for defendant.

Hartford F. Ins. Co. v. Sanduzor, 49 Ill., 489; Mills v. Lockwood 40 Ill., 130; Campbell v. Conover, 26 Ill., 64; Brush v. Seguin, 24 Ill., 254; Board of Education v. Hoag, 21 Ill. App., 588; Pease v. Roberts, 9 Ill. App., 132; Selby v. Hutchinson, 5 Gilm. (Ill.), 261; Delahay v. McConnell, 4 Scam. (Ill.), 156; Lampsett v.

Whitney, 3 Scam. (Ill.), 170; Mulford v. Shepard, 1 Scam. (Ill.), 583.

¹ Bromley v. People, 150 Ill., 297; Ottawa, O. & F. R. V. Ry. Co. v. McMath, 4 Ill. App., 356.

² Chicago, etc., R. R. Co. v. Town of Marseilles, 107 Ill., 313.

³ McReynolds v. Burlington, etc., 106 Ill., 152.

§ 965. **Same—Grounds for the motion enumerated.**—The application for a new trial is generally made on one of the following grounds:

1. Want of a proper jury.
2. Misbehavior of the prevailing party.
3. Misconduct of the jury.
4. Absence of the party, his counsel or a witness.
5. Surprise.
6. Newly discovered evidence.
7. Excessiveness of the damages.
8. Smallness of the damages.
9. Misdirection of the court, and the admission or rejection of testimony.
10. That the verdict is against the law or the evidence.

§ 966. **Same. 1. Want of proper jury.**—A new trial will generally not be granted on the ground that a juror had, unknown to the party, formed and expressed an opinion, and pre-judged the case, where that fact was not discovered until after the trial.¹ This fact should be ascertained by the examination of his *voir dire* and the jury then challenged for cause.² By not putting the inquiry to the juror as to his previously formed opinion, and ascertaining, or at least endeavoring to ascertain, the fact, such cause of challenge is waived and the party cannot afterwards avail himself of such neglect by motion to set aside the verdict. If, however, the party put the question to the juror as to previously formed opinions and thus endeavor to ascertain the facts before the jury was sworn, or by an examination upon his *voir dire*, and fail to ascertain the fact which would have disqualified him, and afterwards discovered that the juror did not stand indifferent to the cause, a new trial will be granted.³ But a new trial will not be granted in any case for previously expressed opinions of a

¹ *Byars v. City of Mt. Vernon*, 77 Ill., 487; *Hughes v. People*, 116 Ill., 330.

² *Ante*, § 837.

³ *Vennum v. Harwood*, 1 Gilm. (Ill.), 659; *Smith v. Eames*, 3 Scam. (Ill.), 76; *Coughlin v. People*, 144 Ill., 140.

juror unless such opinions were hurtful to the party moving for a new trial.¹

In like manner the fact that a juror is not a resident of the county or state, or has been called by mistake (where no fraud, collusion, or apparent injury, has ensued) cannot avail on a motion for a new trial. But if the mistake as to the juror has been intentional and productive of injustice, the court will set aside the verdict.² The court will, in this as in other causes for new trial, exercise its sound legal discretion.³

§ 967. Same. 2. Misbehavior of the prevailing party.—

Where the prevailing party delivers evidence to the jury after it has left the bar which was not shown to the court, it will avoid the verdict, unless it appears that the jury did not consider it.⁴ Any tampering with the jury, either personally or by others, which has a tendency to bias or prejudice the jury in the consideration of the cause, will ordinarily be sufficient grounds for obtaining a new trial.⁵ Even tampering with the jury after the verdict has been sealed is severely condemned.⁶

Fraudulent trickery on the part of the counsel whereby opposing counsel is taken by surprise and a verdict obtained, will be sufficient ground for the granting of a new trial.⁷

A motion for a new trial, on the ground that the misconduct of the prevailing party prevented the attendance of a witness for the unsuccessful party, will be denied where the witness was not subpoenaed and his attendance could have been procured by the use of such process.⁸

¹ Hughes v. People, 116 Ill., 330.

² Hester v. Chambers, 84 Mich., 562; 1 Pick. (Mass.), 38; 7 Metc. (Mass.), 326; 9 Dana (Ky.), 203; 4 Yerger (Tenn.), 111; 1 A. K. Marsh (Ky.), 212.

³ People v. Ransom, 77 Wend. (N. Y.), 417.

⁴ Coke on Litt., 227b.

⁵ 2 Arch. Pr., 255; Vane v. City of Evanston, 150 Ill., 616; Mobile & O. R. R. Co. v. Davis, 130 Ill., 146.

⁶ McLaughlin v. Hinds, 151 Ill., 403.

A new trial has been granted in a case where hand bills reflecting on the character of the plaintiff had been distributed in court and shown to the jury on the day of the trial, although the defendant, by his affidavit, denied all knowledge of the hand bills. 3 Bos. & P., 272.

⁷ 2 Arch. Pr., 256; 1 Burrill's Pr., 468.

⁸ Stumer v. Pitchman, 124 Ill., 250.

Improper remarks of counsel in his closing argument will not, however, be sufficient ground on which to procure a new trial, unless the remarks were of such an inflammatory nature as to prejudice the mind of the jury.¹

§ 968. **Same. 3. Misconduct of the jury.**—That the jurors eat and drink at the expense of the party, for whom they thereafter render verdict, is universally considered sufficient misconduct to avoid a verdict.² But the mere fact that the jurors drink liquor during the progress of the trial, or during their deliberation before agreeing upon a verdict, is not of itself sufficient to affect the verdict. To be grounds for a new trial they must have drunk in sufficient quantities, or at such times during the progress of the trial, as to affect the verdict.³

The fact that the jurors have determined upon their verdict by casting lots is likewise sufficient grounds for new trial.⁴ But an affidavit merely on *information and belief* that the jurors have each marked down the amount of damages he deemed proper and that the aggregate of the several sums was divided by twelve, which amount was agreed upon is not sufficient to procure a new trial.⁵ And the affidavit of a juror will not be received for that purpose.⁶

That jurors, during the progress of the trial and before the evidence was all submitted, discuss the merits of the case publicly and indicate what verdict they will return is such misconduct as to entitle the unsuccessful party to a new trial.⁷

It is said that the trial Judge is incompetent to decide that a verdict was not affected by outside influence to which the jury had been disposed and that if he refused to set such verdict aside, averring that it is just, he usurps the functions of a jury.⁸

¹ Ohio & M. Ry. Co. v. Long, 52 Ill. App., 670; further as to "Argument of Counsel," see *ante*, § 906.

² Coke on Litt., 227; Winslow v. Abrams, 1 Hill (N. Y.), 207.

³ Graybeal v. Gardner, 48 Ill. App., 305.

⁴ 1 Arch. Pr., 197; 1 Burrill's Pr., 468; *ante*, § 943n.

⁵ Cummings v. Crawford, 88 Ill., 312.

⁶ Reed v. Thompson, 88 Ill., 245

⁷ Jewsbury v. Sperry, 85 Ill., 56.

⁸ Churchill v. Alpena Judge, 56 Mich., 536.

Affidavits of jurors will not be received for the purpose of showing that the verdict should be set aside and a new trial granted on account of the misconduct of the jury; but they will be received to explain or repel any charges made against them.¹

§ 969. Same. 4. The absence of a party, his counsel, or a witness.—It is seldom that a new trial will be granted because of the absence of the defendant or his counsel, and it will not be granted where such absence is attributed to his own negligence. To obtain a new trial on such a ground it must affirmatively appear that the defendant exercised proper diligence to avoid the result and that injustice has been done to him.² The fact that a party employs competent counsel to conduct his case at law does not relieve him of all personal responsibility or care in relation thereto. The fact that an attorney did not know when the term of court was held at which judgment was taken and therefore was absent is not sufficient. An affidavit for a new trial on the ground of absence or illness of counsel must also show an excuse for the absence of the party himself. Furthermore, the affidavit must make it to appear that the party asking for the new trial can, at such new trial, make a better defense. The motion should be supported by the affidavit of the witness on whose absence the motion is founded and by whom it is proposed to prove the facts relied on.³

A new trial will rarely be granted because of the absence of a witness, for it was the party's privilege to have applied for a continuance before the case was tried.⁴ And where a motion for a new trial is made on the ground of absence of a witness, a failure to show that such witness was not absent by

¹ 1 Swan's Pr., 917; Reed v. Thompson, 88 Ill., 245; ante, § 948.

² Bruson v. Clark, 151 Ill., 495; Singer Mfg. Co. v. May, 86 Ill., 398; Koon v. Nichols, 85 Ill., 155; Stetham v. Shoultz, 17 Ill., 99; Miller v. McGraw, 20 Ill. App., 203.

³ Cowan v. Clark, 35 Ill., 416; Porter v. Triola, 84 Ill., 325; Hartford, etc., Ins. Co. v. Vanduzor, 49 Ill., 489; Limington v. Strong, 8 Ill. App., 384.

⁴ 2 Swan's Pr., 923; ante, § 791.

the consent of the moving party is sufficient to defeat the motion.¹

§ 970. **Same. 5. Surprise.**—Surprise may be a valid ground for the granting of a new trial. An affidavit for a new trial showing clearly that the party was taken by surprise on the trial and in regard to some material matter; that he had been vigilant and had used every precaution and effort to be prepared for the trial, and that he had been guilty of no *laches*, will be sufficient.² But a new trial will not be granted on account of surprise when such surprise is attributable to want of diligence and which could have been avoided by application for a continuance.³ It is no ground for a new trial on account of surprise when the surprise was occasioned by the testimony of a witness, and it was within the power of the unsuccessful party to have contradicted such testimony, which contradiction he neglected to make;⁴ or where it was substantially contradicted by a deposition which was read on the trial, the defendant having voluntarily absented himself from the court.⁵

No definite rule can be laid down for what is and what is not a matter of sufficient surprise to entitle the party to a new trial. It is a matter within the discretion of the trial Judge.⁶

¹ North Chicago City Ry. Co. v. Gastka, 27 Ill. App., 518.

When a witness was, during the progress of the trial, taken so suddenly and violently ill that he could not be examined, a new trial was therefor granted. *Tilden v. Gardner*, 24 Wend. (N. Y.), 663; *Ruggles v. Hall*, 14 Johns. (N. Y.), 112.

² Chicago, etc., Ry. Co. v. Voseburgh, 45 Ill., 311; *Holbrook v. Nichol*, 36 Ill., 161.

³ *Keeley v. O'Brien*, 66 Ill., 358; *ante*, § 791.

⁴ *Slade v. McClure*, 76 Ill., 319; *Rockford, R. I. & St. L. R. R. Co. v. Rose*, 72 Ill., 183.

⁵ *Thompson v. Anthony*, 48 Ill., 468.

⁶ Where, before the trial, the attorney for one of the parties had in his possession a deed important to the rights of the other party and delivered it to a third person immediately before the trial without so apprising his adversary, who notified the attorney to produce the deed, and who first learned on the trial that the deed was in his possession, the verdict was set aside and a new trial granted. *Jackson v. Warford*, 7 Wend. (N. Y.), 62.

§ 971. Same. 6. Newly discovered evidence.—When a new trial is sought on the ground of newly discovered evidence it must be made to appear by affidavit:

1. That the evidence has been discovered since trial.¹
2. That no *laches* can be imputed to the party; that is to say, that the evidence could not have been discovered before the trial, had the party exerted reasonable attention and diligence.²
3. The evidence, newly discovered, must be of such a nature that its legitimate effect would probably require a different verdict. It must not be merely impeaching or cumulative, unless it is decisive and would conclusively lead to a change in the result. There must be something more than additional witnesses or additional testimony going to establish the same facts that were controverted upon the trial.³

¹ Dyk v. De Young, 133 Ill., 82; Crozier v. Cooper, 14 Ill., 139.

² Langdan v. People, 133 Ill., 382; Chapman v. Chapman, 129 Ill., 386; Plumb v. Campbell, 129 Ill., 101; Tobin v. People, 101 Ill., 121; Union Rolling Mill Co. v. Gillen, 100 Ill., 52; Wright v. Gould, 73 Ill., 56; Calhoun v. O'Neal, 53 Ill., 354.

³ Jacobson v. Gunzburg, 150 Ill., 135; Wisconsin Central R. R. Co. v. Ross, 142 Ill., 9; Chicago R. I. & P. Ry. Co. v. Clough, 134 Ill., 586; Monroe v. Snow, 131 Ill., 126; Burns v. People, 126 Ill., 282; Grady v. People, 125 Ill., 122; City of Sterling v. Merrill, 124 Ill., 522; Petefish, Skiles & Co. v. Watkins, 124 Ill., 384; O'Neil v. O'Neil, 123 Ill., 361; Kinney v. People, 108 Ill., 519; Higgins v. People, 98 Ill., 519; McCollom v. I. & St. L. Ry. Co., 94 Ill., 534; Laird v. Warren, 92 Ill., 204; Harvey v. Collins, 89 Ill., 155; Dyre v. People, 84 Ill., 624; Claves v. White, 83 Ill., 540; Meyer v. Mead, 83 Ill., 19; Knickerbocker Ins. Co. v. Gould, 80 Ill., 388; McKenzie v. Remington, 79 Ill., 388; Schoenfeld v. Brown, 78 Ill., 487; Skelly v. Boland, 78 Ill.,

488; Krug v. Ward, 77 Ill., 603; Chicago & St. L. R. R. Co. v. Schumacker, 77 Ill., 583; Bowers v. People, 74 Ill., 418; Toledo W. & W. Ry. v. Seitz, 53 Ill., 542; Calhoun v. O'Neal, 53 Ill., 354; Wilder v. Greenlee, 49 Ill., 253; Martin v. Ehrenfels, 24 Ill., 187; Morrison v. Stewart, 24 Ill., 24; Ritchey v. West, 23 Ill., 385; Woolverton v. Sumner, 53 Ill. App., 115; R. J. Gunning Co. v. Cusack, 50 Ill. App., 290; Biederman v. Brown, 49 Ill. App., 488; Halsey v. Stillman, 48 Ill. App., 413; Reichmann v. Baier, 46 Ill. App., 346; Davis v. Mann, 43 Ill. App., 301; Smith v. Belt, 31 Ill. App., 96; Besse v. Sawyer, 28 Ill. App., 248; Cleary v. Cummings, 28 Ill. App., 237; Cooper v. Johnson, 27 Ill. App., 504; Classen v. Cuddigan, 21 Ill. App., 591.

Where it was shown by the defendant in support of a motion for a new trial that diligent search had been made for the instrument in writing sued on; that the same could not be found at the time of the trial and recovery by the plaintiff; but that it had been subsequently found and clearly showed that the

The newly discovered evidence must be of a different kind and character from that adduced on the trial.'

4. The affidavit must disclose the newly discovered evidence so that the court may determine whether, by the introduction thereof, a different verdict ought to be obtained; for if, with the newly discovered evidence before it, the jury ought to come to the same conclusion, it would be useless to grant a new trial. If substantial justice has been done, a new trial will not be granted because of newly discovered evidence.'

The motion for a new trial on the ground of newly discovered evidence should be supported by the affidavits of the witnesses by whom it is proposed to prove the facts relied on, or else an excuse should be made for not obtaining such affidavits.'

§ 972. Same. 7. Excessiveness of damages.—A new trial will be granted on the ground of the excessiveness of the damages awarded where the same could have been ascertained by mere calculation, but which are so grossly excessive as to show that the verdict was the result of passion, or undue or improper motive or influence, or that there has been a material mistake in calculation, or where it is clear the jury have misunderstood the evidence. The extent of damages is almost exclusively within the province of the jury, and although the court may consider the amount of the damages large, it can not interfere with the verdict of the jury where it is not apparent that the jury has acted from prejudice,

plaintiff had no cause of action was ground for new trial. *Protection Life Ins. Co. v. Dill*, 91 Ill., 174.

¹ *Guyot v. Butts*, 4 Wend. (N. Y.), 579.

² 2 Arch. Pr. 254; *Shumway v. Fowler*, 4 Johns. (N. Y.), 425; *Halsey v. Watson*, 1 Caines (N. Y.) Rep., 24; *Hayes v. Houston*, 86 Ill., 487; *Gottschalk v. Hughes*, 82 Ill., 484; *Wood v. Echternach*, 65 Ill., 149; *City of Chicago v. Hislop*, 61 Ill., 86; *Troy v. Reilly*, 3 Scam. (Ill.), 259; *Smith v. Schultz*, 1 Scam.

(Ill.), 490; *Radeke v. Cook*, 21 Ill. App., 595.

³ *Emory v. Addis*, 71 Ill., 273; *Wormley v. Gregg*, 65 Ill., 251; *Cowan v. Clark*, 35 Ill., 416.

The fact that the party desiring the witness, knew his name, but not his place of residence, will be no ground for new trial. A continuance should have been applied for that time might have been procured in which to produce the witness. *Kendall v. Limberg*, 69 Ill., 355; as to "Continuances" see *ante*, § 788.

passion, misapprehension of the evidence, or from some improper motive.¹

New trials will be granted less seldom in actions for tort than in actions on contract, because in the latter cases mistakes can be detected and the province of the jury will be less liable to be invaded.²

The grounds that the damages are excessive must be specifically assigned in the motion, or that ground will be deemed to have been waived and cannot be urged in a court of review.³

When the damages assessed are in excess of what the evidence proves the plaintiff to be entitled, a new trial may be rendered unnecessary by procuring a *remittitur* for the excess to be entered.⁴ The court may require this to be done;⁵ and where it is done a motion for new trial should be denied.⁶

§ 973. Same—Smallness of the damages.—A new trial will be granted where a verdict gives grossly inadequate damages to the plaintiff, upon the same principle that like relief is granted to a defendant,⁷ when excessive damages are assessed by the jury.⁸ New trials have been more frequently granted on this ground in actions upon contracts than in actions for wrongs and injuries, but under the more recent judicial holdings new trials have been granted in causes *ex delicto* to pre-

¹ Calumet River Ry. Co. v. Moore, 124 Ill., 329; Chicago, etc., R. R. Co. v. Blake, 116 Ill., 163; Douglas v. Gausman, 68 Ill., 170; Rockford R. I. & St. L. R. R. Co. v. Heflin, 65 Ill., 366; City of Decatur v. Fisher, 53 Ill., 407; Chicago, R. I. & P. Ry. Co. v. McAra, 52 Ill., 297; Walker v. Martin, 52 Ill., 347; Chicago, B. & Q. Ry. Co. v. Dunn, 52 Ill., 451; Chicago, R. I. & P. Ry. Co. v. Otto, 52 Ill., 416; Illinois Cent. Ry. Co. v. Welch, 52 Ill., 184; Chicago & Alton Ry. Co. v. Pondrom, 51 Ill., 333; Freeman v. Tinsley, 50 Ill., 497; Chicago & N. W. R. R. Co. v. Peacock, 48 Ill., 253; City of Chicago v. Smith, 48 Ill., 107; Ousley v. Hardin,

23 Ill., 403; Blanchard v. Morris, 15 Ill., 35; Pierce v. Pierce, 40 Ill., 292.

² 2 Arch. Pr., 254.

³ Rice v. Heap, 46 Ill. App., 448; Dressel v. Lonsdale, 46 Ill. App., 454; Peoria, D. & E. R. R. Co. v. Booth, 11 Ill. App., 358.

⁴ Winchester v. Grosvenor, 44 Ill., 425.

⁵ Atchison, T. & S. F. Ry. Co. v. Pratt, 53 Ill. App., 263.

⁶ Union Rolling Mill Co. v. Gillen, 100 Ill., 52.

⁷ Ante, § 972.

⁸ Hackett v. Pratt, 52 Ill. App., 346; Williams v. Reynolds, 86 Ill., 263.

vent manifest injustice from being done.¹ And where the action is brought to try a question of permanent right, a new trial may be properly granted, although courts will not generally grant a new trial for the purpose of enabling the plaintiff to recover vindictive damages merely.²

As in the case of excessive damages so in the case of smallness of damages, a new trial may be obviated by the defendant consenting to an entry of judgment against him for the proper larger amount than that found in the verdict.³

§ 974. Same. 9. Misdirection of court, and the admission or rejection of testimony.—Although, as hereinbefore stated, exceptions may have been taken to the rulings on objections made to the introduction of evidence,⁴ and to the Judge's instructions or refusal to instruct the jury,⁵ yet it is proper that the same grounds may be urged on a motion for a new trial that the court may be enabled to correct the error and to do justice to the parties.⁶ If the new trial is granted, it will, of course, be a speedier remedy for the error, than to take the matter up for review on bill of exceptions. If the court sees that it has misdirected the jury and that the natural effect of its instructions was to mislead the jury and it appears probable to have done so, and that the verdict otherwise would have been different, it should be set aside and a new trial granted.⁷ Where, however, the court sees that justice has been done, it will not set aside the verdict to let in evidence, although the same was improperly rejected; that is to say, where its admission would not have changed the result.⁸

¹ *Hackett v. Pratt*, 52 Ill. App., 346.

² *Plumleigh v. Dawson*, 1 Gilm. (Ill.,) 544.

³ *James v. Morey*, 44 Ill., 352; *Carr v. Miner*, 42 Ill., 179.

⁴ *Ante*, § 894.

⁵ *Ante*, § 941.

⁶ *Evans v. Lohr*, 2 Scam. (Ill.), 511; *Wiley v. Town of Brimfield*, 49 Ill., 306.

If in a trial without a jury the court errs in limiting the number of

witnesses this should be urged as ground for a new trial or it will be presumed that the ruling of the court worked no injury. *Burhans v. Village of Norwood Park*, 138 Ill., 147.

⁷ *Frantz v. Rose*, 69 Ill., 590; *Ball v. Hooten, Admr.*, 85 Ill., 159; *Adams v. Smith*, 58 Ill., 417; *Illinois Cent. Ry. Co. v. Swearingen*, 47 Ill., 206.

⁸ *Kelsey v. Henry*, 49 Ill., 488;

The error giving cause for new trial must be urged by the party prejudiced thereby. If the court erred in favor of the party moving for a new trial, or if the instructions to the jury which are complained of, were erroneous, but were immaterial and did not affect the merits of the case, a new trial will not be granted. "Error without prejudice is no ground for reversal."

The court may order a new trial on its own motion when the Judge thinks that he has discovered that he has a personal interest in the case.²

§ 975. Same. 10. That the verdict is against the law or the evidence.—As a general rule, a new trial will be granted where the verdict is against the law, but where the verdict is just, although against strict law, and the rigorous exaction of sharp legal principles would, in the case, be hardly reconcilable with conscience, the court will not disturb the verdict.³

On a like principle, if the jury find a verdict contrary to the evidence, the court will grant a new trial; but if, on the whole, the justice of the case does not require it, or if a verdict be found for the defendant in a vexatious or hard action, or for the plaintiff after an unconscionable defense, a new trial will not be granted unless some rule of law has been violated.⁴

The rule universally requires that the verdict must be manifestly against the weight of the evidence, and that injustice be thereby done, to authorize the granting of a new trial on that ground.⁵ If the evidence has been conflicting and voluminous,

Greenup v. Stoker, 3 Gilm. (Ill.), 202.

¹ Creote v. Willey, 83 Ill., 444; Mansfield v. Wheeler, 23 Wend. (N. Y.), 79; Potter v. Hopkins, 25 Wend. (N. Y.), 417; Camden v. Belnap, 21 Wend. (N. Y.), 354.

Lost instructions.—That instructions in a case are lost before the decision of a motion for a new trial is no more ground for new trial than the loss of a summons, a declaration, a plea, a deposition, or the minutes of the evidence. In such a case the court should be asked to restore the

instructions. Addems v. Suver, 89 Ill., 482.

² Aldeman v. Montcalm Judge, 41 Mich., 550.

³ 2 Arch. Pr., 258.

⁴ 2 Burrill's Pr., 926.

⁵ Raggio v. People, 135 Ill., 533; Belden v. Innis, 84 Ill., 78; City of Chicago v. Lavelle, 83 Ill., 482; McClelland v. Mitchell, 82 Ill., 35; Miller v. Balthasser, 78 Ill., 302; St. Paul F. & M. Ins. Co. v. Johnson, 77 Ill., 598; Erich v. White, 74 Ill., 481; The Teutonia Life Ins. Co. v. Beck, 74 Ill., 165; Illinois Cent. R.

and that for a prevailing party is sufficient when standing alone to require a verdict in his favor, the court cannot say that the verdict is against the evidence and grant a new trial because thereof. Where there is evidence from which the jury could have found the verdict it will not be disturbed.¹

- R. Co. v. Chambers, 71 Ill., 519; Chicago & N. W. Ry. Co. v. Ryan, 70 Ill., 211; Chicago, B. & Q. R. R. Co. v. Stumps, 69 Ill., 409; Chicago, R. I. & P. R. R. Co. v. Reidy, 66 Ill., 43; Twining v. Martin, 65 Ill., 157; Sargent v. People, 64 Ill., 327; Stanton v. Dudley, 64 Ill., 325; McGregor v. McDevitt, 64 Ill., 261; Indianapolis, St. L. R. R. Co. v. McClintock, 63 Ill., 514; Hibbard v. Molloy, 63 Ill., 471; Cass v. Campbell, 63 Ill., 259; Knott v. Skinner, 63 Ill., 239; Randall v. People, 63 Ill., 202; Smith v. Slocum, 62 Ill., 354; Chicago City Ry. Co. v. Young, 62 Ill., 238; Kuhner v. Griesbaum, 59 Ill., 48; Broughton v. Smart, 59 Ill., 440; Wilson v. Beavan, 58 Ill., 232; Cheney v. Bonnell, 58 Ill., 268; City of Peru v. French, 55 Ill., 318; Booth v. Hynes, 54 Ill., 363; Downing v. Wright, 51 Ill., 363; American Exp. Co. v. Bruce, 50 Ill., 201; Dalton v. Clough, 50 Ill., 47; Crabtree v. Fuquay, 49 Ill., 520; Haycraft v. Davis, 49 Ill., 455; Ammerman v. Teeter, 49 Ill., 400; Maynz v. Zeigler, 49 Ill., 303; Baker v. Robinson, 49 Ill., 299; Lalor v. Scanlon, 49 Ill., 152; Lockwood v. Onion, 48 Ill., 325; Hope Ins. Co. v. Lonergan, 48 Ill., 49; Carrigan v. Hardy, 46 Ill., 502; McKichan v. McBean, 45 Ill., 228; Gibson v. Webster, 44 Ill., 483; Corey v. McDaniel, 42 Ill., 512; Roth v. Smith, 41 Ill., 314; McCarthey v. Mooney, 41 Ill., 300; Chicago & R. I. R. R. Co. v. Crandall, 41 Ill., 234; Wright v. English, 39 Ill., 178; Topping v. Maxe, 39 Ill., 159; Tolman v. Race, 36 Ill., 472; Clement v. Bushway, 25 Ill., 200; Goodell v. Woodruff, 20 Ill., 191; Carpenter v. Ambrosion, 20 Ill., 170; Bush v. Kindred, 20 Ill., 93; French v. Lowry, 19 Ill., 158; Higgins v. Lee, 16 Ill., 495; Dufield v. Cross, 13 Ill., 699; Schwab v. Gingerick, 13 Ill., 697; Keaggy v. Hite, 12 Ill., 99; Mann v. Russell, 11 Ill., 586; Gordon v. Crooks, 11 Ill., 142; Dawson v. Robbins, 5 Gilm. (Ill.), 72; Chase v. Debolt, 2 Gilm. (Ill.), 371; Leigh v. Hodges, 3 Scam. (Ill.), 15; Harmon v. Thornton, 2 Scam. (Ill.), 351; Wheeler v. Shields, 2 Scam. (Ill.), 348; Wheaton v. Johnson, 55 Ill. App., 53; North Chicago St. R. R. Co. v. Fitzgibbons, 54 Ill. App., 385; McLean County Coal Co. v. Lamprecht, 51 Ill. App., 649; Doremus v. Clarke, 51 Ill. App., 435; East St. Louis Con. Ry. Co. v. O'Hara, 49 Ill. App., 282; Chicago & N. W. R. R. Co. v. Scheuring, 4 Ill. App., 533.
- ¹ Jenkins v. Cohen, 138 Ill., 634; Green v. Mumper, 138 Ill., 434; Cronk v. The People, 131 Ill., 56; Buchanan v. McLennan, 105 Ill., 56; Lewis v. Lewis, 92 Ill., 237; Howitt v. Estelle, 92 Ill., 218; Conn. M. L. Ins. Co. v. Ellis, 89 Ill., 516; Addems v. Suver, 89 Ill., 482; Skiles v. Caruthers, 88 Ill., 458; Guerdon v. Corbet, 87 Ill., 272; Hayes v. Houston, 86 Ill., 487; Bell v. Gordon, 86 Ill., 501; Stickle v. Otto, 86 Ill., 161; Corwith v. Colter, 83 Ill., 585; Plummer v. Rigdon, 78 Ill., 222; Chapman v. Burt, 77 Ill., 387; Toledo, W. & W. Ry. Co. v. Moore, Admx., 77 Ill., 217; Summers v. Stark, 76 Ill., 208; Edgmon v. Ashelby, 76

The rule is the same in both civil and criminal cases that the court will not disturb the verdict merely because it, if trying the question of fact, would have found differently from the jury. The verdict must be manifestly wrong.¹ Where, however, there is no evidence or no reliable evidence upon which to support the finding of the jury it is the duty of the court to set the verdict aside.²

As in other causes alleged for obtaining a new trial, the

Ill., 161; Toledo, W. & W. Ry. Co. v. Elliott, 76 Ill., 67; Kightlinger v. Egan, 75 Ill., 141; Wood v. Hildreth, 73 Ill., 525; Wiggins Ferry Co. v. Higgins, 72 Ill., 518; Varner v. Varner, 69 Ill., 445; Bishop v. Busse, 69 Ill., 403; Clifford v. Lohring, 69 Ill., 401; Illinois Central R. Co. v. Gillis, 68 Ill., 318; O'Neill v. Calhoun, 67 Ill., 219; Presbyterian Church v. Emerson, 66 Ill., 269; Dunning v. Fitch, 66 Ill., 51; Chicago, B. & Q. R. R. Co. v. Van Patton, etc., 64 Ill., 510; McFerren v. Chambers, 64 Ill., 119; Chicago, A. & St. L. R. R. Co. v. Stover, 63 Ill., 358; Bourne v. Stout, 62 Ill., 261; Chapman v. Stewart, 63 Ill., 332; Robinson v. Parish, 62 Ill., 130; Fitch v. Zimmer, 62 Ill., 126; Lincoln v. Stowell, 62 Ill., 84; Bestor v. Moss, 61 Ill., 497; Stevens v. Brown, 58 Ill., 289; Chicago, B. & Q. R. R. Co. v. Gregory, 58 Ill., 272; Janey v. Birch, 58 Ill., 87; Wade v. Watkins, 58 Ill., 64; Chicago & A. Ry. Co. v. Purvines, 53 Ill., 38; Palmer v. McAvoy, 58 Ill., 24; Neustadt v. Hall, 58 Ill., 172; St. Louis, J. & C. R. R. Co. v. Terhune, 50 Ill., 151; Weaver v. Crocker, 49 Ill., 461; McCarthy v. Mooney, 49 Ill., 247; O'Brien v. Palmer, 49 Ill., 72; Sheeran v. Chicago & M. R. R. Co., 48 Ill., 528; Thompson v. Anthony, 48 Ill., 468; Sawyer v. Daniels, 48 Ill., 269; Chittenden v. Evans, 48 Ill., 52; Keith v. Fink, 47

Ill., 272; Brown v. Berry, 47 Ill., 175; Hall v. Lincoln, 46 Ill., 52; Clark v. Pagetor, 45 Ill., 185; Putnam v. Wadley, 40 Ill., 346; Chicago & R. I. R. R. Co. v. McKean, 40 Ill., 218; Hiner v. People, 34 Ill., 297; Wallace v. Wren, 32 Ill., 146; Ohio and Mississippi R. R. Co. v. Brown, 25 Ill., 124; Dunlap v. Taylor, 23 Ill., 440; Morgan v. Ryerson, 20 Ill., 343; Gillett v. Sweat, 1 Gilm., (Ill.) 475; Lowry v. Orr, 1 Gilm., (Ill.) 70.

¹ Gilbert v. Bone, 79 Ill., 341; City of Chicago v. Smith, 48 Ill., 107; O'Reily v. Fitzgerald, 40 Ill., 310; Sullivan v. Dollins, 18 Ill., 85.

² Janson v. Varnum, 89 Ill., 100; Chicago, B. & Q. R. R. Co. v. Lee, Admx, 87 Ill., 454; Chicago & A. R. R. Co. v. Rice, 71 Ill., 567; Reynolds v. Lambert, 69 Ill., 495; Stenger v. Swartout, 62 Ill., 257; City of Chester v. Porter, 47 Ill., 661; Withers v. Kinser, 53 Ill. App., 87.

In actions for libel, slander, etc., vindictive in their nature, it is a general rule that a new trial will not be granted merely because the verdict is against the evidence. Clark v. Hatfield, 88 Ill., 440; Sheen v. Peoria Journal Co., 43 Ill. App., 267.

If, however, the preponderance of evidence shows that the words were true the plaintiff will not be entitled to recover, and if the jury find for him, a new trial should be granted. McDavid v. Blevins, 85 Ill., 238.

courts will be less reluctant to set aside the verdict in actions on contract than in acting for tort, where it is apparent that the jury has been mistaken or that the verdict is against the clear preponderance of evidence.¹

§ 976. Same—Hearing of the motion for a new trial—Ruling—Exception.—The arguments on motion for a new trial are to be heard before judgment is entered in the cause.² For the entry of a judgment will of itself operate as a denial of the motion for a new trial, although such motion be not formally disposed of.³

Under the common law, whether a motion for a new trial would be granted or refused rested within the sound discretion of the court;⁴ and the refusal to grant a new trial could not be assigned for error;⁵ but by force of the statute in this State, exceptions may be taken to the ruling of the court on motions for new trials or motions in arrest of judgment, etc.,

¹ *Bonnell v. Wilder*, 67 Ill., 327; *Dalton v. Clough*, 50 Ill., 47.

New trial to impeach witness.—A new trial will not often be granted to afford an opportunity to impeach a witness but a case may arise so imperative as to require that a new trial be granted to prevent a palpable wrong. *O'Reily v. Fitzgerald*, 40 Ill., 310; *Cochran v. Ammon*, 16 Ill., 316.

Where, however, there is other credible testimony tending to sustain the witness sought to be impeached, a new trial will not be granted for that purpose. *Keith v. Knoche*, 43 Ill. App., 161.

² Rev. Stat., Chap. 110; ¶ 57, § 56; *Ferriss v. Commercial Nat. Bank of Chicago*, 55 Ill. App., 218.

³ *Parr v. Van Horne*, 40 Ill., 122; *Deere v. Lewis*, 51 Ill., 254.

Oral motion unnecessary.—It is not absolutely necessary to make an oral motion for a new trial. The filing of the petition, or the docketing of the case after due notice, is

sufficient to bring the matter before the court. *Anonymous*, 40 Ill., 129.

Abandonment of motion.—If counsel neglect to argue a motion for a new trial it will be deemed to have been abandoned. *Calumet, etc., Co. v. Reinbold*, 51 Ill. App., 323.

Right to make motion not waived.—A party does not waive his right to move for a new trial by the fact that he moves for a judgment on the special findings contrary to the general verdict. *Chicago & N. W. Ry. Co. v. Dimick*, 96 Ill., 42.

Amendment after motion overruled.—An amendment in matter of form has been allowed to be made in the declaration after the overruling of a motion for a new trial, the change being as to matter which would create no surprise. *McCol-lum v. I. & St. L. Ry. Co.*, 94 Ill., 584.

⁴ *Sawyer v. Stephenson*, 1 Ill. (Breese), 24.

⁵ *Collins v. Claypole*, 1 Ill. (Breese), 212.

and the party excepting may assign for error any decision so excepted.' Unqualified and unlimited control is bestowed upon the Supreme Court to supervise every verdict that may be rendered in any of the courts of record in this State.* But no ruling of the court on such motion can be assigned for error unless an exception has been entered thereto.¹ It is sufficient that the bill of exceptions shows that a motion was made for a new trial and overruled and an exception taken thereto.*

Furthermore, when a motion for a new trial has been made, no objections to the rulings of the court will be considered in a court of review, except those which have been set forth in the written grounds for a new trial and covered by an exception to the rulings of the court thereon.² The court of review is then confined to the reasons assigned for new trial and the party seeking relief will be deemed to have waived all others.* But although no motion for new trial has been made, the errors of the trial court are always subject to review when preserved by exceptions properly taken during the progress of the trial and properly incorporated into the bill of exceptions.*

Duty of court.—The court on the hearing of a motion for a new trial should fearlessly and wisely exercise its power

¹ Rev. Stat., Chap. 110, ¶ 62, § 61; Chicago & R. I. R. R. Co. v. McKean, 40 Ill., 218.

² Chicago & R. I. R. R. Co. v. McKean, 40 Ill., 218.

³ East St. Louis Electric Ry. Co. v. Stout, 150 Ill., 9.

⁴ Bromley v. People, 150 Ill., 297.

As to the drawing of bill of exceptions and the duty of the court regarding the same where a motion for a new trial has been overruled, see Weatherford v. Wilson, 2 Scam. (Ill.), 253.

⁵ Hintz v. Graupner, 188 Ill., 158; Stuve v. McCord, 52 Ill. App., 331; Ging v. Robinson & Son, 31 Ill. App., 511; Miller v. Ridgely, 19 Ill. App., 306.

The ruling of a court denying a motion for a new trial and the rendition of judgment are separate acts. An exception should be particularly taken to the overruling of the motion and not to the rendition of judgment. East St. Louis, etc., R. R. Co. v. Cauley, 49 Ill. App., 310.

⁶ City of Mendota v. Fay, 1 Ill. App., 418.

Presumption as to grounds on which new trial granted.—When a motion for a new trial is granted the Supreme Court will presume that the trial Judge granted the new trial on the merits of the case. Brenner v. Coerber, 42 Ill., 497.

to grant such motion for the protection of the parties litigant. The very purpose for which a court has been given the power to grant a new trial is that parties might be afforded protection from the abuse of the power of the tribunal composed of twelve men wholly irresponsible (the common law writ of attaint having been abolished); "a tribunal which has not always been found very deeply imbued with the knowledge of the law, when called on to apply its principles to the case before it; a tribunal not remarkable, as usually selected, for its skill in analysis, or in the examination of the facts, or in estimating their force, and made up from persons who are not as daily experience shows, wholly devoid of prejudice, or entirely uninfluenced by passion, or unaffected by popular opinion."¹ It is the duty of the court to supervise the verdict of the jury in all that class of cases sounding merely in damages where the recital of the facts touched the sympathies or aroused the prejudices to such an extent as to obscure the understanding of the jury and prevent them from exercising their better judgment; and to see that the verdict is the conclusion of that deliberate judgment that ought to characterize all judicial proceedings and not the result of passion and prejudice.² It is as much the duty of the trial Judge to give careful attention to every part of the testimony in the case when tried with the jury as when tried without, and if the verdict is manifestly wrong, it should be promptly set aside.³

§ 977. **Same—Costs**—In all cases where a new trial shall be granted on account of improper instructions having been given by the Judge, or improper evidence admitted, or because the verdict of the jury is contrary to the weight of the evidence, or for any other cause not the fault of the party applying for such new trial, said new trial shall be granted without costs, as of right.⁴

§ 978. **Same—Number of new trials granted.**—Any

¹ Chicago & R. I. Ry. v. McKean, 40 Ill., 218, Breese, J.

² Smith v. Slocum, 62 Ill., 354.

³ Beldin v. Innis, 84 Ill., 78.

⁴ Rev. Stat., Chap. 110, ¶ 57, § 56.

number of new trials may be granted on motion therefor, except that no more than two new trials shall be granted to the same party on the same ground in the same cause. And no verdict (or judgment) shall be set aside for irregularity only, unless cause be shown for the same during the sitting of the court at the term such verdict (or judgment) shall be given.¹

§ 979. (d) **Motion in arrest of judgment—Nature.**—A motion “in arrest of judgment” is wholly different in its nature from a motion “for a new trial.” While a motion for a new trial is based wholly upon facts and rulings of the court upon matters wholly extrinsic and foreign to the record, a motion in arrest of judgment is based upon errors appearing upon the record. In practice a motion in arrest of judgment generally follows the denial of a motion for a new trial. If the new trial be allowed,² a motion in arrest of judgment is unnecessary and would be absurd. Therefore it is not good practice to enter both motions at the same time. Again if the record be so erroneous as not to support a judgment no judgment should be entered and a motion for a new trial will be unnecessary. Where there is enough upon the face of the record to enable the court to give judgment upon the whole of the record a motion in arrest will be denied.³

¹ Rev. Stat., Chap. 110; ¶ 57; § 56; *Silsbee v. Lucas*, 53 Ill., 479.

Restriction only applicable to trial court.—The provision of the statute that only two new trials can be had on the same ground by the same party in the same cause only applies to the trial court. A court of review may reverse the judgment of an inferior court any number of times. *Illinois Cent. Ry. Co. v. Patterson*, 93 Ill., 290; *Stanberry v. Moore*, 56 Ill., 472.

² Strictly speaking, a motion in arrest of judgment is a waiver of a motion for a new trial, and if a party having filed both, calls up his motion in arrest for disposal without directing the attention of the court to the other motion, it will be a

waiver of the motion for a new trial. *Hall v. Nees*, 27 Ill., 411.

³ *Commercial Ins. Co. v. Treasury Bank*, 61 Ill., 482; *Jones v. People*, 53 Ill., 366; *Parr v. Van Horn*, 38 Ill., 226; *Wallace v. Curtiss*, 36 Ill., 156; *Schofield v. Settley*, 31 Ill., 515; *Evans v. Lohr*, 2 Scam. (Ill.), 511; *Western Stone Co. v. Whalen*, 51 Ill. App., 512; *Thimming v. Miller*, 13 Ill. App., 595.

That the declaration, as well as the whole record, does not show a cause of action, is a frequent ground urged for arrest of judgment, but if there is one good count in the declaration the motion will be denied. *Shreffler v. Nadelhoffer*, 133 Ill., 536; *Chicago, M. & St. P. Ry. Co. v. Donerty*, 53 Ill. App., 282; *West-*

Only such judgments will be arrested as would be erroneous and reversible if entered.¹

The intrinsic errors appearing upon the face of the record, and for which a motion in arrest of judgment will be allowed, are such as the total variance of the declaration from the original writ, the material variance of the verdict from the pleading and issues thereon, and the insufficiency of the declaration in law to sustain an action.²

It is an invariable rule that whatever matter of law is alleged in arrest of judgment must be such as, upon demurrer, would have been sufficient to overturn the action of the pleading demurred to.³

§ 980. **Same—When motion to be made.**—A motion in arrest of judgment, like a motion for a new trial, shall be made before final judgment is entered in the cause or during the term at which it is entered.⁴

Cannot be made after demurrer.—“After judgment on demurrer there can be no motion in arrest of judgment for any exception that might have been taken on arguing the demurrer; the reason is that the matter of law, having been already settled by the solemn determination of the court, they cannot afterwards suffer any one to come as *amicus curiæ* and tell them that the judgment which they gave, on mature de-

ern Stone Co. v. Whalen, 51 Ill. App., 512; Thifmning v. Miller, 13 Ill. App., 595; Waugh v. Suter, 23 Ill. App., 271. And where a good cause of action is defectively stated it cannot be urged in arrest of judgment. Western Stone Co. v. Whalen, 151 Ill., 472. As to irregularities cured by verdict, see *ante*, § 750.

Rule of construction.—While, as hereinbefore stated, pleadings are construed most strongly against the pleader before verdict, yet after verdict has been rendered thereon, *i. e.*, on motion in arrest of judgment, the court will intend every material fact alleged or fairly and reasonably

inferred from what is alleged upon the record; and if by such construction it will support a judgment, a motion in arrest of judgment will be denied. Pennsylvania Co. v. Ellett, 132 Ill., 654.

¹ 2 Tidd's Pr., 918.

² 3 Bla. Com., 393; Biederman v. O'Conner, 117 Ill., 493.

Objections going to the *substance* only can be heard. Nelson v. Borchemius, 52 Ill., 236.

Formal defects are cured by the verdict. Toledo, etc., Co. v. Ingraham, 77 Ill., 309; *ante*, § 750.

³ 3 Bla. Com., 393; Consolidated, etc., Co. v. Young, 24 Ill. App., 255.

⁴ Rev. Stat., Ch. 110, ¶ 57, § 56.

liberation, is wrong; but it is otherwise after judgment by default, for that is not given in so solemn a manner.'''

§ 981. **Same—How the motion shall be made.**—The statute provides that the grounds for the motion shall be particularly specified in writing and the purpose, like that in support of a motion for a new trial, is to enable the court of review to see fully upon what grounds the motion was urged and to enable it to determine whether the rulings thereon were or were not proper. Like in a motion for a new trial specific points in writing may be waived,² and when a motion in arrest of judgment assigns no specific reasons therefor and the ruling of the court denying the motion is excepted to, it seems that the party making the motion is at liberty to urge any sufficient reason in the appellate court.*

§ 982. **Same—Exceptions, when unnecessary.**—While exceptions may be taken to the decision of the court overruling motions in arrest of judgment and the party may assign for error the ruling excepted to,⁴ yet it is not necessary that an exception be taken to the decision of the court in overruling a motion in arrest of judgment, because such motion becomes part of the record without being preserved in a bill of exceptions. A bill of exceptions is only necessary to get intrinsic matters upon the record. The motion in arrest of judgment questions the sufficiency of the record to sustain the judgment and is not upon extrinsic matter.*

§ 983. **Same—Effect of granting motion in arrest of judgment.**—When any judgment shall be arrested for any defect in the record of proceedings *after the first process*, the

¹ 2 Tidd's Pr., 918; Shreffler v. Nadelhoffer, 133 Ill., 536; Independent Order of Mutual Aid v. Paine, 122 Ill., 625; s. c., 23 Ill. App., 171.

² *Ante*, § 964.

³ West Chicago St. R. R. Co. v. Coit, 50 Ill. App., 640.

⁴ Rev. Stat., Ch. 110, ¶ 62, § 61.

⁵ Bragg v. City of Chicago, 73 Ill.,

152; Nichols v. People, 40 Ill., 395; Mix v. Nettleton, 29 Ill., 245; Hill v. Ward, 2 Gilm. (Ill.), 285.

The objections which would be valid if urged in arrest of judgment will prevail if urged on a writ of error. Sweeney v. People, 23 Ill., 208.

plaintiff shall not be compelled to commence his action anew; but the court shall order new pleadings to commence with the error that caused the arrest.¹

§ 984. (e) Motion for judgment non obstante veredicto.—A motion for judgment *non obstante veredicto* (notwithstanding the verdict) may be made by the plaintiff and the plaintiff alone.² Like a motion in arrest of judgment it must be for a cause apparent upon the face of the record, but is different from a ground for arrest of judgment in that it is based upon a showing in the record that the matters pleaded or replied to, although found to be true, constitute neither a bar nor a defense to the action; that is to say, where the plea clearly confesses the action of the plaintiff and does not sufficiently avoid it, this judgment will be given on the confession, *notwithstanding the verdict*.³ It is most frequently awarded where the answer or plea confesses the plaintiff's cause of action and sets up matter in avoidance, which, although found by the jury to be true, is insufficient in law to constitute a bar or defense to the action.⁴

A judgment entered *non obstante veredicto* is in one sense a judgment upon the merits, not as disclosed by the verdict, but as exhibited in the pleadings.⁵ In this respect it differs from a repleader which, as shown,⁶ goes to the *form* or manner of pleading alone. If the defect is not merely in form but also in substance, and the court can see that no matter how the defense is presented it has no merit, judgment *non obstante veredicto* will be awarded.⁷

§ 985. Same—When the motion shall be made.—A motion for judgment *non obstante veredicto* must be made

¹ Rev. Stat. Chap. 110, ¶ 59, § 58.

² *Rand v. Vaughan*, 1 Bing. (N. C.), 787; *German Ins. Co. v. Frederick*, 58 Fed. Rep. 144.

³ *Hitchcock v. Haight*, 2 Gilm. (Ill.), 604; Steph. Pl., 97; *Broom's Com.*, 284; *Freeman on Judgments* (3rd Ed.), 7.

⁴ *Roberts v. Dame*, 11 N. H., 226; *Dewey v. Humphrey*, 5 Pick. (Mass.), 187; 2 *Elliott's Gen's. Pr.*, 997.

⁵ *Otis v. Hitchcock*, 6 Wend. (N. Y.), 433.

⁶ *Ante*, § 963.

⁷ 2 *Tidd's Pr.*, 922; 2 *Elliott's Gen'l Pr.*, 997.

after verdict and before judgment.¹ It has been said in this State that the motion should properly precede a motion for a new trial, and that if there is a motion for a new trial pending it should be withdrawn for the purpose of having the motion for a judgment *non obstante veredicto* heard and determined, and further that so withdrawing the motion for a new trial the party did not thereby lose his right to again move for a new trial.²

§ 986. (f) **Motion for judgment on special finding.**—

Where the jury returns a general verdict and special findings on questions of fact,³ and a party deems that the latter are inconsistent with the former, it is proper to move for judgment on the special findings, notwithstanding the general verdict. As before shown, the party has a right to have judgment so entered where the inconsistency between the special findings and the general verdict is irreconcilable,⁴ and the special findings of fact exclude every theory which would sustain a judgment for the plaintiff.⁵

The motion for judgment on special findings, when they are variant from the general verdict, is necessary in order to raise the question. It cannot be presented for the first time in a court of review and is not presented by motion for new trial.⁶

A motion for judgment on special findings greatly resembles the ordinary motion for judgment *non obstante veredicto*, but a motion for a judgment on special findings may be made by either party, provided such party be not the one in whose favor the the general verdict is rendered.⁷

An exception should be taken to the rule of the court in

¹ 2 Tidd's Pr., 928.

² Stein v. Chicago & G. T. Ry., 44 Ill. App., 38.

³ Ante, § 944.

⁴ Ante, § 956.

⁵ Stein v. Chicago & G. T. Ry. Co., 41 Ill. App., 38.

⁶ Terre Haute, etc., R. R. Co. v. Clark, 73 Ind., 168; Tritlipo v. Lacy, 55 Ind., 287.

Motion for judgment on special finding not a waiver of right to move for a new trial.—The defendant does not by moving for a judgment in his favor on the special finding lose his right to move for a new trial. Chicago & N. W. Ry. Co. v. Dimick, 96 Ill., 42.

⁷ Brown v. Searle, 104 Ind., 218.

refusing to enter judgment on the special findings. It is requisite for the same reasons that an exception must be entered to the rulings of the court on motion for new trial or in arrest of judgment.¹

¹ *Ante*, §§ 976, 982.

PART IX.

ENTRY OF JUDGMENT.

ENTRY OF JUDGMENT.

ARTICLE I.

JUDGMENT—COSTS.

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| <p>§ 987. Definition.
988. Kinds of judgment.
989. Classification as to their nature.
990. When and how the judgment entered.
991. Same—Taking case under advisement.
992. Same—Refusal to enter judgment—<i>Remittitur</i>.
993. Form of judgment—generally.
994. Joint and several judgments.
995. Judgment by default.
996. Confession of judgment.
997. (a) Conditions upon which judgment by confession entered—Practice.
998. (b) Proof and presumptions.
999. (c) Setting aside judgment by confession.</p> | <p>§ 1000. (d) Review—extent of.
1001. Entries <i>nunc pro tunc</i>.
1002. Correcting errors of fact in entry of judgment.
1003. Extent of lien created by judgments. (a) On real property.
1004. (b) Upon personal property.
1005. (c) Against the body.
1006. (d) Priority of lien.
1007. Setting aside judgment entered upon verdict.
1008. Costs. (a) Generally.
1009. (b) When the plaintiff shall recover.
1010. (c) When defendant shall recover.
1011. (d) Definition of costs on appeal.
1012. (e) How costs taxed.</p> |
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§ 987. **Definition.**—A judgment is the sentence of the law pronounced by the court upon matters contained in the record. It is the answer of the court to the problem before it and not the process by which the answer has been obtained. It is the conclusion which naturally and regularly follows from the premises of law and fact presented by the issue and decided on the argument or trial; and, when rendered by the plaintiff, is, in fact, the *remedy* prescribed by the law for the redress of the injury complained of, the suit or action being wholly the vehicle or means of attaining the administration of it.¹

¹ 3 Bla. Com., 395; Legnard v. Crane, 55 Ill. App., 496; Baldwin v.

Although awarded by the court, the judgment is not considered to be the determination or sentence of the court, but is considered to be the act of law pronounced and declared by the court after due deliberation and inquiry and therefore style of the judgment is not that it is decreed or resolved by the court but that "it is considered" that the plaintiff or defendant do recover, etc.¹

A judgment is the sentence of law declared by the court. It is an act done and presumably is entered *instanti*.² It must be specific and certain and must determine the rights recovered or the penalties imposed and be in such form and manner that the defendant may readily understand and be capable of performing it.³ Furthermore, when the judgment is pronounced it is conclusive upon the parties in the cause and their privies.⁴ And the cause of action is merged into the judgment; that is to say, after a valid judgment is entered another suit cannot be maintained on the cause of action upon which the judgment was entered, but any subsequent proceeding must be for the enforcement of the judgment and not the cause of action. Even the entry of judgment by confession in one court is a merger of the cause of action on which a suit has theretofore been begun in another court and will conclude such action.⁵

McClelland, 50 Ill. App., 645; Coats v. Barrett, 49 Ill. App., 275; Crippen v. People, 8 Mich., 117.

¹ 3 Bla. Com., 396; 2 Burrill's Pr., 244.

² Baldwin v. McClelland. 50 Ill. App., 645.

³ People v. Pirfenbrink, 96 Ill., 68.

⁴ Horton v. Critchfield, 18 Ill., 133; Arenz v. Reihle, 1 Scam. (Ill.), 340; Davis v. Hamilton, 53 Ill. App., 94.

⁵ Mount v. Scholes, 120 Ill., 394.

General rule regarding conclusiveness.—It is a universal rule that a judgment entered by a court having general jurisdiction of the class of cases to which the one in issue belongs and also of the person, will be presumed to have been regularly entered upon proper proof, unless

the contrary affirmatively appears by the record itself. Chicago, R. I. & P. Ry. Co. v. Town of Calumet, 151 Ill., 512; Hermann v. Pardridge, 79 Ill., 471; Wilson v. Nilson, 44 Ill. App., 209; Blair v. Ray, 5 Ill. App., 453.

A judgment is only conclusive upon the parties in respect to the grounds actually covered by it and the law and the facts necessary to uphold it. Hyde v. Howes, 2 Ill. App., 140.

As to judgment of court in sister state.—A judgment rendered by a court in a sister state is regarded as a domestic judgment and not as a foreign judgment. The only question that can be raised in a suit upon such judgment in this State is

§ 988. **Kinds of judgments.**—Judgments may be considered to be of three kinds, viz. :

1. Where the *facts* are confessed by the parties and the law determined by the court, as in the case of judgment on demurrer.¹
2. Where the law is admitted by the parties and the *facts* disputed, as in the case of judgment on demurrer; and
3. Where one of the parties fails to pursue his litigation, in which the action is prematurely terminated, as in the case of judgment be default, cognovit, nonsuit, etc.²

§ 989. **Classification as to their nature.**—Judgments are, according to their nature, interlocutory or final.

Interlocutory judgments are either such as are given in an

whether it is or is not a judgment or in other words whether the court had jurisdiction of the subject matter and of the persons of the parties. If the record shows that the court had jurisdiction it is conclusive of the rights of the parties and no evidence can be urged to impeach it, but where the record fails to show proper service or appearance of the defendant he may then show that he was not within the jurisdiction of the court and did not in any manner submit himself thereto. *Horner v. Spelmann*, 78 Ill., 206; *Zepp v. Hager*, 70 Ill., 223; *Belton, Admx. v. Fisher*, 44 Ill., 32; *Bimeler v. Dawson*, 4 Scam., 536; *Kimmel v. Scultz*, 1 Ill. (Breese), 169.

Exception.—As to land situate in this State our own courts will construe a will and parties are not concluded by the construction of a court of another state regarding the same. *Osburn v. McCartney*, 121 Ill., 408.

¹ *Ante*, Vol. 1, § 640.

The demurrer to a declaration admits every material allegation and there is nothing left to be inquired

into, but the amount of the damages sustained by the plaintiff. *Binz v. Tyler*, 79 Ill., 248.

A judgment on a demurrer acts by way of estoppel and is as conclusive of the facts confessed by the demurrer as a verdict finding the same facts would be; that is to say the facts established by a judgment on demurrer can never afterwards be contested between the same parties or their privies. *Nispen v. Laparle*, 74 Ill., 306.

A judgment on a demurrer to a plea is always conclusive.

Where a plaintiff demurs to a plea and elects to stand by his demurrer and judgment on such demurrer, when one of the pleas answers the whole declaration is a final judgment for the defendant. *Bissell v. City of Kankakee*, 64 Ill., 249.

And when the plea is found to be bad a final judgment may be entered against the defendant. *Clemson and Waters v. State Bank of Illinois*, 1 Scam. (Ill.), 45.

² *Ante*, §§ 623, 624 and 923; 2 *Burrill's Pr.*, 245.

intermediate stage of the cause upon some plea or proceeding, which does not finally determine or complete the suit (of which description are some judgments for the plaintiff upon pleas in abatement of the action;)¹ or they are such as merely determine the right of the plaintiff to recover judgment without ascertaining the amount to which he is entitled, and which require further proceedings to render them complete. Of this description are judgments in default, and in some case, on demurrer, etc.; consequently the style of these judgments is that the party "ought to recover," etc.²

Final judgments are such as at once put an end to the action by declaring that the plaintiff either has, or has not, entitled himself to recover the debt and damages he sues for.³ A final judgment puts an end to the action so that nothing remains to be done except to execute the judgment.⁴ Final judgments are either rendered in the first instance, or as a consequence of the entry of the interlocutory judgment. Judgments for the defendant, except in actions for replevin, are always final.⁵

A judgment to be final must terminate and completely dispose of the action. Whether a judgment is or is not final is not to be determined inferentially from the fact that costs are adjudged and execution granted against one of the parties. Costs are regulated by statute and are an incident to final judgment, but not necessarily proof of it.⁶

§ 990. When and how the judgment entered.—After the jury is returned its verdict has been discharged (or after the finding of the court upon the facts when the case has been tried without a jury) the next proceeding is the entry of the judgment. The judgment is presumed to be entered *instanti*

¹ In an action at law on a plea in abatement on a finding of the issues for the plaintiff the judgment is interlocutory or final according to the nature of the action. In an action for damages in assumpsit or tort it is interlocutory, but an action of debt for a sum certain or for a specific recovery of lands or goods

it is final. *Steele v. Grand Trunk J. Ry. Co.*, 20 Ill. App., 366.

² 3 Bla. Com., 396, 397; 2 Burrill's Pr., 246.

³ 3 Bla. Com., 398.

⁴ *Sweet v. Merki*, 27 Ill. App., 245.

⁵ 2 Burrill's Pr., 246.

⁶ *Lee v. Yanaway*, 52 Ill. App., 23.

but in actual practice the Clerk makes a minute of the verdict and judgment upon his minute book and the same is subsequently entered at large upon the record. The judgment so entered is not, in this State, signed by the Judge who pronounced the judgment, as in some other states, but the judgment is presumed to be correctly entered. The *entry* by the Clerk is purely a ministerial act and he has no power to shape such judgment. If it is not entered as given to him it is not the judgment of the court and the act of the Clerk in entering it will be considered as a mistake, a misdemeanor, or a crime. The *rendering* of the judgment is a judicial act and can be alone performed by the Judge and yet a judgment is not a judgment until it is recorded.¹

In practice the Judge keeps minutes of his own and thereupon makes a memorandum of every judgment which he renders. The law does not require him to do this and therefore such memorandum cannot be used by a party to prove what the judgment really was, but such memorandum may be used by the Judge himself as a memorandum to correct the form of the judgment as entered by the Clerk,² even after the expiration of the term for correcting *errors in form*.³

The judgment remains under the control of the court during the term at which it was entered of record and during such term it may be modified, set aside, or vacated. After such term, however, it can only be amended as to matter of form and for the purpose of making apparent that which existed before.⁴

¹ *Kayser v. Hall*, Admr., 85 Ill., 511; *Edwards v. Evans*, 61 Ill., 492; *American Exchange Nat. Bk. v. Moxley*, 50 Ill. App., 314.

² *Launtz v. Heller*, 41 Ill. App., 528.

³ *Ante*, § 743; *Ayer v. City of Chicago*, 149 Ill., 262.

Amendments in *affirmance* of a judgment may be made at a subsequent term if there is anything by which to amend and proper notice be given to the adverse party; but

amendments in *derogation* of the judgment cannot be made at a term subsequent to that in which the final judgment was entered. *Felden v. People*, 128 Ill., 595.

As to amendment after appeal, see *Rafferty v. McGowan*, 136 Ill., 620.

⁴ *Baldwin v. McClelland*, 152 Ill., 42; *Stanton v. Kinsey*, 151 Ill., 801; *State S. Inst. v. Nelson*, 49 Ill., 171; See further *ante*, Vol. I., § 743.

§ 991. **Same—Taking case under advisement.**—The court has a right to take a case under advisement for a reasonable time and even when judgment is not entered until a succeeding term the propriety of the practice will not be considered, where no injury can result therefrom.¹

A case taken under advisement may be decided and judgment entered in vacation and a judgment so entered may, for good cause shown, be set aside, or modified, or excepted to at the next term of court, upon motion filed on or before the second day of the term, of which motion the opposite party or his attorney shall have reasonable notice. If not so set aside or modified it shall thereupon become final.²

The practice of delaying the decision of a case for a long time is objectionable and has been condemned, but has not been held to be sufficient ground for reversal,³ except that a judgment entered in *vacation* eleven months after the verdict was rendered, has been held to be fatally erroneous.⁴

§ 992. **Same—Refusal to enter judgment—Remittitur.**—Upon a verdict being rendered by the jury for too great an amount it is a common and approved practice for the court to refuse to render judgment thereon until the same is reduced to the proper amount by the filing of a *remittitur* by the plaintiff. It is said to be almost essential to the proper conduct of jury trials that the court should possess such power.⁵

§ 993. **Form of the judgment—Generally.**—The nature and form of the judgment will, of course, vary according to the nature of the action and of the issue, the mode of the trial, the result of the decision and the circumstances of the case in general. Something of the nature and effect of the judgment will be hereinbefore found in connection with the amount of the recovery in each of the several forms of action.⁶

¹ Hosmer v. Hunt Drainage District, 134, Ill., 360.

² Rev. Stat. Chap 37, ¶ 65, § 30; Toledo, P. & W. Ry. Co. v. Eastburn, 79 Ill., 140.

³ Ditch v. Trustees, 8 Ill. App., 294.

⁴ Jared v. Van Vleet, 13 App., 334.

⁵ Libby, McNeil & Libby v. Scherman, 50 Ill. App., 123. Further see "Verdict," *ante*, §§ 943, 951.

⁶ *Ante*, Vol. I, Part. III.

A judgment is an entirety and the entry of it must either be perfect in itself or be capable of being made perfect by reference to other parts of the record, or the papers on file in the case.¹ A judgment can only be entered as to a finding upon all the issues,² and the amount of the judgment should not be entered in figures. It should, in all cases, be written out in letters.³ All judgments for money must be certain and find the sum for which they are rendered. If they fail to do so they will be fatally defective.⁴

No particular form of words is absolutely necessary to a valid judgment. If it be final, clear, capable of being performed, and do substantial right between the parties, it will not be reversed for want of accuracy of form.⁵ While no particular form of words is necessary the forms found by long usage to be sufficient will not generally be departed from. This work is not designed as an assistant to Clerks of courts, and space cannot be given herein to particular forms of judgments. For specific form of any particular kind of judgment reference is made to works treating more particularly thereof.⁶ And a few suggestions are hereto subtended as notes.⁷

¹ Haines v. People, 19 Ill., 354.

² Hackett v. Jones, 34 Ill. App., 562; see *ante*, § 944, "What the verdict must comprehend."

³ Dukes v. Rowley, 20 Ill., 21; Linder v. Monroe, 38 Ill., 388.

⁴ Carpenter v. Shereby, 71 Ill., 427; Pittsburg, etc., Ry. Co. v. City of Chicago, 53 Ill., 80.

⁵ Pierson v. Hendrix, 88 Ill., 34; Johnson v. Gillett, 52 Ill., 358.

⁶ See Burrill's Pr., Vol. 2; 2 Swan's Pr., Ch. XXI.-XXIX.

⁷ On overruling a demurrer to a plea in abatement the proper judgment is that the writ be quashed. Motherell v. Beaver, 2 Gilm. (Ill.), 69; further as to "Judgment on Demurrer," see *ante*, § 640.

A judgment in debt must express the amount of the "debt" for if it is a judgment in damages only it

will be erroneous. Maguire v. Town of Xenia, 54 Ill., 299.

In debt on a bond, the proper judgment for the plaintiff is that he recover the amount of the penalty as the debt, to be discharged by the payment of the damages found and costs. Keegan v. Kinnare, 123 Ill., 280; Wales v. Bogue, 31 Ill., 464; Eggleston v. Buck, 31 Ill., 254; Stose v. People, 25 Ill., 600.

It is irregular to render a judgment in "damages" in an action of debt, but the irregularity therein is cured by the statute. Rockford R. L. & St. L. Ry. v. Steele, 69 Ill., 253.

In *assumpsit* it is erroneous to enter a judgment for debt and damages. Lyon v. Barney, 1 Scam. (Ill.), 387.

A judgment for the amount found with the words "being the amount

A mere error in form where the judgment is for the true amount of the indebtedness, or damages, will be no ground for reversal in a court of review.¹ Such judgment will be corrected and the proper judgment there entered.²

§ 994. Joint and several judgments.—Where an action on contract has been brought against several defendants jointly, it must be rendered jointly against all or none, except that if a personal defense, such as infancy or bankruptcy be successfully interposed, judgment may be rendered against those to whom such defense does not apply. If all that have been made joint defendants are not shown to be liable, the plaintiff should amend his declaration by dismissing the defendants not liable and then the rule must be applied and judgment

of rent due, in form aforesaid by the jury herein found due, has been held to be good judgment, either in debt or assumpsit. *Brown v. Keller*, 30 Ill., 68.

In garnishment, the judgment should be in the name of the defendant in the writ against the garnishee. *Chicago, R. I. & P. Ry. Co. v. Mason*, 11 Ill. App., 525. Further, see *ante*, § 377.

Sufficient form—example.—A judgment in these words: "The court being fully advised in the matter finds the issues for the plaintiff, and provides to render judgment in favor of the said plaintiff, and against the said defendant, for the sum of two hundred and forty-seven dollars and seventy-five cents and costs of this suit, and execution is awarded for the same," is not in the approved form, but when tested by the rules of law has been found to be sufficient. *Coats v. Barrett*, 49 Ill. App., 275.

An entry in the following words: "The jury retired and returned the following verdict: We, the jury, find for the plaintiff in the sum of

§200, and the same is the judgment of the court, with costs of this suit," was held to be a sufficient judgment when collaterally attacked. *Schemmerhorn v. Mitchell*, 15 Ill. App., 418.

Insufficient Form—Example.—The words "whereupon is considered by this court have and recovered of said defendant the sum of" is no judgment because it is not for anybody or in favor of anybody. *Fuller Watchman's Electrical Detector Co. v. Louis*, 50 Ill. App., 428.

An entry in the words "judgment entered upon the verdict for three thousand dollars and costs" is likewise no "judgment." *Martin v. Barnhart*, 39 Ill., 9.

A pretended entry of a judgment in the words "whereupon the court entered judgment upon the finding" is not a judgment, because it shows no action of the court upon that finding. *Faulk v. Kellums*, 54 Ill., 189.

¹ Rev. Stat., Ch. 7, ¶ 3, § 3.

² *Masters v. Masters*, 13 Ill. App., 611.

entered against all the then defendants. A joint judgment is a unit. If it is vacated as to one it is vacated as to all and if it is paid or discharged as to one it is paid or discharged as to all. Each defendant is liable for the whole and cannot procure his discharge by proportionate payment. Each is held so long as his co-defendants are held. If, however, any of the named joint defendants have not been served or appeared in the suit he in fact is not a party to the suit and the judgment may be entered against the others.¹

The rule does not apply to actions for torts. In such cases the judgment may be rendered against any shown to be liable and a joint judgment cannot be entered against two in an action *ex delicto* where both are not shown to be guilty. And a joint judgment may be rendered when the action is shown to be joint.²

§ 995. Judgment by default.—"Judgment by default" technically means a judgment rendered against a defendant who has been served with the process and who fails to appear. By the common usage of the term, however, it designates a judgment entered because of a failure to obey some rule or order of the court as well as a judgment rendered upon a failure to enter an appearance. Where there is a failure to appear, judgment, which is strictly a "judgment by default," may at once be entered; but if there is an appearance the usual practice is to take a rule upon the defendant to show cause why judgment should not be entered. If the rule

¹ Kingsland v. Koeppe, 137 Ill., 344; Clafflin v. Dunne, 129 Ill., 241; Potter v. Gronbeck, 117 Ill., 404; Chicago & St. L. R. R. Co. v. East-erly, 89 Ill., 156; Robinson v. Brown, 82 Ill., 279; People v. Harrison, Admr., 82 Ill., 84; Goit v. Joyce, 61 Ill., 489; Rees v. City of Chicago, 38 Ill., 322; Fender v. Stiles, 31 Ill., 460; Morrow v. People, 25 Ill., 330; s. c., 16 Ill. App., 505; Chicago, B. & Q. R. R. Co. v. Coleman, 18 Ill., 297; Brockman v. McDonald, 16 Ill.,

112; Dow v. Rattle, 12 Ill., 373; Smith v. Byrd, 2 Gilm. (Ill.), 412; Rattan v. Stone, 3 Scam. (Ill.), 540; Cooper v. McNeil & Higgins Co., 43 Ill. App., 350; Hartley v. Lybarger, 3 Ill. App., 524; Logan v. Burr, 3 Ill. App., 458; Dally v. Young, 3 Ill. App., 39; *ante*, §§ 19 and 34.

² Ragor v. Kendall, 70 Ill., 95; Wallace v. Espy, 68 Ill., 143; Wight v. Meredith, 4 Scam. (Ill.), 360. *Ante*, § 44.

is then not complied with the defendant is called and an assessment of damages made and judgment entered. This latter judgment is by the common application of the term, designated as a judgment by default.¹

As hereinbefore shown,² a plaintiff is not entitled to a judgment by default until he is himself in a position to demand that the defendant proceed, and if a default judgment is entered the defendant can have it set aside for good cause shown during the term at which the judgment is entered and at the designation of the court. Furthermore, the default admits the existence of a cause of action but does not admit the damages, and the ~~plaintiff~~ ^{defendant} has a right to be heard on the assessment of damages in addition to the right to cross-question the plaintiff's witnesses thereon.³

No default judgment can be entered against a person served with process or appearing, although he be named as a defendant in the case.⁴ And the fact that a part of several defendants have appeared will not warrant the entry of an additional judgment against others not having appeared or having been served.⁵

Furthermore, in an action against two defendants jointly, one of whom is in default and the other of whom has answered, final judgment cannot be entered against the defendant in default when no proceedings are taken against the other. The proper practice is to try the issue as to the defendant who has pleaded and then have the same jury assess the damages against both the defendants. The judgment entered must be joint and the defendant in default has a right to appeal.⁶

§ 996. Confession of judgment.—By “confession of judgment” is meant the voluntary submission to the jurisdiction of the court, given by consent and without service of process.⁷

¹ Compare Elliott's Gen'l Practice, § 1024.

² *Ante*, § 801.

³ *Ante*, §§ 801-802; Baldwin v. McClelland, 152 Ill., 42; Souerbry v. Fisher, 62 Ill., 135; Woodruff v. Matheny, 55 Ill. App., 350; Smith v. Little, 53 Ill. App., 157.

⁴ *Warren v. McHatten*, 2 Scam. (Ill.), 32.

⁵ *Klem v. Dewes*, 28 Ill., 316.

⁶ *Waugh v. Suter*, 3 Ill. App., 271.

⁷ *First Nat. Bank v. Garlinghouse*, 53 Barb. (N. Y.), 619.

What is commonly meant by "confession of judgment" is a confession of judgment on "warrant of attorney" although strictly speaking, a confession of judgment may be by the entry of the cognovit, as hereinbefore indicated.¹ The entry of a judgment upon a cognovit differs from an entry of judgment upon warrant of attorney in that the former is executed during the progress of the trial and judgment then entered thereon, while the warrant of attorney is executed prior to the commencement of the suit. and frequently at the time of the creation of the indebtedness as a security therefor.²

The confession of judgment upon warrant of attorney in term time is a proceeding that is familiar to the common law when applied to actions on contract, but a confession of judgment in vacation or upon a cause of action arising from tort is unknown to the common law and in derogation of it. Consequently, courts have general jurisdiction to enter judgments upon warrant of attorney in actions upon contract, but in actions arising from torts the jurisdiction is strictly confined to that prescribed by the statute.³

The statute provides that "any person, for a debt *bona fide* due may confess judgment by himself or attorney duly authorized, either in term time or vacation without process. Judgments entered in vacation shall have like force and effect, and from the date thereof become liens, in like manner and extent as judgments entered in term time."⁴ Where the power (warrant) of attorney authorizes an attorney of the state to appear before a court of record within the state⁵ and confess judgment for the amount due upon a note to which such power (warrant) is attached, the power may be exercised by the confession of judgment either in term time or vacation before the Clerk of the court. The Clerk has power to enter judgment in vacation and the entry of judgment by the Clerk must precede the issu-

¹ *Ante*, § 624.

² *French v. Willer*, 126 Ill., 611.

³ *Gardner v. Bunn*, 132 Ill., 403;
French v. Willer, 126 Ill., 611;
Bush v. Hanson, 70 Ill., 480; *Wille*
ler v. French, 27 Ill. App., 76.

⁴ Rev. Stat. Chap. 110, ¶ 66, § 65;
Keith v. Kellogg, 97 Ill., 147; *Oppen-*
heimer & Co. v. Giershofer & Co.,
54 Ill. App., 33.

⁵ As to form of warrant of attorney
see *ante*, § 624.

ance of an execution. An execution issued without the entry of a judgment by the Clerk will be absolutely void.¹

The entry of a judgment by the Clerk upon a warrant of attorney is not a judicial act. The judgment is entered in pursuance of the contract which acknowledges the debt and authorizes the Clerk to enter judgment, and the judgment so entered is a contract acknowledged of record. It is a conclusion of law. Such a proceeding is in derogation of the common law and is valid only in cases affirmatively appearing to be within the statute.² The court obtains jurisdiction of the person of the defendant by the appearance of the attorney as authorized by the power. Such attorney is an attorney in fact under special limit of authority which must be strictly construed.³

¹ Conkling v. Ridgely, 112 Ill., 36; Keith v. Kellogg, 97 Ill., 147; Ling v. King & Co., 91 Ill., 571; Middleton v. White, 35 Ill., 114.

² Durham v. Brown, 24 Ill., 93; Dearborn Laundry Co. v. Chicago & A. R. R. Co., 55 Ill. App., 438; Bunn v. Gardiner, 18 Ill. App., 94.

³ Baldwin v. Freyendall, 10 Ill. App., 106.

When judgment may be entered before maturity of the note.—Judgment cannot be entered upon a warrant of attorney upon the same day such warrant and note is executed, although the note be payable on demand and the warrant authorize the entry of judgment thereon "at any time" thereafter. Graves v. Whitney, 49 Ill. App., 435; White v. Jones, 38 Ill., 159; Waterman and Hall v. Jones, 28 Ill., 54; see Cummins v. Holmes, 11 Ill. App., 158.

But where the warrant authorizes the confession of judgment upon a note "at any time" it may be done at any time after the delivery of the note even before the maturity thereof. The warrant and note being construed together as parts of one

and the same transaction the contract evidently justifies such an entry. McDonald v. Chisholm, 131 Ill., 273; Adam v. Arnold, 86 Ill., 185; Elkins v. Wolfe, 44 Ill. App., 376; Alldritt v. First Nat. Bank of Morrison, 22 Ill. App., 192; s. c., 22 Ill. App., 24; Towle v. Gonter, 5 Ill. App., 409.

Warrent sufficient in form.—A sufficient form of warrant of attorney for ordinary cases has been hereinbefore given, ante, § 624. But a warrant containing a recital in the following words has been held to be sufficient to authorize the confession of judgment before the maturity of the note: "In consideration * * * we do hereby make * * * and appoint P., etc., to be our true and lawful attorney * * * for us and in our name * * * to appear before any court of record * * * at any time after the date hereof, and to waive service of process, and confess a judgment against us, or either of us, and in favor of the holder of this note," etc. Farwell v. Huston, 151 Ill., 239.

A warrant of attorney need not be

Not in forcible detainer.—A judgment cannot be entered by confession on warrant of attorney in a forcible detainer suit, although such warrant be included within the terms of the lease. Such an entry of judgment is impliedly prohibited by the particular mode or proceedings provided by the statute relating to proceedings on forcible entry and detainer. In an effort to enter such judgment the court acquires no jurisdiction of the person of the defendant.¹

§ 997. (a) **Conditions upon which judgment by confession entered—Practice.**—The warrant of attorney to confess judgment is a waiver by the defendant of the service of process and an authority for an attorney to appear in the cause in his behalf and permit judgment therein to be entered. In

under seal. *Truett v. Wainwright*, 4 Gilm. (Ill.), 411.

Who may execute warrant to confess judgment.—One partner cannot confess judgment in the name of his copartner. *Sloo v. The State Bank of Illinois*, 1 Scam. (Ill.), 428. As to who can confess judgment in general see *ante*, §§ 623, 624.

Quære.—Will a judgment confessed be valid if for a larger amount than is actually due? *Sloo v. State Bank of Illinois*, 1 Scam. (Ill.), 428.

Can a partner who did not execute the warrant of attorney ratify a judgment confessed by the other partner? *Id.*

1. *Attorneys' fees may be included when.*—When the power of attorney authorizes the confession of judgment upon a promissory note and for a "reasonable attorney fee" such an agreement rests upon a valuable consideration and judgment may be entered for such sum as the court determines to be "reasonable." *Weigley v. Matson*, 125 Ill., 64; *Campbell v. Goddard*, 123 Ill., 220; *Ball v. Miller*, 38 Ill., 110.

Consolidation of notes.—In the

confession of judgment upon several notes it is competent for the court to enter judgment for the amount of all together. A court of general jurisdiction has power to consolidate different actions of the same nature between the same parties. *ante*, § 720, "Consolidation of Causes." And it is not necessary that an order should first be made authorizing such an entry. *Iglehart v. Chicago Marine, etc., Ins. Co.*, 35 Ill., 514.

For bona fide purpose.—A judgment entered by confession to be valid, must be for an honest purpose on a bona fide debt. A confession of judgment for a fraudulent purpose as upon forged notes, and without the knowledge of the parties to the suit will be *coram non jure* and the judgment will be void for the want of jurisdiction of the defendant, and all proceedings thereunder will be void. *Bullen v. Dawson*, 139 Ill., 633; *Mount v. Scholes*, 120 Ill., 394.

¹ *French v. Willer*, 126 Ill., 611; *Willer v. French*, 27 Ill. App., 76; *Burns v. Nash*, 23 Ill. App., 552.

proceeding to take confession of judgment therefor no process of the court need be issued, but the other steps necessary to the procuring of a judgment in other cases must be followed; that is to say, there must be a declaration filed in the cause and proof must be made of the amount of the indebtedness in compliance with the averments contained in the declaration. If upon a written instrument there must be proof of its execution. Furthermore there must be proof of the authority of the attorney who appears for the defendant to confess judgment. In other words the warrant of attorney must be filed as evidence and proof made of its execution by the defendant. Proof of the execution of a warrant of attorney is usually made and may always be made by filing an affidavit of the genuineness of the signature of the defendant thereto, and when the judgment is to be entered by the Clerk in vacation such proof *must* be made by affidavit because the Clerk cannot hear evidence. There must also be filed the defendant's plea of confession entered by his attorney under authority of the warrant. A Clerk in entering judgment upon a warrant of attorney can only look to the plea of confession for he can hear no evidence and can determine nothing. The warrant therefore must be clear and explicit and must be strictly pursued. An *admission* of indebtedness is not sufficient; express authority to enter judgment must be shown.¹

¹ Gardner v. Bunn, 132 Ill., 403; Campbell v. Goddard, 117 Ill., 251; Elliott v. Daiber, 42 Ill., 467; Frye v. Jones, 78 Ill., 627; Iglehart v. Chicago Marine, etc., Co., 35 Ill., 514; Ball v. Miller, 33 Ill., 110, Durham v. Brown, 24 Ill., 93; Bunn v. Gardner, 18 Ill. App., 94; Stein, Block & Co. v. Good, 16 Ill. App., 516; compare Lewis v. Barber, 21 Ill. App., 638.

Jurisdiction is acquired over the person of the defendant by virtue of the warrant of attorney, and for this reason it is that the execution thereof must be proved. It is a contract requiring proof. Anderson v. Feld, 6 Ill. App., 307.

Affidavit of execution of warrant of attorney.—The words "Charles Potter, being first duly sworn, doth depose and say, that he is well acquainted with the handwriting of Hall and Brother and that he believes the signature to the within note and power of attorney to be true and genuine" was held to be a sufficient affirmation of the execution of such instruments by M. V. Hall, a member of said firm. It is said that it is immaterial how the affiant acquired his knowledge of said handwriting. Hall v. Jones, 32 Ill., 38.

Affidavit to further show that maker is alive, when.—When the warrant of attorney has been executed

§ 998. (b) **Proof and presumptions.**—There is a broad distinction between judgments which are confessed in open court and those judgments which are entered by the Clerk. When a judgment is entered in open court a judicial act is performed and every legal presumption will be indulged in favor of the validity of the judgment, but where the judgment is entered by the Clerk, the proceeding being statutory and in derogation of the common law, no presumption will be indulged in favor of it.'

It is a well established principle that authority to confess judgment without process must be clearly given and strictly

more than a year and a day the practice in this State, following practice in Great Britain, requires that an affidavit be filed showing that the debtor is still alive and that the debt, or at least a portion of it, is still due. *Hinds v. Hopkins*, 28 Ill., 344; *Young v. Earle*, 28 Ill., 344; *Stein & Co. v. Good*, 16 Ill. App., 516; *Alldritt v. First Nat. Bank*, 22 Ill. App., 24; 1 *Tidd's Pr.*, 492, 552, 553, 599.

Certificate of notary public no proof of execution.—The certificate of a notary public that the person executing the warrant of attorney is personally known to him to be the same person whose name is signed to the power of attorney, and that he appeared before him and acknowledged the execution thereon as his free and voluntary act, is not proof of the execution sufficient to sustain a judgment entered thereon. *Oppenheimer & Co. v. Giershofer & Co.*, 54 Ill. App., 38.

When presumptions entertained.—When judgment is entered in open court it will be presumed that there was proof of the execution of the warrant of attorney before the judgment was confessed, although the same does not appear of record. *Iglehart v. Chicago Marine, etc., Co.*, 35 Ill., 514.

A declaration that is so defective as to be bad on demurrer will be cured by the entry of judgment by confession. *Iglehart v. Chicago Marine, etc., Co.*, 35 Ill., 514. Further as to irregularities cured by verdict, see *ante*, § 750.

Record need not show confession by attorney at law.—It is not necessary that the record of a judgment entered by confession on warrant of attorney should show that such judgment was confessed by an attorney at law. It is presumed that a court knows its own officer and after judgment is entered it will be presumed that the confession was by an attorney at law as required by the warrant. *Iglehart v. Chicago Marine, etc., Co.*, 35 Ill., 514.

¹ *Farwell v. Huston*, 151 Ill., 239; *Hansen v. Schlesinger*, 125 Ill., 230; *Osgood v. Blackmore*, 59 Ill., 261; *Hall v. Jones*, 32 Ill., 38; *Roundy v. Hunt*, 24 Ill., 597; *Anderson v. Field*, 6 Ill. App., 307; *Follansbee v. Scottish Am. Mortgage Co.*, 5 Ill. App., 17.

A judgment entered in vacation will be presumed to be regular until the contrary appears from the files or otherwise. *Thomas v. Mueller*, 106 Ill., 36.

pursued. This is applicable to the warrant of attorney, but the instrument is subject to the rules of construction applicable to other written contracts. Such an instrument is only a contract of security for the debt and will be so construed as to give effect to the presumed intention of the parties.¹

The warrant of attorney, upon which a judgment is entered by the Clerk in vacation, becomes part of the record without the aid of a bill of exceptions.²

§ 999. (c) **Setting aside judgment by confession.**³—For the purpose of doing justice, courts of law exercise equitable jurisdiction over judgments that have been entered by confession. Therefore, upon showing equitable grounds for setting aside a judgment entered by confession, the court will vacate such judgment and permit the defendant to put in his defense to the plaintiff's alleged cause of action. The practice is for the defendant, against whom a judgment has been entered upon warrant of attorney, to move the court to set aside such judgment, supporting his motion by affidavit, showing equitable grounds therefor. Upon a motion to set aside a default judgment, the question before the court is not whether there have been errors of law, but whether there is any equitable reason why the judgment should be vacated. If the defendant fails to show a defense on the merits, the court will not set aside the judgment, but if the plaintiff appears not to be entitled to a judgment it is the duty of the court to vacate it. The general practice now is, especially where the right of the plaintiff to recover is left in doubt, not to set aside the judgment absolutely, but to permit it to stand as the security of the plaintiff till after the trial of the issues joined in the case. If the defense is successful, the judgment will be set

¹ French v. Willer, 126 Ill., 611; Holmes v. Bemis, 124 Ill., 453; Graves v. Whitney, 49 Ill. App., 435; Holmes v. Parker, 25 Ill. App., 225.

² Baldwin v. McClelland, 50 Ill. App., 645; Schmidt v. Bauer, 33 Ill. App., 92.

Where judgment is entered by confession upon a lease in term time a copy of the lease of the declaration is no part of the record. Frank v. Thomas, 35 Ill. App., 547.

³ As to setting aside judgment entered upon verdict, see *post*, § 1007.

aside; otherwise it will be permitted to continue in full force and effect.¹

Where a judgment by confession is entered in term time it may be set aside for good cause shown during that term,² and where judgment by confession is entered by the Clerk in vacation, application to set it aside should be made at the next succeeding term.³ Furthermore, where the warrant of at-

¹ Farwell v. Huston, 151 Ill., 239; Packer v. Roberts, 140 Ill., 9; Holmes v. Parker, 125 Ill., 478; Norton v. Allen, 69 Ill., 306; Knox v. The Winsted Savings Bank, 57 Ill., 330; Pitts v. Magie, 24 Ill., 610; Hall v. Jones, 32 Ill., 38; Lake v. Cook, 15 Ill., 353; Seaver v. Siegel, 54 Ill. App., 632; Mumford v. Tolman, 54 Ill. App., 471; Chicago Fire Proofing Co. v. Park Nat. Bank, 44 Ill. App., 150; Gordon v. Goodell, 34 Ill., 429; Martin v. Stubbings, 20 Ill. App., 381; Carpenter v. First Nat. Bank, 19 Ill. App., 549; Campbell v. Goddard, 17 Ill. App., 383; Gibboney v. Gibboney, 2 Ill. App., 322.

Judgments entered upon warrant of attorney are often opened for the purpose of letting in the defense of one who was precluded by accident, fraud, or otherwise, from making such defense at the proper time. The judgment itself is not generally vacated until the merits are determined by the defendant and then it will be vacated or permitted to continue in force according to the right of the matter. Hall v. Jones, 32 Ill., 38.

The defense let in may be to the whole or a part of the plaintiff's alleged cause of action. An uncontradicted affidavit that judgment was entered for a larger amount than was due, entitles the defendant to have the judgment set aside and he allowed to plead to the

disputed portion of the judgment. Lanyon v. Lanz & Co., 43 Ill. App., 654.

But where the affidavit supporting the motion does not deny that the warrant of attorney was voluntarily given and for a good consideration, but only avers that the judgment includes usurious interest will not entitle the defendant to have the judgment set aside if the plaintiff remit a sum equal to the usury. Ralph v. Baxter, 66 Ill., 416; further as to excessive damages, see *ante*, § 972.

Extent of the defense.—Where a judgment entered by confession in vacation is opened and the defendant granted leave to plead without restriction, he may plead any matter in bar which he might have done had the suit been begun by summons in the ordinary way. Borchsenius v. Canutson, 100 Ill., 82.

Plaintiff may amend.—When a judgment entered in vacation is set aside to permit a defense to be entered, all the pleadings in the case are opened to such an extent that a declaration may be amended as to form so as to prevent a variance between it and the instrument sued on. Carpenter v. First Nat. Bank, 19 Ill. App., 549.

² Rev. Stat., Chap. 110, ¶ 40, § 39; Bolton v. McKinley, 22 Ill., 203.

³ Campbell v. Goddard, 117 Ill., 251.

torney is insufficient, or has been rendered nugatory by alteration, then the judgment entered is no judgment, and although entered in term time it is proper for the court, at a subsequent term, to permit the defendant to defend on the merits.¹ An application to set aside a judgment by confession should, however, be made at the earliest opportunity. Where the delay has been great much will be presumed to sustain the judgment, and especially so where a clear case is not shown upon the merits and no claim is made that the defendant has been deprived of any legal defense.²

The application for the setting aside of a judgment entered by confession should be made to the court in which such judgment was entered.³ But it seems that where judgment by confession is entered in a foreign county the defendant may, by proper showing in a bill of chancery, enjoin the collection of such judgment for the same cause that would have been available at law.⁴

No one but a party affected by the judgment can interpose a motion to have it vacated or set aside.⁵ Ordinarily no one except the defendant can object to such judgment.⁶ But since judgment was entered for the benefit of the plaintiff, he has a right to have the judgment vacated on his motion and where judgment has been opened and a defense let in the plaintiff has a perfect right to submit to a nonsuit. Submitting to a nonsuit will of course be a vacation of the judgment theretofore entered by confession.⁷

Affidavits filed in support of a motion to set aside a judgment entered upon warrant of attorney will be construed most strongly against the party making the application. It is not sufficient that they should show a state of facts from which,

¹ *Burwell v. Orr*, 84 Ill., 465; *Wyman v. Yeomans*, 84 Ill., 403.

Void cognovit renders judgment entered thereon void.—A judgment which has been entered by confession upon the cognovit that is void should be vacated and the plaintiff left to pursue the ordinary remedy by an action at law, because a judgment entered on a void cognovit

cannot be enforced. *Graves v. Whitney*, 49 Ill. App., 435.

² *Hall v. Jones*, 32 Ill., 38. Further as to "Presumptions," see *ante*, § 998.

³ *Atkinson v. Foster*, 134 Ill., 472.

⁴ *Cooper v. Tiler*, 46 Ill., 462.

⁵ *Farwell v. Huston*, 151 Ill., 239.

⁶ *Gardner v. Bunn*, 182 Ill., 403.

⁷ *Gordon v. Goodell*, 34 Ill., 429.

if proved on the trial, a defense may be inferred. They must show a *prima facie* case for the defendant.¹

Counter affidavits may be properly introduced by the plaintiff, where the defendant moves the court to set aside the judgment entered upon warrant of attorney, supporting his motion by affidavits purporting to show equitable grounds therefor.²

§ 1000. (d) **Review—Extent of**—Irregularities in a judgment properly entered in conformity with the power granted by the defendant in the warrant of attorney, like irregularities in other judgments, will be rendered immaterial thereafter by the statute of jeofails and amendments.³ Where the authority to confess the judgment, and the record shows, either by proof or legal presumption, that the debt is due, judgment so confessed will not be reversed by a court of review; and in no case will a judgment so confessed be inquired into, unless application is first made to the court below and a showing there made of equitable grounds why such judgment should be set aside. After such an application has been made and denied, the parties may prosecute an appeal or writ of error to a court of review.⁴ Likewise where the judgment entered is for too great an amount, application must be made to the trial court to correct it, or the objection will not be considered in the court above.⁵ The defendant to a judgment entered by confession is estopped from his right to take an appeal by his having consented to the entering of such judgment; but the mere agreement that a judgment may be entered for one-half of the amount of the finding is not a judgment by confession so as to deprive the defendant from taking an appeal. It is more in the nature of a stipulation to remit one-half of the damages and to limit the recovery to the remittitur.⁶

¹ Crossman v. Wohlleben, 90 Ill., 537; Chicago Fire Proof Co. v. Park Nat. Bank, 145 Ill., 481.

² Truby v. Case, 41 Ill. App., 153.

³ *Ante*, § 570.

⁴ Ball v. Miller, 38 Ill., 110; Hinds v. Hopkins, Young and Earl, 28 Ill., 344; Roundy v. Hunt, 24 Ill., 597.

⁵ Iglehart v. Morris, 34 Ill., 501.

Further as to excessive judgment, see *ante*, § 999 n.

⁶ Brown v. Galesburg Pressed Brick Co., 132 Ill., 648.

Waiver of errors.—A judgment by confession was entered upon a lease and the defendant upon appli-

§ 1001. **Entries nunc pro tunc.**—Where a cause has proceeded so far that a party is entitled to the entry of a judgment and no such judgment is entered by the Clerk,¹ the court has power at any time thereafter, without regard to the statute of limitations, to cause such judgment to be entered *nunc pro tunc*. The entry of a judgment *nunc pro tunc* is not an amendment of a judgment or the correction of a judgment theretofore entered, but is an entry of a judgment now for then when such entry has been omitted. The rendering of a judgment being a judicial act and the entering of a judgment being merely a ministerial act, the latter, when omitted, may be by the court caused to be performed at any time upon due application and proper evidence; but the power to enter judgment *nunc pro tunc* does not give authority to make a new decision or render a new judgment. The entry now for then merely states what the judgment was then. It cannot be made to then have a retroactive effect, nor can it be made to prejudice the rights of innocent third parties who have intervened. Their rights are paramount to the rights of the parties to the suit.²

§ 1002. **Correcting errors of fact in entry of judgment.**—By the common law a writ of error *coram nobis* (before us) could be sued out of the court in which the error was committed to supply or rectify a mistake *of fact* not put in issue

cation was allowed to interpose his defense. He then filed a demurrer which the court overruled and ordered that judgment should stand as final, unless the defendant should further plead. The defendant elected to stand by his demurrer and prayed for an appeal. It was held that the cognovit filed in the case was a waiver of errors and the appeal was denied. *Seaver v. Siegel*, 54 Ill. App., 632.

Presumptions favoring judgment by confession.—See "Proof and Presumptions," *ante*, § 998.

¹ As to the duty of the Clerk to

enter judgments before the final adjournment of the court for the term or as soon thereafter as practicable and his liability for failure to perform such duty, see Rev. Stat. Chap. 25, ¶ 14, § 14.

² *Hosmer v. Hunt Drainage District*, 134 Ill., 360; *Howell v. Morlan*, 78 Ill., 162; *Bunker v. Green*, 48 Ill., 243; *Oetgen v. Ross*, 36 Ill., 335; *Loomis v. Francis*, 17 Ill., 206; *Elliott's Gen'l Pr.*, 192, 1033.

That statute of limitations does not apply to entries of judgments *nunc pro tunc*. See *Risser v. Martin* (Ia.), 53 N. W. Rep., 270.

or passed upon by the court; such as the death of a party when the judgment was rendered, coverture of a female party, infancy and failure to appoint a guardian, error in the process, or mistake of the Clerk; but it did not lie to correct an error in the judgment itself.¹

The writ of *coram nobis* has never been in use in this State, but the remedy which it insured may be obtained by motion made in the trial court where, and during the term when, the error in fact occurs.² The text of the statute is as follows:

"All error in fact committed in the proceedings of any court of record, and which by the common law could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing made at any time within five years after the rendition of final judgment in the case upon reasonable notice. When the person entitled to make such motion shall be an infant, *feme covert*, *non compos mentis*, or under duress, at the time of passing judgment, the time of such disability shall be excluded from the computation of said five years."³

The proceeding is simply by motion supported by affidavit, but it calls in question the legality of the judgment, and when it is shown that the judgment was entered on an error of fact not put in issue by the pleadings to grant the motion.⁴ But the proceeding is not applicable to an ordinary motion to open a judgment.⁵ A motion under this statute is only applicable to correct such errors as could by the common law be corrected by the writ of error *coram nobis*.

§ 1003. Extent of lien created by judgment. (a) **On real property.**—When a judgment is entered in a court of record it becomes a lien on the real estate of the person against whom it is obtained situate within the county for the period of one year without further proceedings on the part of the plaintiff. If execution is issued on such judgment within a year

¹ *Maple v. Havenhill*, 37 Ill. App., 311; *And. Law Dict.*

² *McKindley v. Buck*, 48 Ill., 488.

³ *Rev. Stat.*, Chap. 110, ¶ 67, § 66; *Coursen v. Hixon*, 78 Ill., 339.

⁴ *Clafin v. Dunne*, 129 Ill., 241.

⁵ *Fix v. Quinn*, 75 Ill., 232.

from the time it first became a lien, judgment continues then to be a lien on such real estate for a period of seven years from the entry of the judgment, and no longer. If execution is not issued upon the judgment within a year after such judgment was rendered such execution may nevertheless be levied upon the real estate of the defendant any time within seven years from the rendition of the judgment and becomes a lien on the real estate from the time it shall be delivered to the Sheriff or other proper officer to be executed.¹ No execution can issue upon a judgment after the expiration of seven years from the time such judgment first became a lien except on the revival of the same by *scire facias*. But real estate levied upon within said seven years may be sold upon *venditio rei exponas* at any time within one year after the expiration of said seven years.²

The judgment becomes a lien upon the real estate of the judgment debtor situate in any other county in this State in like manner and effect, upon the filing in the office of the Clerk of any court of record in such other county, or a transcript of such judgment, and execution may issue thereon in said county.³

§ 1004. (b) Upon personal property.—A judgment does

¹ If no execution is issued within a year and in the meantime another judgment is obtained and execution is issued thereon, the lien of the latter judgment will take priority over a subsequent execution issued on the former judgment. *Dobbins v. First Nat. Bank*, 112 Ill., 553.

² *Rev. Stat.*, Ch. 77., ¶ 1, § 1; ¶ 6, § 6; *Conwell v. Watkins*, 71 Ill., 488; *Ewing v. Ainsworth*, 53 Ill., 464; *Gridley v. Watson*, 53 Ill., 186; *Tenney v. Hemenway*, 53 Ill., 97.

Time deducted.—When the party in whose favor judgment is rendered is restrained, by injunction out of chancery, or by appeal, or by the order of a Judge or court, or is delayed, on account of the

death of the defendant, either from issuing execution or selling thereon, the time he is so restrained or delayed shall not be considered as any part of the time above mentioned. *Rev. Stat.*, Ch. 77, ¶ 2, § 2.

Real estate defined.—The term "real estate" as above used includes lands, tenements, hereditaments, and all legal and equitable interests therein and thereto, including estates for the life of the debtor or of another person, and estates for years, and leasehold estates, when the unexpired term exceeds five years. *Rev. Stat.* Ch. 77, ¶ 3, § 3.

³ *Rev. Stat.*, Chap. 77, ¶ 1, § 1; *Ewing v. Ainsworth*, 53 Ill., 464.

not become a lien upon personal property and does not bind the same until an execution issuing on such judgment is delivered to the Sheriff or other proper officer to be executed.¹

§ 1005. (c) **Against the body.**—When the judgment shall have been obtained for a tort committed by the defendant, or where the defendant shall have been held to bail by writ of *capias ad respondendum*, as provided by law, or where he shall refuse to deliver up his estate for the benefit of his creditors, an execution upon the judgment obtained against him shall issue against the body of the defendant, but in no other case.²

§ 1006. (d) **Priority of lien.**—It is a maxim of the law that he who is prior in time has priority of right. Therefore, as a general rule, the one who first obtains judgment acquires the prior lien; but by force of the statute in this State there is no priority of the lien of one judgment over that of another rendered at the same term or on the same day in vacation.³

Furthermore, to preserve the priority of the lien of the judgment first obtained, execution must issue upon it within one year after the rendition of such judgment, for if execution is not issued within one year after the rendition of the judgment, another judgment will take precedence if execution is thereon first issued, although judgment on which it issued was rendered subsequently.⁴

§ 1007. **Setting aside judgment entered upon verdict.**—After a judgment has been entered there are two methods by which it may be attacked. (1) By direct attack, that is by

¹ Rev. Stat., Chap. 77, ¶ 9, § 9.

Indicated time of delivery of execution.—For the better manifestation of the time when such execution is so delivered the sheriff or other proper officer shall, on receipt of such writ, indorse upon the back thereof the day of the month and

year and hour when he received the same. *Id.*

² Rev. Stat., Chap. 77, ¶ 5, § 5.

³ Rev. Stat., Chap. 77, ¶ 1, § 1.

⁴ Rev. Stat., Chap. 77, ¶ 1, § 1.

⁵ As to setting aside judgment by confession, see *ante*, § 999.

an attempt to set it aside or correct it in some manner provided by law; and (2) by collateral attack.¹

A judgment may be set aside upon motion supported by affidavit showing good and sufficient cause therefor, if such motion be made during the term at which the judgment is entered.² During the term at which the judgment is entered it is within the discretion of the court to set aside the judgment and grant a new trial, and this should be done where, by accident or misfortune, and without his fault, judgment has been rendered against the defendant, or where the judgment seems to be largely in excess of the amount due; but the court should not, upon such motion, dismiss the plaintiff's case or enter judgment of nonsuit. The court's power is limited to grant a new trial. The law intends that every man shall have a fair and impartial trial and if the contrary is made to appear by the affidavit the court should grant the motion to set aside the judgment and order a new trial.³

In general the power of the court over the judgment is at an end when the term closes at which such judgment was entered, and thereafter the court cannot change the record except in obedience to the mandate of a superior court. But this rule is subject to a few exceptions, one of which is that in ejectment cases the unsuccessful party may procure a new trial by the payment of costs at any time within one year after the rendition of judgment.⁴ Another exception is that where the parties consent at a subsequent term that the judgment be opened, the court has power to order a new trial.⁵

¹ Chudleigh v. Chicago, R. I. & P. Ry. Co., 51 Ill. App., 491.

² Rev. Stat., Chap. 110, ¶ 40, § 39.

³ Bruson v. Clark, 151 Ill., 495; Roberts v. Corby, 86 Ill., 188; Morgan v. Hays, 1 Ill. (Breese), 126; Mathison v. Stevens, 12 Ill. App., 474; Millard v. St. Francis Xavier Academy, 8 Ill. App., 341.

⁴ Ante, § 964n.

⁵ Baldwin v. McClelland, 152 Ill., 42; Kelly v. City of Chicago, 148 Ill., 90; Gage v. City of Chicago, 141

Ill., 642; Humphreyville v. Culver, Page, etc., 73 Ill., 485; National Ins. Co. v. Chamber of Commerce, 69 Ill., 22; Kuehne v. Goit, 54 Ill. App., 596.

The order setting aside a judgment is not itself a final judgment from which an appeal or writ of error may be prosecuted. Walker v. Oliver, 63 Ill., 199; Roseland Mfg. Co. v. Arcan, 55 Ill. App., 336.

Judgment set aside as to one must be set aside as to all where several

After a judgment is set aside the recitals contained in the record of it fail thereafter to have any force as evidence.¹

§ 1008. Costs. (a) **Generally.**—Incident to the judgment are the "costs" or expenses to the suit. Costs are (1) Interlocutory, which are awarded on interlocutory matters arising in the course of the suit; and (2) final, which depend upon the final event of the suit. Final costs are the costs to be here considered.

At common law no final costs were recoverable by either the plaintiff or the defendant and such costs were first made recoverable by the Statute of Gloucester,² and were thereby made a parcel of the damages. Generally speaking the plaintiff has a right to costs in all cases where he was entitled to damages antecedent to or by the provisions of the Statute of Gloucester. But the Statute of Gloucester did not permit costs where no damages were recoverable at common law or by the provisions of the statute and in such cases the plaintiff is not entitled to costs unless they are expressly given him by statute.³

The statute in this State especially prescribes in what cases the plaintiff and in what cases the defendant shall recover costs. These provisions will be given in the following sections.

§ 1009. (b) When the plaintiff shall recover.—It is provided by statute that "if any person shall sue in any court of this State in any action, real, personal, or mixed, or upon any statute for any offense, or wrong immediately personal to the plaintiff, and shall recover any debt or damages in such action, then the plaintiff or demandant shall have judgment to recover

defendants have been sued and judgment obtained against them. Fuller v. Robb, Imp., etc., 26 Ill., 246.

Setting aside a judgment does not set aside the verdict on which such judgment was based. Edwards v. Irons, 73 Ill., 588.

Motion itself does not affect judgment.—The fact that a motion is

made to set aside a judgment entered will not operate in any way to impair or affect the force or conclusiveness of the judgment itself. Parr v. Van Horne, 40 Ill., 122.

¹ Morgan v. Campbell, 54 Ill. App., 242.

² 6 Edw. I., Chap. 1, § 2.

³ 2 Tidd's Pr., 945.

costs against the defendant, to be taxed, and the same shall be recovered, together with the debt or damages, by execution" except in the cases otherwise provided by law.¹

Where no damages are recovered against the defendant and the cause is therefore dismissed, no *costs* can be adjudged against the defendant.² Likewise in a forcible entry and detainer case, where the defendant is adjudged "not guilty," no costs can be awarded against the defendant.³ The plaintiff may recover his costs, if he recovers any debt or damages in suits commenced for and on behalf of the people of this State, or the governor thereof, or for or on behalf of any county of this State, or in the name of any person for the use of the people of this State, or any county, or any other person might do in like cases.⁴

§ 1010. (c) When defendant shall recover.—The statute of this State provides that "if any person shall sue in any court of record in this State, in any action wherein the plaintiff, or demandant, might have costs in case judgment be given to him and he be *non-pros'd*, or suffer a discontinuance, or be nonsuited after appearance of the defendant, or a verdict pass against him, then the defendant shall have judgment to recover his costs against the plaintiff (except against executors or administrators prosecuting in the right of their testator or interstate) or demandant, to be taxed, and the same shall be recovered of the plaintiff or demandant, by like process as the plaintiff or demandant might have had against the defendant, in case judgment had been given for such plaintiff or demandant."⁵

¹ Rev. Stat., Chap. 33, ¶ 7, § 7.

² Morgan v. Campbell, 54 Ill. App., 242.

³ Chapman v. Knowles, 34 Ill. App., 558.

Where there are several defendants a general judgment for costs against all of them is good, although they may not all have defended. Smith v. Harris, 12 Ill., 462.

⁴ Rev. Stat., Chap. 33, ¶ 17, § 17.

Upon prohibition or scire facias the plaintiff obtaining judgment or an award of execution shall recover his costs. Rev. Stat., Chap. 33, ¶ 14, § 14.

⁵ Rev. Stat., Chap. 33, ¶ 8, § 8.

Costs cannot be awarded against the plaintiff whose name has been stricken out, as where, in an action for use, the name of the nominal plaintiff was stricken out and the

When defendant acquitted.—If several persons are made defendants to any action, and any one or more of them shall, upon the trial, be acquitted by verdict, every person acquitted shall recover his costs of suit, in like manner as if such verdict of acquittal had been given in favor of all the defendants.¹

When case dismissed.—In all cases, where any action shall be dismissed for any irregularity, or *non-pros'd* or nonsuited, by reason that the plaintiff neglects to prosecute the same, the defendant shall have judgment for his costs, to be taxed and have execution therefor.²

Not in suits for the people or a municipal corporation.—No costs can be recovered against the plaintiff in an action commenced for and on behalf of the people of this State, or the governor thereof, or for or on behalf of any county of this State, or in the name of any person for the use of the people of this State, or any county; but this rule does not apply to any popular action, nor to any action to be prosecuted by any person in behalf of himself and the people or a county, upon any penal statute.³

cause was permitted to proceed in the name of the beneficiary plaintiff. *McDowell v. Town*, 90 Ill., 359. As to judgment generally in suits by one plaintiff for the use of another, see Rev. Stat., Chap. 33, ¶ 19, § 19.

Costs in replevin.—In replevin if a person makes an avowry, justification, or cognizance, and the same be found for him, or if the plaintiff be nonsuited or *non-pros'd*, suffer a discontinuance or be otherwise barred, then such person shall recover his damages and costs against the plaintiff, in like manner as the plaintiff would have done if the same had been found against the defendant. Rev. Stat., Chap. 33, ¶ 9, § 9.

Where several matters pleaded.—Where any defendant in any action, or plaintiff in replevin, shall plead several matters, and any such matters, upon demurrer joined, shall be adjudged insufficient, or if a verdict

shall be found in any issue of the cause, for the plaintiff or demandant costs shall be given at the discretion of the court. Rev. Stat., Chap. 33, ¶ 11, § 11. Further as to costs on demurrer see *ante*, § 635.

Upon scire facias or prohibition the defendant shall recover his costs if the plaintiff shall be nonsuited, *non-pros'd* or suffer a discontinuance or verdict be rendered against him. Rev. Stat., Chap. 33, ¶ 14, § 14.

¹ Rev. Stat., Chap. 33, ¶ 13, § 13.

² Rev. Stat., Chap. 33, ¶ 16, § 16.

³ Rev. Stat., Chap. 33, ¶ 17, § 17; *City of Petersburg v. Whitnack*, 48 Ill. App., 663; *People v. Village of Chapin*, 48 Ill. App., 643.

Costs cannot usually be recovered against public officers; such as School Trustees, (*Cassady v. Trustees of Schools*, 94 Ill., 589), or administrators. *Selby v. Hutchinson*, 4 Gilm. (Ill.), 319.

§ 1011. (d) **Definition of costs on appeal.**—"In all cases of appeal or *certiorari* upon the judgment of Justices of the Peace when the judgment of the Justice of the Peace shall be wholly affirmed or reversed, the party succeeding shall recover from the opposite party his costs, not only in the appellate court, but before the Justice of the Peace and shall have his execution therefor; but where the judgment of the Justice of the Peace shall be affirmed in part, or where the defendant shall not have appeared and defended in the case before the Justice of the Peace, then the court may divide the costs between the parties according to the justice of the case."¹

Costs may likewise be apportioned in ejectment cases where a recovery is had of only a part of the lands sought to be recovered.²

§ 1012. (e) **How costs taxed.**—In this State the Clerk enters the judgment on his record, when rendered, and costs are awarded without any specification of the amount. He subsequently makes up his costs agreeable to the rates, which shall, for the time being, be allowed or specified by law. There is no taxation of costs by the court.³

In contemplation of law the party who requires an officer to perform a service for which compensation is allowed, pays the officer as the costs accrue and it is upon this ground that the successful party recovers a judgment for his costs and if such party has not actually advanced the fees to the officer he is still responsible to him therefor.⁴

The costs as taxed by the Clerk are regarded as *prima facie* correct and if their correctness is sought to be challenged it

¹ Rev. Stat., Chap. 33, ¶ 20, § 20.

The discretion of the court in the apportionment of costs is not generally reviewable. *Smith v. Kinkaid*, 1 Ill. App., 620.

² *Foster v. Letz*, 86 Ill., 413; see further as to "Ejectment," *ante*, § 238.

³ Rev. Stat., Chap. 33, ¶ 25, § 25; *Bryan v. Smith*, 2 Scam. (Ill.), 47; *Parisher v. Waldo*, 72 Ill., 71.

⁴ *Carpenter v. People*, 3 Gilm. (Ill.), 147; *Boyd v. Humphries & Co.*, 53 Ill. App., 522.

must be done in a direct proceeding, either by replevying the fee bill or by a motion to retax the costs.¹

¹ *Parisher v. Waldo*, 72 Ill., 71. As to retaxation of costs, see Rev. Stat., Ch. 33, ¶ 26, § 26; as to replevy of fee bill, see Rev. Stat., Ch. 33, ¶ 27, § 27.

Collection of costs.—The statute especially provides for the collection of costs by bill of costs being certified by the Clerk under the seal of the court and delivering the same to the Sheriff who demands payment of the person liable therefor, and, if the same is not paid within thirty days, the Sheriff may levy upon the goods,

chattels, lands and tenements of the person chargeable and proceed as with other executions. Rev. Stat., Ch. 33, ¶ 28, § 28.

Demand may be made and execution may issue, against one who has become security for costs, without judgment having been first rendered against him. The failure of the plaintiff to recover in his action renders the surety liable and execution may issue against him under this statute. *Whitehurst v. Coleen*, 53 Ill., 247.

PART X.

PROCEEDINGS TO OBTAIN REVIEW.

ARTICLE I.

OF WHAT JUDGMENT, WHEN AND IN WHAT COURT A REVIEW MAY BE HAD.

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| <p>§ 1013. What may be reviewed.</p> <p>1014. Who may obtain a review.</p> <p>1015. Two methods of obtaining review.</p> <p>1016. In what tribunal a review may be obtained.</p> <p>1017. (a) When causes taken from trial court to Supreme Court.</p> | <p>§ 1018. (b) When causes taken first to appellate court.</p> <p>1019. (c) When causes reviewed by an appellate court may be reviewed by the Supreme Court.</p> <p>1020. (d) When causes reviewed by an appellate court may not be reviewed by the Supreme Court.</p> |
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§ 1013. What may be reviewed.—It is a universal law that appeals can only be taken from, and the review of an appellate court had upon, *final* judgments, orders and decrees of the trial court. If the judgment of the trial court leaves either party at liberty to again apply to that court for relief the judgment is not final and no appeal can be taken therefrom. Furthermore, there must be a final disposition of the whole case. If a case against several is finally disposed of as to one, leaving other proceedings to be had to determine the matters as to others, there is no such final judgment as the law contemplates as the basis of an appeal.¹

¹ Sholty v. Sholty, 140 Ill., 82; McCormick v. West Chicago Park Com'rs, 118 Ill., 655; Englewood Connecting Ry. Co. v. Chicago & E. I. Ry. Co., 117 Ill., 611; Farson v. Gorham, 117 Ill., 137; International Bank v. Jenkins, 109 Ill., 219; Harzfeld v. Converse, 105 Ill., 534; Young v. Matthieson, 105 Ill., 26; Racine & M. R. R. Co. v. Farmer's L. & T. Co., 70 Ill., 249; Thompson v. Follansbee, 55 Ill., 427; Sloo v. State Bank of Illinois, 1 Scam. (Ill.), 428; Benevolent Ass'n Paid Fire Dep't v. Farwell, 5 Ill. App., 240; People v. Neal, 3 Ill. App., 181. Further as to what is a final judgment, see *ante*, § 410.

No appeal from interlocutory orders.—An order permitting an amendment is an interlocutory order, from which no appeal will lie. Harding v. Fuller, 40 Ill. App., 643.

An order to account entered in an action of account is an interlocu-

The right of appeal does not exist at the common law. It is a right created entirely by the statute law. Consequently cases are governed entirely by the statute law and all matters concerning appeals will be construed strictly in accordance with the rules for construing statutes. And no appeal will be allowed unless prescribed by the statute.¹ The statute confers new rights and prescribes a remedy unknown to the common law. This remedy must be strictly pursued, especially as respects jurisdiction.²

When the statute prohibits an appeal or writ of error, such statute will govern absolutely, unless it violates a constitutional right, although the state may have declared the action of the inferior court to be final.³

Furthermore, when the statute prescribes to what court an appeal may be taken, it must be strictly followed, for the appellate jurisdiction is given by the statute and is dependent upon a strict compliance therewith.⁴

tory order from which no appeal will lie. *Lee v. Yanaway*, 52 Ill. App., 23.

A refusal to quash a *capias* is not a final order and no appeal can be taken therefrom. *Casey v. Curtis*, 41 Ill. App., 236.

Reversing or remanding a case is not a final judgment.—A judgment of an appellate court remanding a case to the trial court "for such other proceedings as to law or justice shall appertain" is in no sense a final judgment and cannot be reviewed by the Supreme Court. *Chicago & N. W. Ry. Co. v. Andrews*, 148 Ill., 27. *Buck v. County of Hamilton*, 99 Ill., 507.

A judgment by an appellate court reversing the judgment of a trial court is not final and reviewable unless it disposes of the merits of the case. *Harzfeld v. Converse*, 105 Ill., 534.

Refusing to grant a new trial on the assessment of damages caused by the laying out of a highway is

such a final order that the proceedings may be reviewed on appeal or writ of error. *Schlattweiler v. St. Clair County*, 63 Ill., 449.

An order sustaining an attorney is a final order from which an appeal will lie. *Winkelman v. People*, 50 Ill., 449.

Judgment on demurrer to the plea of the statute of limitations is final and may be reviewed. If the amount of the judgment exceeds one thousand dollars the decision of the appellate court may be reviewed. *International, etc., v. Jenkins*, 104 Ill., 143.

¹ *Lewis v. Shear*, 93 Ill., 121; *Holden v. Herkimer*, 53 Ill., 258; *Horner v. Goe*, 54 Ill., 285; *Fraus v. People*, 59 Ill., 427; *McGowan v. Duff*, 41 Ill. App., 57.

² *Burns v. Nash*, 23 Ill. App., 552.

³ *Skinner v. Lake View Avenue Co.*, 57 Ill., 151.

⁴ *Dailey v. Phillips*, 52 Ill. App., 444.

§ 1014. Who may obtain review.—The right to procure a review of an inferior court is purely statutory and is only permitted to one who is a party to the proceeding.¹ One who has had no interest in the litigation cannot maintain an appeal or writ of error. Only those will be heard to complain who have had their rights affected by the judgment.²

§ 1015. Two methods of obtaining review.—A review of the proceedings had in the trial court may be obtained in two general methods. As hereinbefore shown a review of the proceedings had in a Justice's court may be procured in a Circuit Court either by filing an appeal bond in the Justice's court and sending the files up, or by suing out a writ of supersedeas in the Circuit Court and sending it down to bring the files up. In like manner a review of the proceedings had in the Circuit courts may be procured in an appellate court or a Supreme Court by perfecting the appeal in the Circuit Court and sending up the record, or by suing out a writ of error in the court above and sending down to have the record brought up. These two methods will be particularly set forth in a subsequent article.³

§ 1016. In what tribunal a review may be obtained.—Appeals, being unknown to the common law, can only be had in the particular cases and to or from the particular tribunals indicated by the statute. Writs of error were designed to prevent a failure of justice and are writs of right in common law cases where no other mode of review is provided. In statutory cases, and where prescribed by the statute, the writ

¹ *Lake Erie & St. L. R. R. Co. v. Surwald*, 147 Ill., 194; *Hesing v. Attorney General*, 104 Ill., 292.

² *Lake Erie & St. L. R. R. Co. v. Surwald*, 150 Ill., 394; *Hedges v. Mace*, 72 Ill., 472, *post*, §§ 1029, 1039.

A witness entitled to costs cannot take an appeal from an order retaxing the costs. *Boyd v. Humphries & Co.*, 53 Ill. App., 422.

A plaintiff may have his own

judgment reversed. *Teal v. Russell*, 2 Scam. (Ill.), 319.

If a plaintiff takes an appeal subsequent to an appeal having been taken by the defendant it must be to the same court. *Metropolitan Life Ins. Co. v. Broach*, 31 Ill. App., 493. Further see *ante*, § 409.

³ See *post*, §§ 1030-1035, "Taking case up by appeal;" and *post*, §§ 1036-1042, "Taking case up on writ of error."

must issue in the manner provided thereby. In this State the provisions of the statute are so varied that much confusion is apt to exist in the mind of the practitioner regarding the tribunal to which an appeal may be taken, or from which a writ of error may be sued out in any particular case. An effort will be made in the next succeeding sections to indicate the tribunal in which a review may be obtained in the different cases.

§ 1017. (a) When causes taken from trial court to Supreme Court.—There are six classes of cases in which

¹ The term "trial courts" as here used includes circuit courts, the Superior Court of Cook County, the county courts and city courts; in other words, all courts of record in civil cases.

When causes taken from county court.—It is especially provided by statute that causes may be taken for review from the county court to the Supreme Court (or appellate court) in proceedings for the confirmation of special assessments, in proceedings for the sale of lands for taxes and special assessments, and in all common law and attachment cases, and cases of forcible detainer and forcible entry and detainer in the same manner as from the circuit courts, unless otherwise provided. The proceedings of the county court must, however, have been prosecuted to final judgment, order, or decree. Rev. Stat., Chap. 37, ¶ 213, § 123; Const. 1870, Art. 6, § 19; Oettinger v. Specht, 162 Ill., 179; Lynn v. Lynn, 160 Ill., 307; Kankakee and Seneca R. R. Co. v. Strant, 101 Ill., 653; Andrews v. Rumsey, 75 Ill., 598; Hobson v. Paine, 40 Ill., 25; Unknown Heirs of Langworthy v. Baker, Admr., 23 Ill., 484.

Appeals from the county court to the circuit court do not lie in common law cases, (McFadon v. Mc-

Ewen, 22 Ill. App., 563); and does not come within the scope of this work. As to when it is allowable, see Steele, Exr., v. Steele, 89 Ill., 51; Darwin v. Jones, Admr., 82 Ill., 107; Lewis v. People, 82 Ill., 104; Holcomb v. People, 79 Ill., 409; Bowden v. Bowden, 75 Ill., 143; Meyers v. Meyers, 32 Ill. App., 189; Lewis v. Flowree, 32 Ill. App., 314.

As to when there may or may not be a trial *de novo*, see Lucas v. Dennington, 86 Ill., 88; Thorp v. Goewey, Admr., 85 Ill., 611; Hulett v. Ames, 74 Ill., 253; Grimshaw v. Scoggan, 72 Ill., 103; Brown v. City of Joliet, 22 Ill., 123; Lovell v. Divine, 12 Ill. App., 50.

As to power of the circuit court on appeal, see Lawler v. Gordon, 91 Ill., 602; Hough v. Harvey, 84 Ill., 308; Coffey v. Fosselman, 72 Ill., 69; Kern v. Strasberger, 71 Ill., 303; Shepard v. Rhodes, 10 Ill. App., 557.

Appeals from Circuit Court to Supreme Court after appeal from County Court.—When they will lie or will not lie and the practice therein, see Frank v. Moses, 118 Ill., 435; Hess v. People, 84 Ill., 247; Wright v. Smith, 76 Ill., 216; Phelps v. Dolan, 75 Ill., 90; United States Express Co. v. Meints, 72 Ill., 293.

When taken to Supreme Court and when to Appellate Court, see

there is a right of appeal or writ of error direct to the Supreme Court from the trial court. They are:

1. Criminal cases above the grade of misdemeanors;
2. Cases involving a franchise;
3. Cases involving a freehold;
4. Cases involving the validity of the statute or construction of the constitution;
5. Cases relating to revenue; and
6. Cases in which the State is interested.

The appellate jurisdiction of the Supreme Court is limited to cases within these classes.'

Shissler v. People, 93 Ill., 472; *Webster v. Gilmore*, 91 Ill., 324; *West v. People*, 8 Ill. App., 377. The extent of jurisdiction is the same as when taken from other courts.

¹ *Rev. Stat.*, Ch. 110, ¶ 89, 88; *Swift, Mayor, v. People*, 160 Ill., 561; *Chicago, etc., v. Gage*, 103 Ill., 175; *Gage v. Busse*, 94 Ill., 590; *Young v. Stearns*, 91 Ill., 300.

A franchise is a special privilege conferred by grant. *Hesing v. General Attorney*, 104 Ill., 221

A freehold is involved in partition proceedings. *Bangs v. Brown*, 110 Ill., 96.

In special assessment cases. *Kilgour v. Drainage Com'rs*, 111 Ill., 342.

In proceedings to recover land by establishing a resulting trust. *Lehman v. Rothbarth*, 111 Ill., 185.

In proceedings to set aside a deed as a cloud upon a title. *Chicago, etc., v. Gage*, 103 Ill., 175.

In proceedings to condemn right of way. *Peoria, etc., v. Peoria, etc.*, 105 Ill., 110.

In proceedings to distribute real estate under a will. *Newberry v. Blatchford*, 106 Ill., 534.

In *certiorari* proceedings to test the validity of proceedings to estab-

lish a road. *Martin v. Commissioners of Highways*, 52 Ill. App., 116.

In injunction proceedings praying the establishment of a title. *Village of Riverside v. Watson*, 54 Ill. App., 432.

In proceedings for specific performance in the conveyance of land.

Hayes v. O'Brien, 149 Ill., 403.

All eminent domain cases are appealable to the Supreme Court by express provision of the statute and do not depend upon involving a freehold. *Metropolitan W. S. El. R. R. Co. v. Siegel*, 161 Ill., 633.

A freehold may have been involved in the suit and yet if an appeal is taken from part of the judgment or decree, which does not relate to the freehold, no freehold will be involved in the appeal and it cannot be taken directly to the Supreme Court. *Walker v. Pritchard*, 121 Ill., 221; *Cheney v. Teese*, 113 Ill., 444.

The validity of a statute must by the record, be shown to be involved. An assertion that it is involved is not sufficient. *St. Louis, etc., v. Canty*, 103 Ill., 423.

A case involving the construction of a statute merely and not the "validity" of the statute is not one that can be appealed direct to the

Although a statute may provide that an appeal may be taken to the Supreme or appellate court, it does not give a party an option to take to either of the courts which he may choose, but such statute will be construed to mean that he may take an appeal to which of the courts has jurisdiction in his particular case.¹

An appeal to the Supreme Court prayed for and allowed will carry such appeal to the grand division in which the cause is pending. If the appeal is desired to be taken to another grand division of the Supreme Court there should not only be an agreement of the parties to that effect, but there should be an order to that effect entered upon the record of the trial court.²

§ 1018. (b) When causes taken first to appellate court.

—The appellate courts of this State each has jurisdiction within its district³ to review all cases from the several trial courts as follows: All criminal cases less than the grade of misdemeanors and all cases which do not involve a franchise, a freehold, the validity of a statute, or cases relating to the revenue or in which the State is interested.⁴

Supreme Court. *Gross v. People*, 95 Ill., 366.

That the validity of the statute is involved within the meaning of the rule, the record must show that the validity of the statute was in some way presented to the trial court for its decision. *Opaque Cloth Shade Co. v. Veight*, 161 Ill., 337; *City of Cairo v. Bross*, 99 Ill., 521.

As to when the validity of the statute is in question, see *People v. Blue Mountain Joe*, 129 Ill., 370; *International Bank of Chicago v. Jenkins*, 104 Ill., 143.

A constitutional question must really exist and be unsettled by the Supreme Court to permit an appeal direct thereto. Merely assigning error that a law is unconstitutional is not sufficient. *City of Virden v. Allan*, 107 Ill., 503.

Cases relating to revenue.—These cases must be for the collection of revenue and the like, such as suits for taxes and not merely cases which may remotely affect the revenue. *Potwin v. Johnson*, 106 Ill., 532; *Herhold v. Chicago*, 106 Ill., 547; *Hodge v. People*, 96 Ill., 423.

¹ *Johnson v. Eliel*, 9 Ill. App., 520.

² *Gross v. People*, 95 Ill., 366.

³ And within other districts by consent of the parties. Rev. Stat., Chap. 37, ¶ 33, § 16.

⁴ Rev. Stat., Chap. 37, ¶ 25, § 8; Rev. Stat., Chap. 110, ¶ 89, § 88; *ante*, § 1017.

A freehold is not involved unless the title is directly in issue. *Chicago, etc., v. Watson*, 105 Ill., 217.

It is not involved in forcible entry and detainer proceedings; *Kepley v. Luke*, 106 Ill., 385; *Spence v.*

A freehold to be involved within the meaning of the statute must be involved in the points assigned for error. The fact that it is involved in the judgment or decree will not be sufficient to prevent an appeal being taken to the appellate court where it is not involved in the points assigned for error.¹

An action of debt to recover a penalty for the violation of an ordinance or statute may be removed to an appellate court for review, but since it cannot be classed as an action *ex contractu* it is not thereafter removable from an appellate court to the Supreme Court.²

§ 1019. (c) When causes reviewed by an appellate court may be reviewed by the Supreme Court.—In all cases determined in an appellate court, in actions arising *ex contractu* wherein the amount involved is one thousand (1,000) dollars or more, exclusive of costs, and in all cases sounding in damages, wherein the judgment of the court below is one thousand (1,000) dollars, or more, exclusive of costs, and the judgment is affirmed or otherwise finally disposed of in the appellate court, the judgment, order or decree of the appellate court, when final, may be removed to the Supreme Court on writ of error or by appeal.³ In all other cases removable and removed to the appellate court, wherein final judgment, order or decree has been entered, a removal from

Anderson, 108 Ill., 457; Zokein v. Lovell, 107 Ill., 209; Schofield v. Pope, 104 Ill., 130

In proceedings to set aside the Sheriff's sale improperly made, as could upon the title. Johns v. Boyd, 117 Ill., 339.

In proceedings to set aside a tax levy. Westcott v. Kinney, 120 Ill., 564.

In proceedings to force liens by creditors where no adverse claims of title are arrayed against each other. Chicago, etc., R. R. Co. v. Peck, 112 Ill., 408.

In proceedings to enjoin a city from undermining lots, abutting on streets. Mathiessen & Hegeler Zinc

Co. v. City of La Salle, 117 Ill., 411.

In proceedings by a creditor's bill to set aside a sale of land and submit it to a judgment. Illinois Furnace Co. v. Vinnedge, 106 Ill., 650; Dobbins v. Cruger, 106 Ill., 333.

A franchise is not involved in proceedings to test the right of a railway company to a public street. Mills v. Parlin, 106 Ill., 60.

¹ Franklin v. Loan & Invest. Co., 152 Ill., 345.

² Rev. Stat., Chap. 37, ¶ 25, § 8; City of Chicago v. Gosslin, 91 Ill., 48.

³ The term "*ex contractu*" does not here include actions involving a penalty.

the appellate court to the Supreme Court for review may be had.'

Whether the statute provides that in any case where a majority of the judges in the appellate court shall be of the opinion that a case decided by them involving a less sum than one thousand (1,000) dollars, exclusive of costs, also involves questions of law of such importance, either on account of principal or collateral interests as that it should be passed upon by the Supreme Court, they may, in such case, grant appeals and writs of error to the Supreme Court, on petition

¹ Rev. Stat., Chap. 37, ¶ 25, § 8; Rev. Stat., Chap. 110, ¶ 91, § 90; Umlauf v. Umlauf, 103 Ill., 651; Wabash Ry. Co. v. Henks, 91 Ill., 406.

One thousand dollars claimed.—When over one thousand dollars is claimed by either the defendant or plaintiff an appeal lies from the appellate court to the Supreme Court. Capen v. DeSteiger Glass Co., 105 Ill., 548; Moshier v. Shear, 100 Ill., 469; Lobstein v. Lehn, 120 Ill., 459.

The alleged damages must exceed one thousand dollars. It is not enough that the damages amount to one thousand dollars and no more. Hankins v. Chicago & N. W. Ry. Co., 100 Ill., 466.

The amount is not determined by that on which error is assigned, but by the amount involved in the action. Svanoe v. Jurgens, 144 Ill., 507; Walker v. Malin & Co., 94 Ill., 596.

Interest cannot be added to make up the required amount. The amount is determined by the amount claimed when the suit is brought. Keiser v. Cox, 116 Ill., 670.

"*Actions ex contractu*" include all causes of action arising *ex contractu* as contradistinguished from those which arise *ex delicto*, whether the action be at law or in equity.

Umlauf v. Umlauf, 103 Ill., 651; Cummins v. Holmes, 107 Ill., 552. It is the nature of the cause of action rather than the form of action which governs and penal actions are not included. Umlauf v. Umlauf, 103 Ill., 651; Rev. Stat., Chap. 37, ¶ 25, § 8.

In forcible entry and detainer cases where the rental value of the premises exceeds \$1,000 a review of the proceedings had in the appellate court may be had in the Supreme Court. Flagg v. Walker, 109 Ill., 494.

"*All other cases.*"—The statute making the amount in controversy a test of the jurisdiction of the Supreme Court in matters of appeal from an appellate court has no application when the object of the suit is not to recover a debt or damages, or some specific article of property, either personal or real. In all other cases an appeal will lie from an appellate court to the Supreme Court. Richards v. People, 100 Ill., 423.

In a common law proceeding by *certiorari* an appeal will lie from final judgment without regard to the magnitude of the interest involved and without a certificate of importance, when no property rights are directly involved. Hyslop v. Finch, 99 Ill., 171.

of the parties to the cause; in which case the said appellate court shall certify to the Supreme Court, the grounds of granting said appeal.¹

Furthermore, it is provided that in all actions where there is no trial on an issue of fact in the lower court, appeals and writs of error shall lie from the appellate court to the Supreme Court where the amount claimed in the pleadings exceeds one thousand (1,000) dollars.²

The judgment, order or decree from which an appeal may be taken from an appellate court to the Supreme Court must be final. It must be an affirmance of the judgment of the trial court, or such a determination that no proceedings can be had in the trial court except to carry into effect the mandate of the appellate court.³

That it is necessary to show that the case is one in which an appeal may be taken from the appellate to the Supreme Court must appear upon the record. The court must be able to determine from the record what the amount is in controversy. No extrinsic proof can be made of that fact. An affidavit that more than one thousand dollars is involved will not be considered.⁴

It is the policy of the law that the Supreme Court shall not review the action of the appellate court, except in questions of law; but to this rule there is an exception. It is true that an affirmance by the appellate court of the judgment of the trial court is final as to questions of fact. It is also true that if, in accordance with the statute, the appellate court find

¹ Rev. Stat., Chap. 37, ¶ 25, § 8.

The Supreme Court cannot compel the appellate court to make this certificate. *Fuller v. Bates*, 96 Ill., 132.

Certificate of importance.—The certificate must certify that the case “involves questions of such importance, etc.” No other reason certified will give the Supreme Court jurisdiction to hear the appeal. *Lamar Ins. Co. v. Gulick*, 96 Ill., 619.

They must also certify that the case “involves questions of law.” *Commercial Nat. Bank v. Cauniff*, 151 Ill., 329; further, see *Gray v. Agnew*, 95 Ill., 315.

² Rev. Stat., Chap. 37, ¶ 25, § 8; *Washington & L. v. N. Ry. Co.*, 136 Ill., 49.

³ Rev. Stat., Chap. 110, ¶ 91, § 90; *Ball v. Schaffer*, 112 Ill., 341; *Fanning v. Russell*, 94 Ill., 386.

⁴ *Brownell v. Baker*, 5 Ill. App., 571.

upon questions of fact differently from the trial court and the facts so found are recited in the final order, judgment, or decree, such finding will be final. It is apparent then that in case the judgment of the appellate court is the result wholly or in part of the finding of facts, concerning matters in controversy, *different* from the finding of the trial court and the finding is *not* recited in the final judgment or decree of the court, the facts may be reviewed in the Supreme Court.¹ When the judgment of the appellate court does not recite the finding of facts when such judgment is "different" from the judgment of the trial court, it will be inferred that it did not find facts differently from the trial court. In such a case the Supreme Court will look into the evidence as on a demurrer to evidence and if it appears or tends to prove a cause of action the judgment of the appellate court will be reversed by the Supreme Court.²

On the admission or exclusion of evidence the Supreme Court may review the action of the appellate court; it is only in *passing upon* questions of fact in the final determination of the case that the action of the appellate court is conclusive, except in certain cases.³

Ultimatum in practice. When the case is one that will not generally be reviewed by the Supreme Court, either because of involving a demand of less than one thousand dollars in other than a penal action, or because of the finding of facts being properly recited in the final judgment, or because the judgment of the trial court is affirmed, or because of other statutory reasons, the only way in which a practitioner can procure the Supreme Court to review the action of the appellate court is to get the judges of the appellate court to certify

¹ Rev. Stat., Chap. 110, ¶ 90, § 89; ¶ 88, § 87; *Commercial Bank of Manitoba v. Chicago, St. P., etc., R. Co.*, 160 Ill., 401; *Consolidated Coal Co. v. Peers*, 150 Ill., 344; *Tenny v. Foot*, 95 Ill., 99.

² *Brant v. Lill*, 90 Ill., 808; *Ottawa, O. & F. R. V. R. Co. v. McMath*, 91 Ill., 105.

An affirmance by the appellate

court of the judgment of the trial court implies a finding of facts in the same way as they were by the trial court and is conclusive upon the Supreme Court. *Sconce v. Henderson*, 102 Ill., 376.

³ *Wrought Iron Bridge Co. v. Com'rs of Highways*, 101 Ill., 518.

that the case involves questions of law of such importance, either on account of the principal or collateral interests, that it should be passed upon by the Supreme Court.¹

§ 1020. (d) When causes reviewed by an appellate court may not be reviewed by the Supreme Court.—In no case determined in an appellate court arising upon the cause of action *ex contractu* when the amount is less than one thousand (1,000) dollars, exclusive of costs, and in no case sounding in damages wherein the judgment of the court below is less than one thousand (1,000) dollars, exclusive of costs, and the judgment is affirmed or otherwise finally disposed of, can a judgment, order, or decree of the appellate court be removed to a Supreme Court for review, either by appeal or writ of error.²

It is the primary intention of the statute that the Supreme Court shall re-examine civil cases brought to it by appeal or writ of error as to question of law only. Therefore the determination of the appellate court upon questions of fact cannot be reviewed in the Supreme Court, except in the cases specifically enumerated.*

But in order that the judgment of the appellate court be final as to matters of fact, such judgment must be an affirmance of the judgment of the trial court,³ or else when the result wholly or in part of the finding of fact concerning the matter in controversy, is *different* from the finding of the trial court, the

¹ Baxtrom v. Chicago & N. W. Ry. Co., 117 Ill., 150; Smith v. Harris, 113 Ill., 136; Pulsifer v. Clauson, 100 Ill., 557; Rev. Stat., Chap. 37, ¶ 25, § 8.

² Rev. Stat., Chap. 37, ¶ 25, § 8; Seelye v. Seelye, 143 Ill., 264; Sedgwick v. Johnson, 107 Ill., 385; Umlauf v. Umlauf, 103 Ill., 651; Piper v. Jacobson, 93 Ill., 389; Hutchinson v. Howe, 100 Ill., 11.

In *replevin* where the record fails to show that the amount involved was one thousand dollars, exclusive of costs, or that the value of the property involved is more than that

sum, a review of the proceedings in the appellate court cannot be had. Hancock v. Power, 93 Ill., 150.

³ Rev. Stat., Ch. 110, ¶ 90, § 89; see *ante*, § 1019, and Rev. Stat., Ch. 110, ¶ 89, § 88; Thomas Pressed Brick Co. v. Hester, 162 Ill., 46; Brant v. Lill, 96 Ill., 608.

⁴ An affirmance of the judgment of the trial court implies a finding of facts, the same as they were found by the trial court and is conclusive upon the Supreme Court. Sconce v. Henderson, 102 Ill., 376; Brownell v. Welch, 91 Ill., 523.

finding or fact must be recited in the final order, judgment, or decree.¹

The judgment of the appellate court affirming the judgment of the trial court is conclusive in all matters relating to the character, force and effect of the testimony.²

¹ Rev. Stat., Ch. 110, ¶ 88, § 87; *Leeper v. Terre Haute & I. R. R. Co.*, 162 Ill., 215; *Commercial Bank of Manitoba v. City of Chicago*, St. P. & K. C. R. R. Co., 160 Ill., 401; *Commercial Nat. Bank v. Cauniff*, 151 Ill., 329; *Lenz v. Harrison*, 148 Ill., 598; *Bernstein v. Roth*, 145 Ill., 189; *Joliet Street Ry. Co. v. Call*, 148 Ill., 177; *Phoenix Ins. Co. v. Johnston*, 148 Ill., 106; *Kern v. Chicago Brewery Ass'n*, 140 Ill., 371; *Doyle v. Wilkinson*, 120 Ill., 430; *Schroeder v. Walsh*, 120 Ill., 403; *Chicago, B. & Q. R. R. Co. v. Bell*, 112 Ill., 360; *Bangor Furnace Co. v. Magill*, 108 Ill., 656; *Moore v. Peo-*

ple, 108 Ill., 484; *Bennett v. Connelly*, 103 Ill., 50; *St. Louis, etc., v. Wiggins*, 102 Ill., 514; *Tenney v. Foot*, 95 Ill., 99; *Schwarz v. Bradley*, 95 Ill., 168; *Laird v. Warren*, 92 Ill., 204; *Gravett v. Davis*, 92 Ill., 190; *Tolman v. Grane*, 44 Ill. App., 237.

In replevin the finding of the appellate court as to the facts is conclusive upon the Supreme Court. *Merrimac Paper Co. v. Savings Bank*, 129 Ill., 296.

² *Lake Erie & St. L. R. R. Co. v. Hawthorne*, 147 Ill., 226; *Toledo, St. L. & K. C. R. R. Co. v. Clark*, 147 Ill., 171.

ARTICLE II.

PREPARATION OF RECORD FOR REVIEW.

I. BILL OF EXCEPTIONS.

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| § 1021. Origin, nature and purpose. | § 1025. Same—Signing, sealing and settling bill of exceptions. |
| 1022. The same in the Supreme and appellate courts. | 1026. Filing bill of exceptions—Striking from files. |
| 1023. Requisites of a bill of exceptions. | 1027. Construction of bill of exceptions—Presumptions. |
| 1024. Same—Forms of bills of exceptions and amendments proposed. | 1028. Amendment of bill of exceptions. |

II. AGREED CASES.

- § 1029. Agreed case in lieu of bill of exceptions.

§ 1021. **Origin, nature and purpose.**—Because courts of review on error could only review errors of *law*, and only such errors of law as appeared on the *record*, there was, before the invention of a “bill of exceptions” no method known to the common law for bringing before a superior court, for review, after judgment, any error committed by the Judge on the trial, in admitting or rejecting testimony or in the charge which he might give to the jury, because these facts did not appear upon the record. The right to make a bill of exceptions and the manner of making the same was settled by early judicial decision and was further fixed by the statute of Westminster 2nd, 13 Edward I, which was passed in the year of 1285.¹

“Exceptions” are objections or protests against the ruling or decision of the court upon questions of law. The exception is taken or “entered” at the time of the ruling, unless

¹ 2 Reeves History of English law 186, 188, 189; 3 Bla. Com., 372.

otherwise prescribed.¹ And a "bill of exceptions" is a written statement of the exceptions duly taken by a party on the trial of the cause, with so much of the facts, or other matter, as is necessary to explain the ruling.²

The sole purpose of a bill of exceptions is to cause matters which transpired in the progress of the trial to become a part of the record that without it would not be a part of the record and therefore could not be considered by the court of review. And there is no method known to the law by which this may be done except by bill of exceptions. The rulings of the court upon the admission of evidence, or the sufficiency of the evidence, or the rulings of the court upon a motion for a new trial, or upon any other collateral matter not entered upon the record by the Clerk will not come before the court of review except when made a part of the record by a bill of exceptions. It is likewise true that matters which are entered upon the record by the Clerk need no bill of exceptions to bring them to the attention of the court of review.³

¹ See *ante*, §§ 894-7, "Proceedings at the trial."

² *St. Croix Lumber Co. v. Pennington*, 2 Dak., 470.

³ *McChesney v. City of Chicago*, 151 Ill., 307; *Alley v. McCabe*, 147 Ill., 410; *Mullen v. People*, 138 Ill., 606; *Chicago M. & St. P. Ry. Co. v. Yando*, 127 Ill., 214; *Hake v. Struebel*, 121 Ill., 321; *Gebbie v. Mooney*, 121 Ill., 255; *Baker v. People*, 105 Ill., 452; *Wiggin Ferry Co. v. People*, 101 Ill., 446; *Lomax v. Mitchell*, 93 Ill., 579; *Buettner v. Norton Mfg. Co.*, 90 Ill., 415; *Dimick, Admr., v. Chicago & N. W. Ry. Co.*, 80 Ill., 338; *Higgins v. Curtiss*, 82 Ill., 28; *Gardner v. Russell*, 73 Ill., 292; *Reed v. Horn*, 73 Ill., 598; *Humphreyville v. Culver*, Page, etc., 73 Ill., 485; *Fonville v. Sausser*, 73 Ill., 451; *Neely v. Wright*, 72 Ill., 292; *United States Express Co. v. Meints*, 72 Ill., 293; *Chase v. De Wolf*, 69 Ill., 47; *Tower v. Bradley*, 66 Ill.,

189; *Snell v. Trustees, etc.*, 58 Ill., 290; *Van Pelt v. Dunford*, 58 Ill., 145; *Hay v. Hayes*, 56 Ill., 342; *Cromie v. Van Nortwick*, 56 Ill., 353; *Schuh v. D'Oench*, 51 Ill., 85; *Gill v. People*, 42 Ill., 321; *Gulliver v. Adams Express Co.*, 38 Ill., 503; *Schofield v. Settley*, 31 Ill., 515; *Commissioners of Swan Township v. People*, 31 Ill., 97; *Edwards v. Vandemack*, 13 Ill., 633; *Moss v. Flint*, 13 Ill., 571; *Randolph v. Emerick*, 13 Ill., 344; *Lowe v. Moss*, 12 Ill., 477; *Gallimore v. Dazey*, 12 Ill., 143; *Kimmel v. Shultz, et. al.*, 1 Ill. (Breese), 169; *Baldwin v. McClelland*, 50 Ill. App., 645; *Ruggles v. Gattton*, 50 Ill., 412; *Helmuth v. Bell*, 49 Ill. App., 626; *Deam v. Lowy*, 44 Ill. App., 302; *City of Jacksonville v. Cherry*, 39 Ill. App., 617; *Alley v. Limbert*, 35 Ill. App., 592; *Oberman Brewing Co. v. Adams*, 35 Ill., 146; *Offield v. Siler*, 15 Ill. App., 308; *People v. Blades*, 10 Ill. App., 17.

Furthermore, matters only which occurred at the trial can be made a part of the record by a bill of exceptions. The court cannot by signing a bill of exceptions thereby make something which has not taken place a part of the record.'

The bill of exceptions becomes a "record" when the bill is allowed by the Judge and filed by the Clerk.'

§ 1022. The same in the Supreme and appellate courts.—

The purpose and necessity, as well as the requisites of a bill of exceptions, are the same in the appellate courts as in the Supreme Court. For it is provided by statute that the practice and pleadings in the several appellate courts shall be uniform and shall be the same as now prescribed or which may hereafter be prescribed in and for the Supreme Court of this State, so far as applicable.'

Each court has power to establish rules governing its own practice,' and to such rules the practitioner is referred regarding minute particulars of practice.

§ 1023. Requisites of a bill of exceptions.—It has been said that "whatever brings upon the record properly verified by the attestation of the Judge, the matters of fact occurring at the trial, on which the point of law arises which enters into the ruling and decision of the court excepted to, answers sufficiently the description of a proper bill of exception." It has likewise been said that more care must be taken in the preparation of a bill of exceptions than merely inserting a transcript of the shorthand notes taken at the trial.'

Whatever appears in the record of the trial as kept by the Clerk need not be incorporated into the bill of exceptions.' There is, however, a marked barrenness of authoritative statement in this State as to what preserves itself in a com-

¹ *Schwarze v. Spiegel*, 41 Ill. App., 351.

² *Post*, § 1026; *Lesser v. Banks*, 46 Ark., 482; *Shannon v. People*, 5 Mich., 36.

³ *Rev. Stat.*, Chap. 37, ¶ 27, § 10.

⁴ *Ante*, Vol. I, "Courts and their Jurisdiction"

⁵ *Kleinschmidt v. McAndrews*, 117 U. S., 282.

⁶ *Arcade Co. v. Allen*, 51 Ill. App., 305.

⁷ And if incorporated it will be at the expense of the party who has it done. *Safford v. Vail*, 22 Ill., 326.

mon law record without the aid of a bill of exceptions. It has been said that the record proper in a suit at law consists of the process by which the defendant is brought into court, including the Sheriff's return, the declaration, pleas, demurrer, if there be any, also any judgment upon demurrer, or any other judgment interlocutory or final, not included in the matters enumerated and which therefore require the "objection," "exception," and "bill of exceptions" to make them parts of the record; and all motions and orders striking pleas and other papers from the files, motions for continuances and *all rulings* made by the court on the trial or during the progress of the cause. A mere entry by the Clerk of such matters upon the record is not sufficient to make them a part thereof.¹

The motion, the ruling and the exception must be preserved.

—It is a well established rule that a party desiring to assign error on the decision of a court on a motion or objection, must, in his bill of exceptions, not only preserve the motion or exception, but also the ruling of the court upon it and the

¹ Chicago & E. P. R. R. Co. v. Goyette, 133 Ill., 21; Blair v. Ray, 103 Ill., 615; Gaddy v. McCleave, 59 Ill., 182; Snell v. The Methodist Church, 58 Ill., 290; Chicago, M. & St. P. R. R. Co. v. Melville, 66 Ill., 329; Reed v. Horne, 73 Ill., 598; Fanning v. Russell, 81 Ill., 398; Hartford F. Ins. Co. v. Vanduzor, 49 Ill., 490; Baldwin v. McClelland, 50 Ill. App., 645; Schmidt v. Skelly, 9 Ill. App., 532; VanCott v. Sprague, 5 Ill. App., 99; McCormick Harvesting Machine Co. v. Adele, 47 Ill. App., 542.

Affidavits in support of motions, notices of motions, etc., must likewise be incorporated into a bill of exceptions in order to make them a part of the record and cause them to be considered by a court of review. Hulett v. Ames, 74 Ill., 253; Smith v. Wilson, 26 Ill., 186; Roundy v. Hunt, 24 Ill., 598; McDonald v.

Arnout, 14 Ill., 58; Edwards v. Vandemack, 13 Ill., 633; Mann v. Russell, 11 Ill., 586; Saunders v. McCollins, 4 Scam. (Ill.), 419; Alday v. Kenworthy, 49 Ill. App., 608; Wright v. Hatchett, 12 Ill. App., 261.

Furthermore, when the affidavits are the only evidence considered in support of a motion, they must all be incorporated, and it must be shown that the bill of exceptions contains all the evidence, or it will be presumed that there was evidence offered sufficient to justify the ruling of the court. Unless the evidence on which the court acted is all shown, it cannot be determined whether the court erred. The mere copying of the affidavits by the Clerk into the record does not make them a part thereof. Phillips v. People, 88 Ill., 160; Garrity v. Lazano, 83 Ill., 597.

exception thereto taken on the trial. The mere fact that the entries of the Clerk show that an exception was taken to the ruling of the court does not make it a part of the record. It can only be made so by a bill of exceptions. The making of a bill of exceptions is a 'judicial act.'

Exceptions to evidence.—The evidence offered on the trial of a cause does not become a part of the record and no review thereof can be obtained by a superior court unless an "objection" to the introduction of such evidence was made on the trial and an "exception" to the ruling of the court thereon entered and the whole (objection, exception, the ruling and evidence) preserved in the bill of exceptions. The mere recital of the Clerk in a transcript of the record that a certain exception was taken is not sufficient to make it a part of the record.² In these cases it is the error in the ruling of the court that will be reviewed.

When evidence must all be incorporated.—A court of review will not weigh evidence unless a motion has been made in the trial court to set aside the verdict and grant a new trial on the ground that the verdict is not sustained by the evidence. In such a case the evidence must be set out accurately and at length in the bill of exceptions, or the court of review cannot determine whether the verdict is or is not sustained by the evidence. The bill of exceptions must *show* that it contains all the evidence heard on the trial. This fact must be certified to by the trial Judge. A certificate of the Reporter or Clerk is not sufficient. Furthermore, where the evidence is

¹ Chicago, R. I. & P. Ry. Co. v. Town of Calumet, 151 Ill., 512; McClurkin v. Ewing, 42 Ill., 288; Ryan v. B. & O. R. R. Co., 60 Ill. App., 612; Arcade Co. v. Allen, 51 Ill. App., 305; Lusk v. Parsons, 39 Ill. App., 380.

Exception must have been taken on the trial.—That a bill of exceptions may be available to procure a review of the ruling objected to, the exception must have been taken at the trial. National Bank v. Le-

Moyné, 127 Ill., 253; Johnson v. Gillett, 52 Ill., 358; Dufield v. Cross, 18 Ill., 699; Clemson v. Kruper, 1 Ill. (Breese), 210; East St. Louis Electric St. R. R. Co. v. Cauley, 49 Ill. App., 310; *ante*, §§ 894-897, 941, 954, 959.

² Powell v. McCord, 121 Ill., 330; Davis v. Ransom, 26 Ill., 100; Chicago, P. & St. L. Ry. Co. v. Leah, 41 Ill. App., 584; City of Jacksonville v. Cherry, 39 Ill. App., 617.

not all shown, the court of review will presume there was evidence sufficient to sustain the verdict.¹

To review the ruling of the court on a motion to set aside the default the bill of exceptions must likewise contain all the evidence.²

Documents and exhibits.—Instruments sued on, or copies thereof, and all other documents and exhibits offered in evi-

¹ Village of Auburn v. Goodwin, 128 Ill., 57; Lee v. Town of Mound City Station, 118 Ill., 304; England v. Selby, 93 Ill., 340; Schmidt v. Chicago & N. W. Ry. Co., 83 Ill., 405; Henry v. Halloway, 78 Ill., 356; Culliner v. Nash, 76 Ill., 515; Cogshall v. Beesley, 76 Ill., 445; Nason v. Letz, 73 Ill., 371; Kern v. Strasberger, 71 Ill., 303; Gallagher v. Brandt, 52 Ill., 80; Wilson v. McDowell, 52 Ill., 405; Ballance v. Leonard, 37 Ill., 48; Buckland v. Goddard, 36 Ill., 206; Ottawa Gas Light and Coke Co. v. Graham, 35 Ill., 346; Harris v. Miner, 28 Ill., 135; Sidwell v. Lobly, 27 Ill., 438; Reed v. Bradley, 17 Ill., 321; McCormick v. Gray, 16 Ill., 138; Webster v. Enfield, 5 Gilm. (Ill.), 298; McLaughlin v. Walsh, 3 Scam. (Ill.), 185; Chicago, M. & St. P. Ry. Co. v. Walsh, 51 Ill. App., 584; Oehmen v. Thurnes, 51 Ill. App., 435; Brown v. Lehigh & Franklin Coal Co., 40 Ill. App., 602; Robertson v. Morgan, 38 Ill. App., 137; Wilson v. Hakes, 36 Ill. App., 539; Ohio & Mississippi Ry. Co. v. Cope, 36 Ill. App., 97; City of Mt. Vernon v. Lee, 36 Ill. App., 24; Garrity v. Hamburger Co., 35 Ill. App., 309; Noy v. Creed, 1 Ill. App., 557.

A statement that "the foregoing was all the evidence introduced, except the note which was in evidence on the trial of the cause" is not sufficient. It shows upon the face that the evidence introduced on the

trial is not all contained in the bill of exceptions. Spain v. Thomas, 49 Ill. App., 249.

Likewise a statement that the bill of exceptions contains "an outline of all the testimony in the case" is insufficient. Buckmaster v. Cool, 12 Ill., 74.

However, a recital at the close of a bill of exceptions "that the foregoing constitutes the substance of all the evidence introduced by the parties on the trial of said cause" is equivalent to a recital that it contains all the evidence. Gardner v. Chicago, R. I. & P. Ry. Co., 17 Ill. App., 262.

Quere.—Will the words at the conclusion of a bill of exceptions "which was all the testimony offered or received" be equivalent to a statement that it contains all the evidence that was offered or received, when it appears that documentary evidence was received. Jordan v. Vehon, 44 Ill. App., 177.

Certificate of Judge conclusive.—A certificate of the Judge that the bill of exceptions contains all the evidence, is conclusive and cannot be contradicted by counsel in the Supreme Court. Goodwin v. Durham, 56 Ill., 239. Objection and exception to the bill of exceptions must be entered before joinder of error. Further see *post*, §§ 1026-1028.

² Wheeler Chemical Works v. Alexander, 30 Ill. App., 502.

dence must be incorporated into the bill of exceptions preceding the signature of the Judge with apt and proper words of identification, or they will not be before the court above for review. Embodying the writing in the record does not incorporate it into the bill of exceptions.¹

Motion for new trial.—Where a motion for a new trial has been made and overruled and the party making the motion desires that the ruling of the trial Judge thereon be reviewed by a superior court, the bill of exceptions must show that the motion for a new trial was made and overruled and an exception taken to the ruling, and must also contain the affidavits offered in support of the motion, for unless this is done the court of review will not consider the matter and could not determine the sufficiency of the grounds alleged if it would. It is not sufficient that the entry of the Clerk shall show such matters.² And if the ground alleged for the new trial is the

¹ Garrity v. Lozano, 83 Ill., 597; Gilchrist v. Gilchrist, 76 Ill., 281; Newman v. Ravenscroft, 67 Ill., 496; Nathan v. City of Bloomington, 46 Ill., 347; Elizabethtown v. Lefler, 23 Ill., 90; Corey v. Russell, 3 Gilm. (Ill.), 366; Imperial Hotel Co. v. H. B. Claffin Co., 55 Ill. App., 337; Legnard v. Rhodes, 51 Ill. App., 477; Roy v. Garroway, 54 Ill. App., 610; Page v. Northwestern Brewing Co., 54 Ill. App., 157; Hennessy v. Metzger, 50 Ill. App., 533; Wilson v. Nilson, 44 Ill. App., 209; Hall v. Cox, 44 Ill. App., 382; Byrnes v. Clark, 31 Ill. App., 651; Brand v. Whehan, 18 Ill. App., 186; Clifford v. Drake, 14 Ill. App., 75.

When judgment entered by confession.—When a judgment is entered by confession in vacation and the proper papers filed, they become a part of the record without being incorporated into the bill of exceptions, but where a judgment is entered by confession in term time the papers do not become a part of the record unless they are preserved

in the bill of exceptions. Waterman v. Caton, 55 Ill., 94.

² East St. Louis Electric R. R. Co. v. Cauley, 148 Ill., 490; Firemen's Ins. Co. v. Peck, 126 Ill., 493; Chicago & St. L. R. R. Co. v. Easterly, 89 Ill., 156; Law v. Fletcher, 84 Ill., 45; Reichwald v. Gaylord, 73 Ill., 503; Nason v. Letz, 73 Ill., 371; St. Louis, A. & T. H. R. R. Co. v. Dorsey, 68 Ill., 326; Brown v. Clement, 68 Ill., 192; Horn v. Eckert, 63 Ill., 522; Daniels v. Shields, 38 Ill., 197; Block v. Jacksonville, 36 Ill., 301; Pottle v. McWorter, 18 Ill., 454; Clark v. Willis, 16 Ill., 61; Engel v. Sellers, 51 Ill. App., 577; Funk v. Mills, 50 Ill. App., 404; Herman-Harrison Milling Co. v. Spehr, 46 Ill. App., 24; Spangerberg v. Charles, 44 Ill. App., 526; Foreman v. Johnson, 37 Ill. App., 452; Griffith v. Welsh, 32 Ill. App., 396; Shedd v. Dalzell, 30 Ill. App., 356; Mueller v. Grant, 26 Ill. App., 585; Gregory v. Spencer, 3 Ill. App., 80.

Reasons for a new trial specified in the court below will be all that

insufficiency of the evidence to sustain the verdict; the whole of the evidence must be incorporated into the bill of exceptions as above shown.

Instructions.—A court of review will not consider whether the trial Judge erred in giving or refusing to give instructions to the jury, unless the instructions in question were excepted to at the trial and made a part of the bill of exceptions. Furthermore, the court of review cannot determine whether there was error in giving the instruction unless all of the evidence offered in the case on which the instruction is based is incorporated into the bill of exceptions and thereby brought to the attention of such court. The fact that the instructions are copied into the transcript by the Clerk does not make them a part of the record.¹

The finding of the court on a trial without a jury must be set out in the bill of exceptions and it must show that they were duly excepted to or they will not become a part of the record and cannot be considered by a court of review. A recital of the findings is not sufficient to make it a part of the record.²

Improper trial.—That a case was erroneously tried out of its order on the docket, and that in consequence thereof the party was absent and sustained injury, will not be considered by a court of review unless the matters are made fully to appear in the bill of exceptions and that objection was made and exception taken in the court below.³

can be relied upon in the court above. *Clause v. Bullock Printing Press Co.*, 20 Ill. App., 113.

¹ *Chicago, M. & St. P. Ry. Co. v. Harper*, 128 Ill., 384; *Burns v. People*, 126 Ill., 282; *Leavitt v. Randolph County*, 85 Ill., 507; *Drew v. Beall*, 62 Ill., 164; *Chicago & N. W. Ry. Co. v. McCahill*, 56 Ill., 28; *Toledo, etc., Ry. Co. v. Miller*, 55 Ill., 448; *Weyhrich v. Foster*, 48 Ill., 115; *Hahn, etc., v. St. Clair, S. & I. Co.*, 50 Ill., 526; *Ballance v. Leonard*, 37 Ill., 43; *Evans v. Lohr*, 2 Scam. (Ill.), 511; *Leigh v. Hodges*,

3 Scam. (Ill.), 15; *Schwartz v. Karlovsky*, 51 Ill. App., 371; *Underhill v. M. & O. R. R. Co.*, 40 Ill. App., 21; *Shedd v. Dalzell*, 30 Ill. App., 356; *Chicago, M. & St. P. Ry. Co. v. Harper*, 26 Ill. App., 621; *Obermark v. People*, 24 Ill. App., 259; *Union Stock Yards & Transit Co. v. Monaghan*, 13 Ill. App., 148; *Rockefeller v. Tobias*, 3 Ill. App., 461.

² *National Bank v. LeMoyné*, 127 Ill., 253; *Gould v. Howe*, 127 Ill., 251; *Everett v. Collinsville Zinc Co.*, 41 Ill. App., 552.

³ *Reiman v. Ater*, 88 Ill., 299; *Bill*

Remarks of court or counsel.—If it is alleged as error that the remarks of the court or counsel are in violation of the rule, such remarks must be made to appear to have been excepted to and must be incorporated into the bill of exceptions as well as the fact that they were objected to and exception entered in the trial court.¹ Furthermore, if the error complained of is that the court denied counsel the right of argument, it must be made to appear that such denial was excepted to and it must further be made to appear that *no* argument was made by such counsel.²

Stipulations.—Agreements between counsel, or stipulations, that certain facts be admitted, or other matters concerning the trial agreed upon, must be incorporated into the bill of exceptions or they will not be matter of record so as to demand the attention of a court of review.³

Record cannot be corrected by bill of exceptions.—It is no part of the office of a bill of exceptions to supply any part of the record proper. If the record is incomplete or erroneous it cannot be supplied or corrected by means of a bill of exceptions. For example, in a record which contained no *placita* or convening order of court, and it not appearing before what Judge the cause was tried, or whether it was heard before the Judge who signed the bill of exceptions, the deficiency cannot be supplied by bill of exceptions.⁴

§ 1024. Same—Forms of bills of exceptions and amendments proposed.—It is, of course, impossible to give forms of bills of exceptions applicable to all cases, but the following may be found valuable as suggestions and may be varied to suit the circumstances of each particular case.

v. Mulford, 80 Ill., 82; Hermann v. Partridge, 79 Ill., 471; Gardner v. Baker, 79 Ill., 448; Keller v. Fournier, 74 Ill., 489.

¹ O'Hara v. King, 52 Ill., 304; Walker v. Butler, 15 Ill. App., 209.

² Curtin v. Long, 62 Ill. App., 36.

³ Wilson v. McDowell, 65 Ill., 522;

Chicago & N. W. Ry. Co. v. Benham, 25 Ill. App., 248; Eureka Coal Co. v. Powers, 11 Ill. App., 81.

As to refusal to dismiss according to stipulations, see Newman v. Dick, 23 Ill. App., 338.

⁴ St. Louis. A. & T. H. R. R. Co. v. Goodall, 43 Ill. App., 234.

NO. 365.—FORM OF BILL OF EXCEPTIONS—TO EVIDENCE—TO INSTRUCTIONS—AND DENYING MOTION FOR NEW TRIAL.

IN THE ---- COURT OF ---- COUNTY.

A-----	B-----	} Assumpsit (or as the case may be).
	vs.	
C-----	D-----	

Be it remembered that on the trial of this cause, at the.....term thereof, A. D.,....., the plaintiff gave in evidence on his behalf as follows, that is to say:

G.....H....., being duly sworn, testified as follows: (*Here state the testimony as given*).

(*Objections made and exceptions taken in the course of the examination may be set forth thus*): Thereupon the counsel for the plaintiff asked the witness (*state what*) to which the defendant has, by his counsel, then and there objected to for the reason that (*here state the objection*). The court then and there overruled the objection and permitted the witness to answer, which he did as follows:

(*Here state witness' answer*).

The ruling and decision of the court in permitting this question to be asked and answered was, by the defendant, then and there excepted to by his counsel, the witness then further testified as follows: (*Here state the testimony of the witness on direct examination*).

On cross-examination by defendant's counsel this witness testified (*here state what*).

(*The testimony of any other witness on behalf of the plaintiff should be set forth in like manner*) and thereupon the plaintiff offers no further evidence.

The defendant thereupon gave in evidence on his behalf the following, that is to say: (*Here state the testimony of the defendant, together with objections or exceptions taken by him in the manner indicated above for the plaintiff*).¹

And the defendant then and there offered no further evidence.

The foregoing was all the evidence introduced on the trial of this cause.²

Thereupon the court instructed the jury in behalf of the plaintiff as follows: (*Insert the instructions given for the plaintiff and number them consecutively*).

¹ "Here insert."—Any documentary evidence, instructions, affidavits, or other papers necessary to be introduced must actually be so introduced. The use of the words "here insert, etc.," in the bill of exceptions itself will not identify the papers with the bill of exceptions. They must be incorporated into it. *Eckles v. Wolf*, 55 Ill. App., 310; *Mosher v. Scofield*, 55 Ill. App., 271.

² It is absolutely necessary that the bill of exceptions should show that it contains all the evidence introduced in the cause. This may be shown without a repetition, if it is separately stated as to the testimony of each of the parties, but it must affirmatively appear and the general affirmation here is not out of place. *Marine Bank of Chicago v. Rushmore*, 28 Ill., 463.

The defendant by his counsel then and there excepted to the giving of each and all of said instructions.

Thereupon the court instructed the jury in behalf of the defendant as follows: (*Here insert instructions given for the defendant and number them consecutively*).

The defendant, by his counsel, then and there asked the court to give to the jury the following instructions: (*Here insert the instructions asked and refused, identifying them by figures or letters*).

The court, however, refused to give these instructions, to which ruling and decision of the court and to its ruling in refusing to give each of said instructions the defendant, by his counsel, then and there excepted.

The jury thereupon rendered a verdict against the defendant which verdict the defendant, by his counsel, then and there moved to set aside and to grant a new trial in this cause and for grounds in support of his motion he filed the following written statements of his reasons therefor: (*Here insert the grounds of the motion*).

The court thereupon overruled the said motion and gave judgment on the verdict against the defendant, to which decision of the court the defendant, by his counsel, made his exception to the said ruling of the court.

(*Conclude the bill as follows:*)

Inasmuch as the matters above set forth do not appear of record, the defendant prayed that the said court would set its hand and seal to this bill of exceptions, which is done accordingly this day of, A. D.

.....

E..... F....., Judge. (SEAL.)

NO. 366.—FORM OF BILL OF EXCEPTIONS FOR DENYING NEW TRIAL ON SOLE GROUND THAT VERDICT CONTRARY TO EVIDENCE.

IN THE COURT OF COUNTY.

A.... B...., }
vs. } Debt (or as the case may be).
C.... D.... }

Be it remembered, that after the verdict was rendered in this cause the defendant, by his attorney, moved the court to set aside the verdict and grant him a new trial on the ground that said verdict was contrary to the evidence. Thereupon the court overruled the motion, to which opinion the defendant excepted and prayed the court to certify the facts proved on the trial, which is here done accordingly, that is to say: (*Here state the facts as proved*). And these were the facts proved and considered by the jury on the trial of said action, to which opinion of the court, in overruling said motion and in refusing to grant said new trial, the defendant excepted and this his bill of exceptions tenders, and prays that the same may be signed, sealed and saved to him, and made a part of the record in this cause; and the same is so done.

E..... F....., Judge. (SEAL.)

NO. 367.—FORM OF BILL OF EXCEPTIONS ON REFUSING A NON-SUIT.

(Title of court and cause as above.)

Be it remembered that on the trial of this cause at the term in the court of county, A. D., the plaintiff to maintain the issue (or issues) on his part gave in evidence to the jury the following (*here state evidence introduced by one witness*) and further that (*continue in this manner until the entire evidence on the part of the plaintiff is given*) and thereupon the plaintiff offered no further evidence. Whereupon the defendant by his counsel moved the said court to direct that the plaintiff become nonsuited in that behalf. The court, however, then and there held that the aforesaid evidence given by the plaintiff was sufficient to maintain the issue (or issues) and thereupon overruled the said motion of the defendant in that behalf and left the consideration thereof to the jury aforesaid; whereupon the defendant by his counsel made his exception to said ruling and decision of the court.

The jury aforesaid then gave its verdict against the defendant upon the issue (or issues) aforesaid. The defendant, by his counsel, then prayed that the said court would set its hand and seal to this bill of exceptions, which is done accordingly this day, A. D.

E..... F....., Judge. (SEAL.)

NO. 368.—FORM OF BILL OF EXCEPTIONS ON REFUSING A CONTINUANCE.

(Title of court and cause as above.)

Be it remembered that on the day of, at this term of said court the defendant moved said court to continue this cause for the reason that (*here state the grounds on which the continuance was asked*) and read and filed in support of said motion, the following affidavit to wit: (*Here insert the affidavit*).¹

Whereupon the court, having heard the said affidavit, denied the said motion and refused to continue this cause.

Whereupon the defendant, by his counsel, then and there made his exception to said ruling and decision of the court.

(Conclude as one of the above forms.)

E..... F....., Judge. (SEAL.)

¹ If counter affidavits were heard all the evidence heard in that behalf on the motion, insert all affidavits and testimony and say, "which was half."

NO. 369.—FORM OF AMENDMENTS PROPOSED TO BILL OF EXCEPTIONS.¹*(Title of court and cause.)*AMENDMENT 1. On page three, line fourteen. strike out the words *(state them particularly)* and insert *(state what)*.AMENDMENT 2. On page five, line eight, after the words *(state them)* insert the words *(state them)*.*(Proceed thus throughout as the case may require.)*

R..... S....., Attorney for Plaintiff.

§ 1025. Same—Signing, sealing and settling bill of exceptions.²—The statute provides that where, during the progress of the trial of a civil cause, an exception is alleged to the opinion of the court and reduced to writing, it is the duty of the Judge to allow said exception and sign and seal the same, and the said exception shall thereupon become a part of the record of such cause.* Upon this authority depends the practice of preparing, settling and signing a bill of exceptions.

In practice counsel prepares his proposed bill of exceptions and submits it to the opposing counsel for his approval. If the opposing counsel approves of the bill of exceptions as submitted he manifests the same usually by indorsement upon the bill. The bill of exceptions is then presented to the Judge who presided at the trial of the cause, and he signs and seals the instrument, which then becomes a bill of exceptions. If counsel do not agree upon the bill of exceptions it is usual for them to meet before the Judge at a time arranged for that purpose when the Judge, upon consideration of the suggestions made to him by counsel, will settle and sign the bill of exceptions.

The making of a bill of exceptions is a judicial act. An instrument does not become a bill of exceptions until it is signed and sealed by the Judge while sitting as the court which tried the case. Stipulation of parties or counsel that a certain document shall stand as a bill of exceptions, cannot obviate

¹ This form may be used for a like purpose for an "agreed case." See post, 1029.

² Who cannot file bill of exceptions.

—A party who takes a voluntary

nonsuit in the trial court goes out of such court and cannot thereafter file a bill of exceptions. *People v. Browne*, 3 Gilm. (Ill.), 87.

³ Rev. Stat., Chap. 110, ¶ 60, § 59.

the requirements of the statute, nor can the Judge delegate to another his power to sign and seal the bill of exceptions.¹

¹ *Alley v. McCabe*, 147 Ill., 410; *David v. Bradley*, 79 Ill., 316; *Culliner v. Nash*, 76 Ill., 515; *Harvey v. Van De Mark*, 71 Ill., 177; *Reeves v. Reeves*, 54 Ill., 332; *Miller v. Jenkins*, 44 Ill., 443; *Emerson v. Clark*, 2 Scam. (Ill.), 489; *Jones v. Sprague*, 2 Scam. (Ill.), 55; *Chicago & W. I. R. R. Co. v. DeMarko*, 57 Ill. App., 382; *Chicago & W. I. R. R. Co. v. DeMarko*, 51 Ill. App., 581; *Clough v. Kyne*, 51 Ill. App. 120; *Lindgren v. Swartz*, 49 Ill. App., 488; *Oehler v. Schroeder*, 46 Ill. App., 204; *Thompson v. Seipp*, 44 Ill. App., 515; *Hall v. Cox*, 44 Ill. App., 382; *People v. Altgeld*, 43 Ill. App., 460; *Cline v. Toledo*, St. L. & K. R. R. Co., 41 Ill. App., 516; *Fries v. Fries*, 34 Ill. App., 142; *Widows and Orphans' Beneficiary Ass'n v. Powers*, 30 Ill. App., 82; *Chicago & N. W. Ry. Co. v. Benham*, 25 Ill. App., 248; *Thompson v. Duff*, 17 Ill. App., 304; *Wabash, St. L. & P. Ry. Co. v. Peterson*, 15 Ill. App., 149; *Wagener v. Richards*, 14 Ill. App., 389; *City of Bunker Hill v. Johnson*, 12 Ill. App., 255; *Frieze v. People*, 12 Ill. App., 349; *Gale v. Rector*, 10 Ill. App., 262; *Illinois Cent. R. R. Co. v. Gilchrist*, 9 Ill. App., 135; *Hayward v. Catton*, 1 Ill. App., 577.

When other judges may sign.—When there are several branches to the same court the bill of exceptions should be signed by the judge before whom the particular matter embraced therein was heard, but where the object of the bill of exceptions is to show that the matter has never been heard before the court in any of its branches the bill may be signed by the judges of the several branches of the court.

When trial judge dies.—In case of death of the trial judge, another judge may sign the bill of exceptions if the applicant offer and show that the bill is correct. If such showing is not made or the judge refuses to sign the bill, the party cannot be relieved of the hardship caused by the death of the trial judge. *Alley v. McCabe*, 147 Ill., 410.

The seal is not only required by our statute to be affixed to the bill of exceptions, but it has been required since the enactment of the statute, 13 Edward I, Chapter 31. If the instrument lack a seal it is not a bill of exceptions. *Miller v. Jenkins*, 44 Ill., 443.

The seal, however, may be affixed by the judge who tried the cause, by way of amendment, even though he may not be in office at the time of such amendment. *Frazier v. Laughlin*, 1 Gilm. (Ill.), 185.

Judge compelled to sign bill of exceptions.—While the settling, allowance, signing and sealing of a bill of exceptions is considered one single act, it is an act which is both judicial and ministerial in its nature. Determining its correctness is judicial, while signing and sealing it is a mere ministerial act, which, if the judge refuses to do, he may be compelled to perform by a writ of *mandamus* sued out of a court of superior jurisdiction. *People v. Anthony*, 129 Ill., 218; *Hawes v. People*, 124 Ill., 560, s. c., 30 Ill. App., 94; *Bristol v. Phillips*, 3 Scam. (Ill.), 287; *Weatherford v. Wilson*, 2 Scam. (Ill.), 253; *People v. Pearson*, 2 Scam. (Ill.), 189; *Hake v. Struebel*, 121 Ill., 321; *People v. Altgeld*, 43 Ill. App., Anderson v. Field, 6 Ill. App., 307.

Time of preparing bill of exceptions.—A technical construction of the law would require that a party reduce his exception to writing and have it signed during the progress of the trial, but it is sufficient in practice that a bill of exceptions be made by and signed during the term at which the cause was tried. Furthermore, counsel may consent, or the Judge, by entry on the record, may direct, that it be prepared in vacation, and signed and sealed *nunc pro tunc*. Upon the face of the bill it should appear that the exception was taken, signed and sealed at the trial, except where it is ordered by the court to be presented at a subsequent time, and where it is signed at a subsequent time it must appear that such time was given in which to have it settled and signed, or it will be no part of the record and cannot be considered. However, where nothing appears to the contrary it will be presumed that it was presented within the proper time and that the Judge would not have signed it unless such were the fact.'

460; *People v. Hawes*, 25 Ill. App., 326.

That he cannot be compelled to sign an amended bill of exceptions under certain circumstances, see *People v. Anthony*, 129 Ill., 218.

The Judge cannot be compelled to sign a bill of exceptions which is not presented to him for signature within the time fixed therefor. *People v. Blades*, 104 Ill., 591; s. c., 10 Ill. App., 17.

The party has a right to aid of Judge.—The party not only has a right to have all the facts connected with the decisions of the court, which was excepted to, included in his bill of exceptions and the Judge's signature thereto, and a writ of *mandamus* to compel the same if necessary, (*People v. Pearson*, 2 Scam. (Ill.), 189,) but he has a right to the assistance of the court if necessary to enable him to prepare and present a complete bill of exceptions. If the adversary is in possession of

papers desired to be incorporated, the court should grant an order that they may be copied and embodied in the bill of exceptions. *People v. Horton*, 46 Ill. App., 43.

Exhibits and documents should precede the signature of the Judge with proper words of identification. A mere affixing of documents to a bill of exceptions, does not make them a part thereof. *Hughes v. Bell*, 55 Ill. App., 379; *Wilson v. Nilson*, 44 Ill. App., 209; *Hursen v. Lehman*, 35 Ill. App., 489.

¹ *Village of Marseilles v. Howland*, 136 Ill., 81; *Brownfield v. Brownfield*, 58 Ill., 152; *Underwood v. Hossack*, 40 Ill., 96; *Neece v. Haley*, 23 Ill., 416; *Burst v. Wayne*, 13 Ill., 664; *Evans v. Fisher*, 5 Gilm. (Ill.), 453; *Belford v. Beatty*, 46 Ill. App., 359; *Douglass v. Suggs*, 36 Ill. App., 553; *Baits v. People*, 26 Ill. App., 431; *Stein v. Kendall*, 1 Ill. App., 101.

It is not necessary that a bill of

A party cannot be prejudiced by the refusal of the Judge to sign the bill of exceptions if it is prepared and presented to him within the time allowed therefor. He has done all he could. The power of the court may be regarded as continuing until a subsequent term if at such term he signed the bill of exceptions.¹

Further time for preparing a bill of exceptions may be obtained from the Judge while sitting as a court if the request is made before the time for preparing such bill has expired. After the time has expired the Judge has lost his jurisdiction to perform the judicial act of extending the time or of signing and sealing the bill. Furthermore, the Judge, while sitting as a court, must be sitting as the court which tried the case. If he is also Judge of another court and sitting as such he has no jurisdiction to extend the time for preparing a bill of exceptions.²

The parties cannot, by stipulation, extend the time for preparing and filing a bill of exceptions. The extension of time is a judicial act, which a court only can perform. When the time expires the court is then without jurisdiction and jurisdiction can be conferred by stipulation of parties.³ But he cannot, after two years, sign a bill of exceptions where he relies solely on his memory in determining whether the requirements have been fulfilled.⁴

§ 1026. Filing bill of exceptions—Striking from files.—

A bill of exceptions does not become a part of the record of

exceptions be tendered until after final judgment is entered, and it is not necessary that it be tendered then if the time is extended by order of court. (*People v. Gary*, 105 Ill., 264.) Though filed before the entry of judgment it does not become a part of the record until after the judgment. *Planing Mill Lumber Co. v. City of Chicago*, 56 Ill., 304.

Danger of delay.—Where parties take time in which to present a bill of exceptions they take the risk of such events as the death of the trial

Judge. *Alley v. McCabe*, 46 Ill. App., 368. See note *supra*, "When trial Judge dies," and "When other Judges may sign."

¹ *Hawes v. People*, 129 Ill., 123; *Magill v. Brown*, 98 Ill., 235.

² *United States Life Ins. Co. v. Shattuck*, 57 Ill. App., 382; *Village of Marseilles v. Howland*, 34 Ill. App., 350.

³ *Morris v. Watson*, 61 Ill. App., 536.

⁴ *Dent v. Davison*, 52 Ill., 109.

the trial court until it is properly signed, sealed and filed therein. The bill of exceptions should be filed in the trial court immediately after it is signed and sealed. It must either be filed before the expiration of the term in which the cause is tried, or else before the expiration of the time specially granted therefor. Further time must be asked for and obtained in which to prepare it. Still further time may be obtained if the first extended time expires in term time, but if it expires in vacation, the Judge cannot *in vacation*, grant an extension of time. The fixing of the time for the filing of a bill of exceptions is a judicial act which the Judge in vacation has no power to perform. An application for further time in which to file the bill of exceptions should be made upon proper notice giving the time and place of such application. Courts have unquestioned power to extend the time for presenting and filing a bill of exceptions to a given time in vacation or to a succeeding term; but such extension must be evidenced by an order entered upon the record of the court.¹

A bill of exceptions which is not filed in apt time does not properly become a part of the record and may be stricken from the files. When a motion is made to strike the bill of exceptions from the record it should be made in the court below; for if this be not done the court above will presume that it was properly filed.² It seems, however, that where the bill of exceptions shows on its face that it was not presented, signed, sealed and filed in apt time, that it may be stricken from the record on motion made in the court to which the appeal was taken.³ When a bill of exceptions is stricken

¹ Village of Marseilles v. Howland, 34 Ill. App., 350; Hance v. Miller, 21 Ill., 636; Treishel v. McGill, 28 Ill. App., 68; People v. Hawes, 25 Ill. App., 326; Dickey v. Town of Bruce, 21 Ill. App., 445; Aholtz v. Durfee, 13 Ill. App., 326; People v. Blades, 10 Ill. App., 17; Day v. City of Clinton, 5 Ill. App., 605; Graff v. Reed, 5 Ill. App., 561; Warner v. Kelley, 5 Ill. App., 559; Hatch v. Wegg, 5 Ill. App., 452; Simpson v.

Simpson, 3 Ill. App., 432; Evans v. Fisher, 5 Gilm (Ill.), 453; Hawes v. People, 129 Ill., 123.

As to presumption regarding time of filing, see *post*, § 1027.

² Village of Hyde Park v. Dunham, 85 Ill., 569.

³ Wallahan v. People, 40 Ill., 102; Warner v. Kelley, 5 Ill. App., 559. As to striking amended bill from files, see *post*, § 1028n.

from the files and no errors are assigned, except such as were presented by the bill of exceptions, the judgment of the court below must of course be affirmed.¹

If a bill of exceptions is stricken from the record before the time has elapsed in which further time for filing a bill of exceptions may be obtained, leave may be procured for filing a further bill of exceptions. If it is too late to obtain such further time then a motion may be made to restore the bill of exceptions to the record, or to rescind the order striking it from the files. If either of these motions is granted and the bill of exceptions is not restored to the files, it cannot be considered as part of the record.²

A motion to strike a bill of exceptions from the files must be made before there is joinder in error, otherwise any objection thereto will be deemed to have been waived.³

§ 1027. Construction of bill of exceptions—Presumptions.—A bill of exceptions is regarded as the pleading of the party taking the exceptions and therefore like another pleading, it will be construed most strongly against the party who prepared it. Inferences favorable to such party are not to be drawn from it and uncertainties in it will be resolved against him. It must clearly show the facts which it purports to show or it will be ineffective.⁴

¹ Gilbert v. McCoy, 68 Ill., 205.

² Brady v. Pullman Palace Car Co., 42 Ill. App., 399.

³ Kane v. People, 13 Ill. App., 382; Burst v. Wayne, 13 Ill., 664; McGill v. Brown, 98 Ill., 235.

Incorporating bill of exceptions itself into the transcript of the record.—The bill of exceptions after becoming part of the record in the trial court will be copied by the Clerk in the transcript of the record which is to be by him authenticated for the use of the court of review. If parties desire to be saved a liability for the costs of the Clerk in copying the bill of exceptions, they

may, by stipulation, have the original bill of exceptions incorporated into the *transcript* of the record. Daube v. Tannison, 54 Ill. App., 290; Rhode v. Lehman, 50 Ill. App., 455; Rev. Stat., Chap. 53, ¶ 68, § 1.

As to what is not a stipulation that the "original bill of exceptions be incorporated into the transcript of the record," see Mason v. Strong, 51 Ill. App., 482; Harris v. Shebeck, 51 Ill. App., 382; Overman & Cook v. Consolidated Coal Co., 51 Ill. App., 289; Chicago, M. & St. P. Ry. Co. v. Harper, 26 Ill. App., 621.

⁴ Garrity v. Hamburger Co., 136

Every reasonable presumption will be made in favor of the regularity of the proceedings of the court in regard to a bill of exceptions. If error is not clearly and affirmatively shown, the judgment will be affirmed. It will be presumed that the lower court proceeded regularly and in conformity with the law until the contrary is made to appear by the record. A presumption of regularity will be indulged in support of the judgment whenever the bill of exceptions is so framed as to leave room for such presumption. This is true, both where the bill of exceptions is lacking and where it is insufficient to show error affirmatively.¹ A court of review can only pass

Ill., 499; McKee v. Ingalls, 4 Scam. (Ill.), 30; Rogers v. Hall, 3 Scam. (Ill.), 5; Miller Brewing Co. v. Beckington, 54 Ill. App., 191; East St. Louis Electric R. R. Co. v. Cauley, 49 Ill. App., 310; Town of Normal v. Gresham, 49 Ill. App., 196; Spangenberg v. Charles, 44 Ill. App., 526; Stock Quotation Telegraph Co. v. Board of Trade, 44 Ill. App., 358; Jordan v. Vehon, 44 Ill. App., 177; O'Berne v. Robbins, 44 Ill. App., 76; Alley v. Limbert, 35 Ill. App., 592; Monroe v. Snow, 33 Ill. App., 230; Chicago City Ry. Co. v. Duffin, 24 Ill. App., 28; First Nat. Bank v. Haskell, 23 Ill. App., 616.

Bill of exceptions imports a verity.—Where excluded evidence inadvertently finds its way into the record, and such evidence so appearing is improper, it will be cause for reversal. It cannot then be shown that such evidence was excluded at the trial. The bill of exceptions imports a verity and the court of review cannot look beyond it. Chicago, B. & Q. R. R. Co. v. Lee, Admx., 68 Ill., 576.

Cannot be supplied by the pleading.—Where a bill of exceptions in an action on a promissory note did not contain a copy of the note introduced in evidence on the trial, it

was held that the deficiency could not be supplied by the declaration or a copy of the note thereto attached. Spain v. Thomas, 49 Ill. App., 249.

Conclusive as to matter of fact.—All matters of fact recited in the bill of exceptions, and certified to by the Judge who tried the cause, will be conclusively presumed to exist as recited. Nelson v. Humes, 12 Ill. App., 52.

Recitation in bill of exceptions takes precedence over other recitations in the record.—Where the recitals in the bill of exceptions, duly signed by the Judge, are not in harmony with the recitations entered by the Clerk in other parts of the record, the real truth will be taken to be that as stated in the bill of exceptions. Hirth v. Lynch, 96 Ill., 409; Westphal v. Sipe, 62 Ill. App., 111.

It will be presumed that the case was called in its proper order; if it were not, that fact must be made affirmatively to appear of record by incorporating it into the bill of exceptions. Bill v. Mulford, 80 Ill., 82.

¹ County of LaSalle v. Milligan, 143 Ill., 321; Mullen v. People, 138 Ill., 606; Village of Melrose v. Bernard, 126 Ill., 496; Gibbie v. Mooney,

upon the evidence when it is presented in a bill of exceptions. If the bill of exceptions is wanting or if it does not contain all the evidence the court of review cannot determine whether the trial court erred in determining that the evidence was proper and sufficient to support the verdict. Furthermore, where it does not affirmatively appear that the bill of exceptions contains the whole of the evidence, the presumption will be indulged that other evidence was introduced sufficient to sustain the verdict, and the judgment of the trial court will be affirmed.¹ The bill of exceptions need not declare that it contains all the evidence that was offered in the case, but it must make that fact affirmatively to appear. The statement "that the testimony here closed" has been held to be equivalent to an assertion that it contained all the evidence.²

121 Ill., 225; Magill v. Brown, 98 Ill., 235; Town of Mt. Vernon v. Patton, 94 Ill., 65; Wallace v. Goold, 91 Ill., 15; Barger v. Hobbs, 67 Ill., 592; Cunningham v. Craig, 53 Ill., 252; Rich v. Hathaway, 18 Ill., 548; Leonard v. The Times, 51 Ill. App., 427; Lindgren v. Swartz, 49 Ill. App., 488; Yeager v. City of Henry, 39 Ill. App., 21; Smith v. City of Gilman, 38 Ill. App., 393; Rohrheimer v. Eagle, 30 Ill. App., 498; Treishel v. McGill, 28 Ill. App., 78; Gordon v. Gordon, 25 Ill. App., 310; Chicago City Ry. Co. v. Duffin, 24 Ill. App., 28; Johnson v. Glover, 19 Ill. App., 585; DeLeuw v. Carrigan, 19 Ill. App., 193; Chicago, R. I. & P. Ry. Co. v. Harmon, 16 Ill. App., 31; People v. Ferguson, 13 Ill. App., 329; Howard v. Austin, 12 Ill. App., 655.

¹ Chicago, R. I. & P. Ry. Co. v. Town of Calumet, 151 Ill., 512; Kelley v. City of Chicago, 148 Ill., 90; People v. Stone, 142 Ill., 281; Garrity v. Hamburger Co., 136 Ill., 490; Thompson v. People, 125 Ill., 256; Miller v. Glass, 118 Ill., 443; Drainage Com'rs v. Hudson, 109 Ill., 659; Nimmo v. Kuykendall, 85 Ill.,

476; Garrity v. Lozano, 83 Ill., 597; Howell v. Morlan, 78 Ill., 162; Choate v. Hathaway, 73 Ill., 518; Prout v. Grout, 72 Ill., 456; Willson v. McDowell, 65 Ill., 522; Goodrich v. City of Minonk, 62 Ill., 121; Miner v. Phillips, 42 Ill., 123; Illinois Cent. R. R. Co. v. Garrish, 39 Ill., 370; Peoria, etc., R. R. Co. v. McIntire, 39 Ill., 298; Carter v. White, 32 Ill., 509; Wooley v. Fry, 30 Ill., 153; Elizabethtown v. Lefler, 23 Ill., 90; Warner v. Carlton, 22 Ill., 415; Adair v. Adair, 51 Ill. App., 301; Helmuth v. Bell, 49 Ill. App., 629; Atchison, T. & S. F. R. R. Co. v. Baltz, 44 Ill. App., 558; Hall v. Cox, 44 Ill. App., 382; Redner v. Davern, 41 Ill. App., 245; Schmidt v. Bauer, 33 Ill. App., 92; Trustees of Schools v. Stoltz, 26 Ill. App., 389; Chicago & N. W. Ry. Co. v. Benham, 25 Ill. App., 248; Masters v. Masters, 13 Ill. App., 611; Bulmer v. Worthington, 3 Ill. App., 460.

² Marine Bank of Chicago v. Rushmore, 28 Ill., 463.

No presumption regarding other instructions.—While it will be presumed that other evidence was

§ 1028. Amendment of bill of exceptions.—A bill of exceptions when signed and sealed and properly filed becomes a part of the judgment record¹ and is amendable under the same rules governing the amendment of other parts of the record. It may be, by the Judge, amended without notice at any time during the term. (The attention of counsel should be called to that fact.) But after the expiration of the term the Judge loses his power to alter it of his own motion. Furthermore, after the expiration of the term it cannot be amended on the mere recollection of the Judge. It must be amended

heard than that shown in the bill of exceptions, when the contrary does not appear, it will not be presumed that other instructions were given, and the bill of exceptions does not show that the instructions are therein contained. *Cox v. People*, 100 Ill. 457.

Presumption regarding affidavits.—Where affidavits in support of motions are not made a part of the bill of exceptions it will be presumed that the court ruled properly upon such motions. *Miller v. Metzger*, 16 Ill., 390.

For example, where the affidavits are not shown, it will be presumed that the court acted properly in allowing a minor bringing suit by his next friend to prosecute as a poor person without costs. It will be presumed that a sufficient showing was made to establish the fact that both the infant and his next friend were poor persons. *Chicago & I. R. R. Co. v. Lane*, 130 Ill., 116.

Presumption regarding time of excepting, signing, sealing and filing.—If the record fails to show when the bill of exceptions was presented, signed and sealed, it will be presumed that this was done within the proper time, and that the exceptions therein noted were taken at the day of the trial and in the order in which they purport to have

been taken. Furthermore, if it is presented for signing and sealing within the proper time, and the Judge makes delay therein, it will be presumed that such delay is unavoidable on the part of the Judge. These presumptions may be rebutted by proof, the burden resting upon the appellee. *Underwood v. Hossack*, 40 Ill., 98; *Village of Hyde Park v. Dunham*, 85 Ill., 569; *Morrison v. People*, 52 Ill. App., 482; *Stein v. Kendall*, 1 Ill. App., 101.

No presumption when bill not signed.—A bill of exceptions which is not signed by the trial Judge is no part of the record and no presumption can be entertained regarding it. It is not to be considered in any sense and the judgment in the court below will be affirmed. *Pierson v. Waters*, 7 Ill. App., 400.

Same—presumption as to jurisdiction.—When no bill of exceptions appears upon the record the court of review will indulge no presumption in favor of the jurisdiction of the trial court upon *certiorari* from a Justice's court. *Faas v. O'Conner*, 6 Ill. App., 593.

¹ It is not a part of the record before judgment is entered in the trial court. It cannot be made to aid the defects of the judgment record. *Planing Mill Lumber Co. v. City of Chicago*, 56 Ill., 304.

from something appearing from the record or the minutes of the Judge or what is apparent from the mere clerical mistake.¹

The proper practice, upon a party discovering that his bill of exceptions does not speak the truth, is to apply in open court, upon due notice having been given to the opposite party, to have the bill of exceptions amended. If justice require it, the party has a right to have his amended bill signed and sealed by the same Judge presiding at a subsequent term of the same court in which the cause was tried. The amended bill then becomes a part of the record and a transcript thereof can be filed, upon leave granted, in a court of review.² An amended bill, filed without leave having been granted to file a supplemental record, will not be considered as part of the record.³

¹ Chicago, M. & St. P. Ry. Co. v. Walsh, 150 Ill., 607; People v. Anthony, 129 Ill., 218; Dougherty v. People, 118 Ill., 160; Heinsen v. Lamb, 117 Ill., 549; Newman v. Ravenscroft, 67 Ill., 496; Wallahan v. People, 40 Ill., 103; Chicago, M. & St. P. R. R. Co. v. Walsh, 51 Ill. App., 584; Horton v. Smith, 46 Ill. App., 241; Brady v. Pullman Palace Car Co., 42 Ill. App., 399; Roblin v. Yaggy, 35 Ill. App., 537; Myers v. Antrim, 14 Ill. App., 437; Terre Haute & I. R. R. Co. v. Bond, 13 Ill. App., 328; Hall v. Mills, 5 Ill. App., 495.

The sealing of the bill of exceptions may be done by way of amendment by the Judge who tried the case, although he may not be in office at the time of affixing such seal. Frazier v. Laughlin, 1 Gilm. (Ill.), 185.

Striking amended bill from the files.—A motion may be made, in the court to which the appeal is taken, to strike the amended bill of exceptions from the files, where such amendment was made without the notice after the expiration of the term. If such fact is established in support of the motion and nothing

appears of record by which the amendment might have been made, an order will be entered to strike the bill from the files. If, however, there is sufficient appearing of record, which, when aided by every reasonable presumption, will warrant the amendment, the bill will not be stricken from the files. Guertin v. Monbleu, 144 Ill., 32; Wallahan v. People, 40 Ill., 102.

Presumptions aiding the amendment.—Where an amended bill of exceptions is not affirmatively shown to have been made in vacation or at a subsequent term without notice to the opposite party, and in the absence of objection and exception, that there was nothing to amend by, it will be presumed that the Judge rightfully considered and made the amendment upon sufficient memoranda or notes, and with proper notice having been given. Myers v. Phillips, 68 Ill., 269; Wallahan v. People, 40 Ill., 103; Pollard v. Rutter, 35 Ill. App., 370.

² People v. Anthony, 129 Ill., 218; Devine v. People, 100 Ill., 290; Goodrich v. City of Minonk, 62 Ill., 121.

³ Elliott v. Levings, 54 Ill., 213.

It therefore follows that an

The court acts judicially in determining the necessity for an amended bill of exceptions and must find in what particulars the bill as first filed fails to correctly state the facts as they transpired on the trial. Furthermore, when the correction is ordered, the record should clearly state the amendment intended.¹ Parties cannot, by stipulation, incorporate into a bill of exceptions, and thereby make to appear of record, that which is not certified to by the Judge as having taken place. The parties cannot perform a judicial act, neither can the court delegate such power to them.²

II. *Agreed Cases.*

§ 1029. **Agreed case in lieu of bill of exceptions.**—In any suit or proceeding in a trial court in law or in chancery, the parties may make an agreed case containing the points of law at issue between them, and may file the same in such court. The agreed case with the decision thereon may be certified to a court of review by the Clerk without certifying any fuller record in the case. Upon such agreed case being certified and filed in the court of review, the appellant or plaintiff in error may assign errors, and the case shall then be proceeded in in the same manner as might have been, had full record been certified to such court of review.³

However, no judgment will be pronounced in the court of review in any agreed case and placed upon the docket of such court, unless an affidavit shall be filed, setting forth that the matters presented by the record were litigated in good faith about a matter in actual controversy between the parties, and that the opinion of such court is not sought with any other design than to adjudicate and settle the law relative to the matters in actual controversy between the parties to the record.⁴

amended bill of exceptions, not before the appellate court, cannot be considered by the Supreme Court when the case is removed thereto. *National Bank v. LeMoynes*, 127 Ill., 253.

¹ *Myers v. Antrim*, 14 Ill. App., 437.

² *Schwarze v. Spiegel*, 41 Ill. App., 351.

³ Rev. Stat., Ch. 110, ¶ 75, § 74.

⁴ Supreme Court Rule 20; Appellate Court Rule 16, Second Dist. & Third Dist.; Rule 17, Fourth Dist.

ARTICLE III.

TAKING CASE UP BY APPEAL.

- | | |
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| § 1030. Who may appeal. | § 1033. Same—Security may be ap-
proved by the Clerk. |
| 1031. When appeal may be taken. | 1034. Same—Effect of insufficient
bond—Amendment. |
| 1032. The appeal bond—When to
be filed—Conditions—Form. | 1035. The filing of the record. |

§ 1030. **Who may appeal.**—Either the plaintiff or defendant in a suit which has been finally determined may appeal.¹ Where the judgment has been rendered against two or more persons, either one of said persons shall be permitted to remove such suit by appeal or writ of error, and for that purpose shall be permitted to use the names of all of said persons, if necessary; but no costs shall be taxed against any person who shall not join in said appeal or writ of error. All such cases shall be determined as other suits are, and in the same manner as if all the parties had joined in such appeal or writ of error.²

§ 1031. **When appeal may be taken.**—An appeal from the final judgment, order, or decree of the trial court may be prayed for and obtained at any time during the term at which such judgment, order, or decree was rendered.³ If an appeal is prayed for and allowed at one term from a judgment entered at a previous term, it will not take up the judgment for review in the court above.⁴

An appeal is prayed orally. It is the usual practice for counsel to ask the court to allow an appeal and fix the amount of the bond and state the time in which the bill of exceptions

¹ *Ante*, § 1014.

² Rev. Stat., Chap. 110, ¶ 71, § 70; St. Louis, etc., v. Edwards, 103 Ill., 472.

³ Rev. Stat., Chap. 110, ¶ 68, § 67; Illinois Central R. R. Co. v. John-

son, 40 Ill., 35; McMillan v. Bethold, 40 Ill., 34; Bissell v. Lloyd, 6 Ill. App., 460.

⁴ Kartas v. Kentucky Liquor Co., 46 Ill. App., 366.

was prepared and filed. The court then has the Clerk to make an entry of record that an appeal was prayed and allowed; that the amount of the bond is fixed at _____ dollars and _____ days given in which to file a bill of exceptions.¹

When the appeal is not taken at the term the judgment, order, or decree was entered, the proceedings then to obtain a review is by writ of error,² as hereinafter shown.³

§ 1032. The appeal bond—When to be filed—Conditions Form.—When an appeal is prayed and allowed, the party praying for such appeal, shall, within such time, not less than twenty days, as shall be limited by the court, give and file in the office of the Clerk of the court from which the appeal is prayed, bonds in a reasonable amount, to secure the adverse party, to be fixed by the court, with sufficient security, to be approved by the court.⁴

If the appeal is from a judgment or decree for the recovery of money, the condition of the bond shall be for the prosecu-

¹ When a judgment is entered by default and a motion made to set it aside, which motion is continued to a subsequent term and overruled, after which an appeal is prayed and allowed, such appeal will only be to the order overruling the motion. It will not take up the question of the propriety of the judgment entered at the preceding term. Nat. Ins. Co. v. Chamber of Commerce, 69 Ill., 22.

² Crane v. Nelson, 37 Ill. App., 597.

³ Post, § 1036.

⁴ Rev. Stat., Chap. 110, ¶ 68, § 67; Wormley v. Wormley, 96 Ill., 129; Darwin v. Jones, Admr., 82 Ill., 107.

As to the discretion to be exercised and the particularity required in the security, see post, § 1033.

Who need not give bond.—The state, counties, cities, villages, towns, school districts and all other municipal corporations, and the cor-

porations of all charitable, educational, penal, or reformatory institutions under the patronage and control of the state, and all public officers when suing or defending in their official capacities, for the benefit of the public, may, in all cases of appeal (or writ of error), by them from any inferior court to any higher court, prosecute the same, without giving bond. Rev. Stat., Chap. 110: ¶ 72, § 71; City of Chester v. Wilson, 15 Ill. App., 239.

Supersedeas without bond.—The Supreme or Appellate Court, or the Judges thereof, in vacation, may grant writs of *supersedeas* on writ of error or appeal, when prosecuted by the state, or any of said corporations or public officers, without requiring any bond to be given as required by law, as in other cases. Rev. Stat., Chap. 110, ¶ 72, § 71.

tion of such appeal and the payment of the judgment, interest, damages and costs in case the judgment is affirmed. In all other cases the condition shall be directed by the court with reference to the character of the judgment, order, or decree appealed from.¹

NO. 370. — FORM OF BOND FOR APPEAL TO APPELLATE OR SUPREME COURT.

KNOW ALL MEN BY THESE PRESENTS that We, C....., D..... and (*here insert the name of surety or sureties*) ofcounty, in the State of Illinois, are held and firmly bound unto A..... B....., of the same county and State,² in the penal sum of (*here state the amount fixed by the court*) dollars lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly, severally and firmly by these presents.

Witness our hands and seals this....day³ of...., A. D.....

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH,⁴ that whereas, the said A..... B..... did, on the....day of....., A. D..... in thecourt of.....county, in the State aforesaid, and of the.....term thereof, A. D....., recover a judgment against the above bounden C..... D....., for the sum of....dollars and....cents, besides costs of suit; for which said judgment of the said....court of....county the said C.....

¹ Rev. Stat., Chap. 110 ¶ 68, § 67.

Action on the bond.—The obligee in such bond may, at any time, on a breach of the conditions thereof, have and maintain an action at law as on other bonds. Rev. Stat., Chap. 110, ¶ 68, § 67; Walker v. Bank of North America, 2 Ill. App., 304.

² In an appeal from a judgment brought by a city for assessment of taxes and in which the city alone is interested, the bond should be made payable to the city and not to the people of the State. City of Nashville v. Weiser, 54 Ill., 245.

³ If the day be left *blank* and the month be named when the recitation below shows the recovery of a judgment on the—day of the previous month, the bond will not be void. It is a voluntary undertaking and is obligatory upon the parties to the bond. Bills v. Stanton, 69 Ill., 51.

⁴ *When not for the payment of money*, the conditions of the bond shall be directed by the court with reference to the character of the judgment appealed from. Rev. Stat., Chap. 110, ¶ 68, § 67; Higgins v. Parker, 48 Ill., 445. It is proper for the court to insert the condition for the payment of the value of the use and occupation of the premises and omit the statutory condition for the payment of such. Higgins v. Parker, 48 Ill., 445; further see George v. Bischoff, 68 Ill., 236.

Conditions not in conformity with the statute, will nevertheless constitute a valid common law bond since the obligation is a voluntary one founded upon contract. Fourrier v. Faggott, 3 Scam. (Ill.), 347. As to "Appeal Bond," generally, see *ante*, Vol. I, "Appeals from Justices of the Peace."

D..... has prayed for and obtained an appeal to the ("Appellate" or "Supreme," as the case may be) court, within and for the....district in said court.

Now therefore, if the said C..... D....., shall duly prosecute his said appeal with effect,¹ and moreover pay the amount of the judgment, costs, interests and damages rendered, and to be rendered, against him, in case the judgment shall be affirmed in said ("Appellate" or "Supreme") court, then the above obligation shall be void, otherwise to remain in full force and virtue.

C..... D..... (SEAL.)²
 (SEAL.)
 (SEAL.)

Approved by me this....day
 of...., A. D.....

.....
 Judge of....court of....county,
 (or "clerk" as the case may be).

§ 1033. Same—Security may be approved by the Clerk.

—The Clerk of the court may, by order of the court, made at the time of praying the appeal, and entered of record, approve of the security offered upon such bond, and such approval may be made in term time or vacation.³

A reasonable discretion should be exercised in passing upon the sufficiency of the surety, and an appellee should only be required to produce security of such pecuniary ability as will in all reasonable probability enable the appellee to collect the bond. It would often be tantamount to a denial of the right to appeal to require security, which in any and every event and under all possible circumstances, will certainly produce the amount of the bond without requiring any further outlay on the part of the appellee.⁴

¹ In a suit on a bond containing this condition in an appeal from a judgment against the real estate for taxes, a suit may be maintained against the obligors on the bond when the appeal is not prosecuted with effect, notwithstanding the fact that the remedy against the land still remains inexhausted. *Mix v. People*, use, etc., 86 Ill., 329.

² A bond may be executed in the name of the principal by his attor-

ney in fact and the court above will presume that when so executed the attorney was duly authorized and that the court or Clerk below was satisfied of that fact, unless the contrary appear. *Sullivan v. Dollins*, 11 Ill., 16; *Sheldon v. Reihle*, 1 Scam. (Ill.), 519.

³ Rev. Stat., Chap. 110, ¶ 69, § 68.

⁴ *Zuckerman v. Hawes*, 146 Ill., 59.

When approval unnecessary.—When the trial court in granting the appeal prescribes the penalty in which the bond shall be given, fixes the time in which it shall be filed and names the security, a bond filed in compliance with these requirements is sufficient without an approval by the Clerk.¹

§ 1034. Same—Effect of insufficient bond—Amendment.
—No appeal to the Supreme or Appellate Court shall be dismissed by reason of any informality or insufficiency of the appeal bond if the party taking such appeal shall, within reasonable time, to be fixed by the court, file a good and sufficient bond in such case, to be approved by the said court.²

Further time for amendment.—Where a rule has been entered for the appellant to file a new appeal bond by a day named, and on such day he, in good faith, presents his bond with security, which he believes to be perfectly good, and the court refuses to approve the bond, it is proper for the court to give further time in which to furnish another surety.³

§ 1035. The filing of the record.—An authenticated copy of the record of the judgment appealed from must be filed in the court from which the appeal is taken, within the time provided by law; which time is the same as that allowed for the filing of the record when the cause is taken up by writ of error, and will be stated particularly in that connection.⁴

¹ Illinois Central R. R. Co. v. Johnson, 40 Ill., 35.

² Rev. Stat., Chap. 110, ¶ 70, § 69.

³ Zuckerman v. Hawes, 146 Ill., 59.

Waiver of irregularity.—An objection to the irregularity or insufficiency in an appeal bond may

be waived by stipulation of the parties. Furthermore, a stipulation of parties granting further time in which to file briefs is in effect a waiver of defects in the appeal bond. National Safe and Lock Co. v. People, 50 Ill. App., 336.

⁴ See *post*, § 1041.

ARTICLE IV.

TAKING CASE UP BY WRIT OF ERROR.

§ 1036. Preliminary observation.

1037. Definition and nature of writ of error.

1038. In what cases it will lie.

1039. When it will not lie.

§ 1040. By and against whom to be issued—How parties designated.

1041. Within what time the writ may be sued out.

1042. Dismissal of a writ of error.

§ 1036. **Preliminary observation.**—It is frequently said that a Supreme Court has power to *review*, in some way, all final judgments. It also has *original* jurisdiction in many cases, as hereinbefore enumerated.¹ Our purpose is, however, in this connection, only to indicate how the power of the Supreme Court and Appellate Courts may be secured to “review” the action of inferior courts.

A writ of error is a writ of right and a party is not required to seek redress by it during the term at which the judgment was entered in the trial court, as he must in praying an appeal. Relief by way of writ of error is more extended, as will subsequently appear.

§ 1037. **Definition and nature of writ of error.**—A writ of error is an original writ issuing out of the court into which it is made returnable, and lies where a party is aggrieved by any error in the foundation, proceeding, judgment, or execution of a suit in any court of record. It is directed to the Judges of the court of record in which the final judgment was given, and commands them to send the record to the court of appellate jurisdiction therein named, to be examined, in order that some alleged error in the proceedings may, if necessary, be corrected. It is in the nature of a commission to the Judges of the court, to which it is returnable, authorizing them to examine the record, upon which the judgment

¹ *Ante*, Vol. 1, 7; also, *post*, “*Man-damus*,” “*Prohibition*,” “*Quo warranto*,” etc.

was given and on such examination to affirm or reverse the same, according to law.¹

It is only *injurious error* in the trial court that will be considered and the consideration is wholly of what appears upon the record. The writ simply brings up the record for examination. It does not, in any manner, act upon the parties. It acts simply upon the record.²

The purpose of a writ of error is to prevent a failure of justice. When a party has no other mode of review, a writ of error becomes a writ of right and cannot be denied in civil cases.³

A writ of error exists independently of statutory law for the purpose of reviewing the action of inferior courts of record when they exercise their common law jurisdiction and in such cases the fact that the statute may have provided an appeal will not, in this State, deprive a party of his right to a writ of error. A writ of error and appeal are often concurrent remedies in this State. In statutory proceedings of inferior courts of record, however, a writ of error to review them is not according to the common law, and it will not lie except where no other mode of review is provided, and then a writ of error will lie because of the policy of the common law to prevent a failure of justice.⁴

The suing out of a writ of error is the commencement of a new suit for all purposes, one of the consequences is that the statute of limitations may be interposed as a bar to it.⁵

§ 1038. In what cases it will lie.—A writ of error is a writ of right and cannot be denied except in capital cases. It

¹ 2 Tidd's Pr., 1134; Cohens v. Virginia, 6 Wheaton (U. S.), 409; Suydam v. Williamson, 20 How. (U. S.), 437; McLaughlan v. McLaughlan, 126 Ill., 427.

² Grier v. Puterbaugh, 108 Ill, 602; Perteeet v. People, 70 Ill., 171; Woarishoffer v. Lake Erie & W. R. R. Co., 25 Ill. App., 84; Clause v. Bullock Printing Press Co., 20 Ill. App., 113.

³ See *post*, § 1038.

⁴ Kingsbury v. Sperry, 119 Ill. 279.

⁵ International Bank v. Jenkins, 107 Ill., 291; Schroeder v. Merchants', etc., Bank, 104 Ill., 71; Roberts v. Fahs, 32 Ill., 474; Ripley v. Mossir, 2 Gilm. (Ill.), 391; Jenkins v. International Bank, 9 Ill. App., 451.

may be sued out to review the final judgment of any court of inferior jurisdiction, regardless of the amount for which such judgment was entered. The judgment, however, which it will procure to be reviewed must be a final judgment. An interlocutory order cannot be so reviewed. In order that the judgment may be so reviewed it must be such a judgment or decision as to settle the right of the parties in the subject-matter of the suit and which will conclude them therein until such judgment is reversed or set aside. Furthermore, the time within which a writ of error may be sued out does not begin to run until the "final judgment" is entered.¹

In all cases where inferior courts of record exercise jurisdiction according to the common law, a writ of error will procure such action to be reviewed. The right to a writ of error in such cases exists at the common law independent of statute. If, however, the inferior courts of record do not exercise their jurisdiction in accordance with the common law, but act in a summary way, or in a new course different from the common law, a writ of error will not lie to review such action, except it be especially provided by statute. A writ of *certiorari* is the proper writ in such cases, in the absence of the statute.² A writ of error will, however, be allowed to review statutory proceedings of inferior courts of record where no other mode of review is provided and failure of justice would otherwise result.³

It is the policy of the law, in this State, contrary to that in some other states, that a writ of error is a concurrent remedy with appeal in all cases in which the latter is provided by statute, and that a writ of error will lie in all cases as above shown without regard to the statute. Furthermore, the fact that one party has taken an appeal will not prevent the other party from suing out a writ of error.⁴

¹ *Ex parte* Thompson, 93 Ill., 89; *Village of Hyde Park v. Dunham*, 85 Ill., 569; *Hall v. Thode*, 75 Ill., 178; *Hammond v. People*, 32 Ill., 446; *Hedges v. County of Madison*, 1 Gilm. (Ill.), 306; *Bowers v. Green*, 1 Scam. (Ill.), 42.

² *Haines v. People*, 97 Ill., 161.

³ *Kingsbury v. Sperry*, 119 Ill., 279.

⁴ *Harding v. Larkin*, 41 Ill., 413.

Whether the writ of error shall be sued out of the Supreme Court or out of the appellate court, is, in most cases, determined by the statute. The statutory rules governing as to the court in which a review may be had upon a writ of error or appeal have been hereinbefore set forth.¹ If, however, a case should arise which the statute does not contemplate shall be taken to the appellate court, it may, by force of the common law, be reviewed by writ of error sued out of the Supreme Court.²

That a writ of error will lie to review the judgment of a court below, such judgment must show a good record. It is essential that the record should show that the court below had acquired jurisdiction, in some of the ways recognized by law, of the person of the party against whom the judgment was rendered; that a declaration was filed and was such a declaration as to set out a cause of action good in substance; and that the power of the court below had been invoked by the institution of a suit in some of the methods and forms known to the law.³

§ 1039. When it will not lie.—A writ of error will not lie to review the proceedings of an inferior court where such proceedings have not reached such a final determination that the parties thereto will be barred from further action unless the same is overruled; that is to say, it will not lie to review interlocutory orders or rulings of the court.⁴ It will not lie

¹ *Ante*, §§ 1017-1020; *Baits v. People*, 123 Ill., 428.

² *Taxation of costs upon a fee bill replevied* was properly taken before the Supreme Court on writ of error and not by appeal. *Smith v. Coats*, 19 Ill., 405.

Writ of error to the County Court.—A writ of error will lie to the County Court from other courts in the cases hereinbefore indicated for the taking of appeals. *Ante*, § 1017n.

Furthermore, a writ of error will lie from the Supreme Court to the County Court in all cases when it

has full jurisdiction and no appeal is given to the Circuit Court or appellate court. *Unknown Heirs, etc., v. Baker*, 23 Ill., 484; *Fitzgerald v. Glancy, Admr., etc.*, 49 Ill., 465.

³ *Miller v. Glass*, 14 Ill. App., 177.

⁴ *Ante*, § 1038; *Harsha v. McHenry*, 82 Ill., 278; *Bridge Co. v. L., N. A. & St. L. Ry. Co.*, 72 Ill., 506; *Walker v. Oliver*, 63 Ill., 199; *Sercomb v. Catlin*, 25 Ill. App., 195; *Atkins v. Huston*, 5 Ill. App., 826; *People v. McFarland*, 3 Ill. App., 237.

What is not a final judgment

to review an order of an inferior court upon a writ of *habeas corpus*. There is nothing final determined between the parties by such proceeding.¹

A writ of error will not lie to review a cause in which the defendant was tried for treason or felony.²

It is a well settled rule of law that error, to be reviewed, must be an erroneous act of the inferior tribunal, to which an objection was raised. If the error is of such a nature that it might have been removed should the attention of the trial court have been called to it by objection, an appellate court will not consider it.³ Furthermore, it must be error which works an injury to the party seeking redress, for no rule of law is better established than that "error without prejudice is no ground for reversal." It has become a maxim.⁴

Since a writ of error is considered as a suit⁵ it will not lie where a suit could not be prosecuted; for example, it will not lie to review a judgment founded on tort after the tortfeasor has died.⁶ Furthermore, a writ of error cannot be had to

subject to writ of error.—The setting aside of a judgment by the Circuit Court that a term subject to the one in which it was rendered is not a final judgment and a writ of error will not lie to review it. *Walker v. Oliver*, 63 Ill., 199.

A judgment sustaining a demurrer to one count of a declaration when there is a general issue filed to another count of the declaration is not a final judgment to which a writ of error will lie. The issue is still undetermined on the other count and plea of general issue. *Bridge Co. v. L., N. A. & St. L. Ry. Co.*, 72 Ill., 506.

An order finding a party guilty of contempt of court is an interlocutory order and so is an order directing a party to dismiss a suit or show cause why he should not be punished for failing to comply with the rule of court. *Sercome v. Catlin*, 25 Ill. App., 195.

An order sustaining exceptions to the report of a commission of surveyors in proceedings under the statute for the permanent survey of lands, is not a final order. *Harsha v. McHenry*, 82 Ill., 278.

¹ *Ex parte Thompson*, 93 Ill., 89; *People v. Skinner*, 19 Ill. App., 332; *Napier v. People*, 9 Ill. App., 523; *Wallace v. Cleary*, 5 Ill. App., 384.

² *Haines v. People*, 97 Ill., 161.

³ *Harmon v. Thornton*, 2 Scam. (Ill.), 351.

⁴ *Moses v. Loomis*, 55 Ill. App., 342; *Locey Mines v. Chicago, Wilmington & Vermillion Co.*, 28 Ill. App., 485; *Newfield v. Rodeminski*, 144 Ill., 83. See further, *post*, "Practice in courts of review," "Reversal."

⁵ *Ante*, § 1037.

⁶ *Barrett and Wife v. Gaston*, 1 Ill. (Breese), 255.

review an action as to one party after it has been reviewed as to another.¹

§ 1040. **By and against whom to be sued out—How parties designated.**—Who may obtain a review by writ of error has been hereinbefore indicated in a general way.² One not a party to the proceeding cannot prosecute a writ of error thereon; neither where the error relates to himself, nor where it relates to a party who does not complain.³ The party to prosecute a writ of error must be a natural or artificial person against whom a judgment for costs can be rendered should the judgment of the trial court be affirmed.⁴

A plaintiff may, for the purpose of being enabled to commence another action, sue out a writ of error to reverse a judgment in his own favor, if it is erroneous.⁵

Either of several defendants may sue out a writ of error as provided by the statute and hereinbefore indicated,⁶ but a cause cannot be reviewed as to one party at one time and another party at another time.⁷

Designation of parties.—Since the suing out of a writ of error is considered as the commencement of a suit,⁸ the party who sues out the writ is called the “plaintiff in error” and the party against whom the writ is directed is called the “defendant in error.” When a writ of error is designed to operate as a *supersedeas*, the party suing it out must first file a certified transcript of the record certified by the Clerk with assignments of error written thereon, together with a bond, as hereinafter indicated.⁹ When the writ is not designed to act as a *supersedeas* no bond is required, but it is required that

¹ *People v. McFarland*, 3 Ill. App., 237. Further as to “Writ of error by one of several defendants,” see *ante*, §§ 1030, 1038.

² *Ante*, § 1014; also as to “Appeal,” see *ante*, § 1030.

³ *McIntyre v. Sholty*, 139 Ill., 171; *Higgins v. Mulvey*, 136 Ill., 636; *Richards v. Greene*, 78 Ill., 525; *Pope v. North*, 33 Ill., 441; *Matter of Sturms*, 25 Ill., 390.

⁴ *Bowles v. Bowles*, 3 Gilm. (Ill.), 408.

⁵ *Thayer v. Finley*, 36 Ill., 262; *Jones v. Wight*, 4 Scam. (Ill.), 338.

⁶ *Ante*, § 1030.

⁷ *People v. McFarland*, 3 Ill. App., 237.

⁸ *Ante*, § 1037.

⁹ *Post*, § 1051, “Practice in Court of Review.”

service of it be made upon the Clerk of the trial court, who is by it commanded to transmit a certified copy of the record to the court from which the writ issued. When it is designed to act as a *supersedeas* no service of it is required, because the transcript of the record to be reviewed is filed before the writ issues.¹

§ 1041. Within what time the writ may be sued out.—

The statute provides that a writ of error shall not be brought after the expiration of five years from the rendition of the judgment complained of; but when a person thinking himself aggrieved by any judgment that may be reversed in the Supreme Court or appellate court, shall be an infant, *non compos mentis*, or under duress, when the same was entered, the time of such disability shall be excluded from the computation of the said five years.² The time at which the statute of limitations begins to run is the time when the party is entitled to have a writ of error issued,³ whether this be the date of the judgment,⁴ or whether the decree does not become final until a subsequent date.⁵ This rule applies only to cases in which a writ of error is a writ of right;⁶ in other words, where it will lie at common law. When it is sought in cases provided by the statute it must be sued out within the time therein provided.⁷ But a statute providing that an appeal shall be made within a certain time does not, by that provision, make it necessary that a writ of error shall not be brought within the usual limitation.⁸

The fact that a writ of error must be sued out within five years does not make it obligatory that the writ be served within such time. It may be served after the expiration of that period.⁹

¹ See *post*, § 1052, "Practice in the Supreme Court."

² Rev. Stat., Chap. 110, ¶ 86, § 85.

³ *Hedges v. Madison County*, 1 Gilm. (6 Ill.), 30.

⁴ *Avery v. Babcock*, 35 Ill., 175.

⁵ *Sale v. Fike*, 54 Ill., 292.

⁶ *Ante*, §§ 1037, 1038.

⁷ *Ellis v. Von Ach*, 14 Ill. App., 194.

⁸ *Atkins v. Huston*, 5 Ill. App., 327.

⁹ *Burnap v. White*, 14 Ill., 303.

§ 1042. **Dismissal of a writ of error.**—Where a writ of error has been sued out by several persons, parties to the proceedings in the inferior court, a portion of the plaintiffs in error may dismiss the suit as to themselves and leave the remaining plaintiffs to prosecute their suit if they desire so to do.¹

Where there has been no final judgment entered in the court below the writ of error will be dismissed upon such fact being brought to the attention of the court from which the writ issued.²

¹ *Thorp v. Thorp, Admr.*, 40 Ill., 113. *Village of Rock Falls*, 3 Ill. App., 464. Further, see *post*, §1063, "Practice in Courts of Review."

² *Commissioners of Highways v.*

ARTICLE V.

TAKING CASE UP BY WRIT OF CERTIORARI.

§ 1043. Definition, nature and purpose.

1044. When the writ may be obtained.

1045. From what courts the writ may issue.

1046. The procedure.

§ 1047. Form of petition.

1048. Assignment of errors not necessary.

1049. Noticing cause for hearing and placing same on calendar.

1050. Judgment.

§ 1043. Definition, nature and purpose.—“*Certiorari*” means *to be certified to*, and it is commonly used to designate a writ by which the record of a proceeding of a lower court is removed into a higher court for review.¹

By the common law, a writ of *certiorari* is a writ of right as to the plaintiff, but is a discretionary writ as to the defendant. In other words the plaintiff may, as a matter of right, have a writ of *certiorari* to bring up the record of the court below when there is no other mode provided for directly reviewing the proceedings of the inferior tribunal, while as to the defendant it is discretionary with the court above whether the writ shall or shall not be granted.²

The purpose of a common law writ of *certiorari* is solely to cause to be brought before the court awarding it, the entire record of the inferior tribunal relating to the subject matter of which complaint is made. The record alone will be examined to determine matters involved. No issue of fact can be raised and nothing *de hors* the record shown.³

§ 1044. When the writ may be obtained.—A writ of *certiorari*, like a writ of error, is designed to prevent a failure of justice; that is to say, it may be sued out for the purpose of having the record of the court below sent up to a

¹ 4 Bla. Com., 320.

² 4 Bla. Com., 321; Wright v. Highway Comrs., 150 Ill., 138.

³ Randolph v. County Board, 19 Ill. App., 100; Comrs. of Highways v. Newly, 31 Ill. App., 378.

court above to be reviewed in cases where no other means for procuring the removal of such record has been provided by law. If an appeal or other mode of directly reviewing the proceeding of an inferior tribunal is provided by law a writ of *certiorari* cannot be obtained.¹ It is then the proper proceeding in all cases where inferior tribunals have exceeded their jurisdiction or acted illegally.²

The general rule of law is that the writ will only be granted when the application therefor shows a proper cause upon its face. It must be made to appear that the proceedings are, or at least *may*, damage the applicant. Where it does not appear that the applicant has any substantial interests or that he may suffer some injury, the writ will be denied.³

A writ of *certiorari* is available for amending a record or having the omitted part sent to a court of review. Since the writ of *certiorari* causes the record of the court below to be certified and sent up for review it is an available remedy for, and is most frequently used in this State to cause such record to be certified and sent up when there is a suggestion in the court above that the record sent thereto on writ of appeal is not a full record but has been diminished. For this purpose the writ may be sued out at any time before the proceedings are terminated in the court of review.⁴ It cannot, however, be made to incorporate into a record that which is in fact no part thereof, although

¹ Wright v. Highway Comrs., 150 Ill., 138; Farrell v. Taylor, 12 Mich., 113; Welch v. VanAuken, 76 Mich., 464.

² Potter v. Board of Trustees, 10 Ill. App., 343.

It is the proper proceeding to review the action of highway commissioners when they have acted illegally in proceeding to lay out a highway. Lees v. Drainage Commissioners, 125 Ill., 47; Commissioners v. Harper, 38 Ill., 103; Trained v. Lawrence, 36 Ill. App., 90; Arnold v. Thorpe, 9 Ill. App., 357; Deitrick v. Highway Comrs., 6 Ill. App., 70.

It is the proper proceeding to re-

view the action of school trustees when the same has been without authority. Trustees v. School Directors, 88 Ill., 100; People v. Trustees of Schools, 43 Ill. App., 650.

³ Davidson v. Otis, 24 Mich., 128; O'Hara v. Hernan, 79 Mich., 224.

⁴ Wisconsin C. R. R. Co. v. Wiczorek, 151 Ill., 579; Lees v. Drainage Com'rs, 125 Ill., 47; Toledo, etc., Ry. Co. v. Town of Chenoa, 43 Ill., 209; Schirmer v. People, 40 Ill., 66; Bergan v. Riggs, 40 Ill., 61; James v. Hughill, 2 Scam. (Ill.), 361; Jones v. Sprague, 2 Scam. (Ill.), 55.

the same was intended to be a part of the record and was inadvertently omitted.¹

A writ of *certiorari* is not the proper remedy to review the merits of the case. It does not procure facts to be reviewed. It only brings up the record in order that *errors* in such record may be corrected.²

§ 1045. From what courts the writ may issue.—A writ of *certiorari* may be sued out of a court having jurisdiction to review the proceedings of the inferior court in which the final judgment was entered. A writ of *certiorari* may be sued out of an "Appellate" court of this State having jurisdiction to review the subject matter of the cause in the trial court situate within the territorial district over which such court has appellate jurisdiction to review the record thereof, in all cases removable to such court by appeal or writ of error, as hereinbefore indicated.³

The writ may be sued out of the Supreme Court of this State to review the record of the Circuit Court in cases which may be removed directly from the trial court to the Supreme Court, as hereinbefore indicated.⁴

The writ may issue from the Supreme Court directed to the appellate court in all cases where the Supreme Court has jurisdiction to review the action of the appellate court in cases taken to it from the trial court as hereinbefore particularly pointed out.⁵

¹ Wisconsin C. R. R. Co. v. Wiczorek, 151 Ill., 579.

Where a portion of the record is lost its place cannot be supplied by affidavit and a writ of *certiorari* will not be granted to send up the same. Troy v. Reilly, 3 Scam. (Ill.), 19.

It is the proper proceeding to procure the Clerk of the trial court to send up a true record where papers which have not been marked "filed" are incorporated into the bill of exceptions. Holmes v. Parker, 1 Scam. (Ill.), 567.

² Smith v. Com'rs of Highways, 150 Ill., 385; Miller v. Trustees of Schools, 88 Ill., 26; McManus v. McDonough, 107 Ill., 95.

That it will not bring up the original bill when the proceedings were had alone upon the cross-bill see Western Union Tel. Co. v. P. & A. Tel. Co., 49 Ill., 90.

³ Ante, § 1018; ante, Vol. 1, § 8; Rev. Stat., Ch. 37, ¶ 28, § 11.

⁴ Ante, § 1017; ante, Vol. 1, § 7; Rev. Stat., Ch. 37, ¶ 25, § 8; Trustees v. School Directors, 88 Ill., 100.

⁵ Ante, § 1019.

§ 1046. **The procedure.**—The practice in proceedings by *certiorari* requires that a proper showing may be made to the court by petition of one of the parties to the proceeding in the court below. The court will then enter an order awarding the writ. After service of the writ a transmission of the record in accordance therewith the court determines the matters before it upon the record and enters judgment accordingly.

§ 1047. **Form of petition.**—The petition of *certiorari* may be in the following form :

NO. 371.—FORM OF PETITION FOR CERTIORARI.

STATE OF ILLINOIS, }
 County. } ss.

To the Honorable , Judge of the Court of County.

Your petitioner, C. D. , respectfully shows to this honorable court that on the day of , A. D. , A. B. brought in the court of county a civil action against your petitioner for the recovery of the sum of dollars, alleged to be due on contract, in which he claimed judgment for dollars and costs; that when said cause came on to be heard, to wit, on the day of , A. D. , your petitioner appeared, whereupon the following proceedings were had, to wit: (*here state the entire course of proceedings up to the verdict*) and that a verdict of dollars in favor of A. B. , against your petitioner was rendered.

Whereupon and notwithstanding, a motion was made by your petitioner to set said verdict aside and award a new trial, the said court refused and rendered judgment on said verdict for the said sum of dollars with interest and costs.

Upon said trial your petitioner excepted to several rulings of the said court, as well as to his instructions to the jury; and said court certified the evidence given on said trial and signed bills of exceptions to said rulings, which are made part of the record of said action, which matters appear upon the record of said court.

Your petitioner avers that said court erred in (*here state in what manner the court exceeded its jurisdiction or proceeded illegally as the case may be if such is the matter sought to have reviewed*).

Your petitioner shows that notwithstanding an authenticated transcript of the record and proceedings of the said court, as aforesaid, were transmitted to this court, yet other parts of the same and also other things touching them still remain before the said court, which are not included

in said transcript, but which still remain in said court to be transmitted hereto (*if such is the reason for which a writ is sought*).

Your petitioner therefore prays that a writ of *certiorari* may be issued out of this honorable court directed to the said..... court commanding it without delay to send, under the seal of the said court, a transcript of the record and proceedings aforesaid and all things touching them to this honorable court, so that having the same herein, this honorable court may cause to be done thereupon, what of right and according to the laws of the land ought to be done.

Verified by affidavit.

§ 1048. Assignment of errors not necessary.—Inasmuch as the court of review must examine the *record* of the court below in order to determine whether or not it has acted illegally or exceeded its jurisdiction, or inasmuch as the object in seeking the writ was to bring up the parts of the record theretofore omitted, assignments of error are not necessary on a common law *certiorari*.¹

§ 1049. Noticing cause for hearing and placing same on calendar.—The noticing of a cause for hearing and the placing of the same on calendar for argument in proceedings by *certiorari*, when the writ has been sued out for the purpose of having the actions of the inferior tribunal quashed, will be governed by the rules applicable to cases brought up by appeal or writ of error as hereinafter shown.²

§ 1050. Judgment.—When a writ of *certiorari* is sued out for the purpose of having the proceedings in the inferior court reviewed, the remedy is an inflexible one and only admits of a judgment quashing the proceedings therein or refusing so to do.³

Where a writ of *certiorari* is procured for the purpose of having the remainder of a diminished record sent to a court of review wherein proceedings by appeal or writ of error is pending, no judgment in such case will be entered, unless it be a judgment for costs.

¹ Stokes v. Jacobs, 10 Mich., 290.

³ Whitbeck v. Hudson Common

² See *post*, § 1075, "Practice of the Supreme Court." Council, 50 Mich., 86.

ARTICLE VI.

PRACTICE IN COURTS OF REVIEW.

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| <p>§ 1051. Proceedings on writ of error when to operate as a <i>supersedeas</i>. (a) Generally.</p> <p>1052. (b) Indorsement — Filing writ and transcript—Return—Certificate.</p> <p>1053. (c) To whom writ of error directed — When service unnecessary—Return.</p> <p>1054. (d) Process on writ of error.</p> <p>1055. Same—Service and return of process—Appearance and notice thereof.</p> <p>1056. Same—Plaintiff's duty to order <i>scire facias</i> notice—Continuance.</p> <p>1057. Pending writ of error, notice to purchasers and tenants.</p> <p>1058. Of what "authenticated copy of the record of the judgment appealed from," must consist.</p> <p>1059. Same—When cause removed from appellate court to Supreme Court.</p> <p>1060. Clerk may be directed what to include in transcript.</p> <p>1061. When transcript of record to be filed—Placing case on docket.</p> <p>1062. Assignment of errors.</p> <p>1063. Same—In Supreme Court when reviewing appellate court decision.</p> <p>1064. Same—Form of assignment of errors.</p> | <p>§ 1065. Assignment of cross-errors.</p> <p>1066. Effect of omission to join in error.</p> <p>1067. Time to plead when defendant prefers not to join in error.</p> <p>1068. Abstract — Preparing and filing.</p> <p>1069. Same — What it shall contain.</p> <p>1070. Same — When abstract to be filed—default.</p> <p>1071. Same—Further abstract.</p> <p>1072. Brief — Preparing and filing.</p> <p>1073. Same—When brief to be filed.</p> <p>1074. Same—Numbers of copy of briefs to be filed.</p> <p>1075. Docketing and hearing the cause.</p> <p>1076. Argument of counsel in courts of review.</p> <p>1077. Same—No oral argument heard upon motion or rehearing—Exception.</p> <p>1078. Same—Time allowed for oral argument.</p> <p>1079. Judgment in courts of review.</p> <p>1080. Same. (1) Judgment of affirmance — Execution.</p> <p>1081. Same. (2) Judgment of reversal in whole — Execution.</p> <p>1082. Same. (3) Judgment of reversal in part—<i>Re-mittitur</i> — Execution.</p> <p>1083. Same. (4) Judgment of dismissal—Execution.</p> |
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§ 1084. Remanding cause—Re-trial
—When unnecessary.

1085. Same — Practice when
case remanded for
trial.

1086. Rehearing—(a) Petition for.

1087. (b) Notice—Filing.

1088. (c) No re-argument permit-
ted in the support of
the petition.

1089. (d) *Supersedeas* or stay of
proceedings.

§ 1090. (e) Redocketing case when
rehearing granted.

1091. (f) Record, abstract, brief
and argument.

1092. (g) Reply to petition.

1093. (h) Closing argument of
petitioner.

1094. (i) Oral arguments — Con-
clusion.

1095. Motion in courts of review.

1096. Change of venue to the Su-
preme Court.

§ 1051. Proceedings on writ of error when to operate as *supersedeas*. (a) **Generally.**—The manner in which a review of causes may be procured, whether the same be by appeal, writ of error, or *certiorari*, has been hereinbefore indicated.¹ The following sections are designed to outline the proceedings to be had in the court of review, whether the same begins with the filing of the record on an appeal taken from the court below, or whether it begins by the suing out of a writ to procure the bringing of the case up from the court below.

When it is desired that a writ of error operate to suspend the execution of the judgment in the lower court by acting as a *supersedeas* thereto, application must be made to the court of review, or to some Judge thereof in vacation, accompanied by a transcript of the record certified by the Clerk of the court below, together with the bond entered into and filed in the office of the Clerk of the court of review;² and written upon or appended to the transcript of the record must be an assignment of errors.

Further, there shall be presented therewith to the court or Judge to whom the application is made “an abstract of the record” with a brief containing the points and authorities relied upon and pointing specifically to those portions of the record upon which the alleged errors arise.

Furthermore, every application for *supersedeas*, whether

¹ Ante §§ 1080, 1086, 1043.

cers, *et. al.* Rev. Stat. Ch. 110, ¶ 72,

² No bond required of public offi- § 71.

made in open court or to a Judge in vacation, must be accompanied by an affidavit of the proposed securities, or some other credible person, justifying the sufficiency of the bill sworn to and properly certified.¹ The preparation of the abstract and brief and the assignment of error, will receive more specific attention hereinafter.²

When application is made, in open court, for a writ of error to operate as a *supersedeas*, the record must have been theretofore filed and the case docketed; but when the application is made in vacation it may be made to one of the Justices of the court of review without having first filed the record and docketed the case.³ All persons have a right, under the Constitution, to a writ of error in civil cases,⁴ but the right to have a writ of error to operate as a *supersedeas* is not a constitutional right and the Legislature may prescribe terms upon which it shall be granted.⁵ Not only must the conditions above prescribed be complied with, but the certificate of the Clerk mentioned must state that the transcript of the record is complete.⁶

In support of the application a showing of proper cause for reversing a judgment is a good ground on which the court may grant a *supersedeas*.⁷ A court will not grant a *supersedeas* unless it is made to appear that the rights of the applicant may be endangered by a refusal so to do. A *supersedeas* will not be granted on the application of a plaintiff in error who seeks reversal of a judgment in his own favor.⁸

¹ Rev. Stat., Chap. 110, ¶ 78; § 77; Supreme Court Rule 1; Appellate Court Rule 1, 1st Dist., 2d Dist., 3d Dist. and 4th Dist.

² See *post*, §§ 1088, 1072, 1062.

³ Anonymous, 40 Ill., 115.

⁴ *Ante*, § 1030.

⁵ Bryan v. People, 71 Ill., 32.

⁶ Frink v. Phelps, 4 Scam. (Ill.), 558.

⁷ Lowry v. Bryant, 2 Scam. (Ill.), 2.

⁸ Carr v. Miner, 40 Ill., 33.

Assignment of error omitted.—When the assignments of error were

inadvertently omitted at the time of making the application for a *supersedeas* the applicant was allowed to supply such assignment by way of amendment. Gibbs v. Blackwell, 40 Ill., 51.

Effect of supersedeas to prevent second suit.—A plaintiff will not be permitted to prosecute a second action to recover the same demand while the judgment in the first is stayed by a writ of error operating as a *supersedeas*, because the plaintiff has ample security in case of an

§ 1052. (b) **Indorsement—Filing writ and transcript—Return—Certificate.**—When a writ of error shall be made a *supersedeas* the Clerk shall indorse upon the said writ the following words:

“This writ of error is made a *supersedeas* and is to be obeyed accordingly,” and he shall thereupon file the writ of error with the transcript of the record in his office.¹ Said transcript shall be taken and considered as a due return of said writ, and thereupon it shall be the duty of the Clerk to issue a certificate in substance as follows:

affirmance. When a second suit is begun it is the usual practice to apply to the court in which such action is pending, for an order to stay proceedings, until there is a determination of the writ of error. *Hailman v. Buckmaster*, 3 Gilm. (Ill.), 498.

Effect of supersedeas limited.—A *supersedeas* operates only to restrain the successful party from proceeding under his judgment. It does not prevent the Clerk below from issuing his fee bills to collect the costs. *Carr v. Miner*, 40 Ill., 33.

Execution of the bond.—The bond for *supersedeas* is in general very like the bond given where an appeal from a Justice's Court is sought in the Circuit Court by *supersedeas* as herein elsewhere indicated, and the former need not be given here. It is specially provided by a rule of court that when the bond is executed by an attorney in fact the Clerk shall require the original power of attorney to be filed in his office, unless it appears that such power of attorney

contains other powers than the power to execute the bond in question, and in such case the original power of attorney shall be presented to the Clerk and a true copy thereof filed certified by the Clerk to be a true copy of the original. Supreme Court Rule 2; Appellate Court Rule 2, 1st Dist., 2d Dist., 3d Dist., and 4th Dist.

Bond for costs by non-resident.—The provision of the statute that a non-resident plaintiff shall not institute a suit without first having given bond for costs, is applicable to writs of error sued out of courts of review. If a writ is sued out by such a plaintiff without having given bond for costs the same may be dismissed on motion. *Roberts v. Fahs*, 32 Ill., 474; Rev. Stat., Ch. 33; ¶ 1, § 1; further as to “Bond for Costs” see *ante*, Vol. 1, §§ 430-31.

¹ Rev. Stat., Ch. 110, ¶ 73, § 77; Supreme Court Rule 3; Appellate Court Rule 3; 1st Dist.; 2d Dist., 3d Dist., and 4th Dist.

STATE OF ILLINOIS,

Office of the Clerk of ----- Court. } ss.

Given under my hand and seal of the Court, at, this
..... day of, A. D.

..... Clerk.

In practice the writ of error is never issued when the record is filed and the writ is to operate as a *supersedeas*. In such a case the Clerk issues a *scire facias* and files the writ of error unless he is expressly directed by the parties not to do so.'

¹ Robinson v. Magarity, 28 Ill., 423.

³ Longwith v. Butler, 3 Gilm.

¹ Supreme Court Rule; Appellate Court Rule 4, 1st Dist., 2nd Dist., 3rd Dist. and 4th Dist. (Ill.), 74.

to summon the defendant in error to appear in court and show cause, if any he have, why the judgment or decree mentioned in the writ of error shall not be reversed. If the *scire facias* be not returned executed, an *alias* and *pluries* may issue without an order of court.¹ After two returns "not found," a rule may be had upon the defendant in error to join in error, even though there be no actual service,² or service may be had by publication.³

§ 1055. Same—Service and return of process—Appearance and notice thereof.—The first day of each term shall be return day, for the return of process. No party shall be compelled to answer, or prepare for hearing, unless the *scire facias* shall have been served ten days before the return day thereof; nor shall a defendant be at liberty to enter his appearance and compel the plaintiff to proceed with the cause, unless the defendant shall have given the plaintiff ten days' notice, before the term, of his intention to enter his appearance and have the cause proceed to a hearing.⁴

§ 1056. Same—Plaintiff's duty to order *scire facias*—Notice—Continuance.—In all cases in which a writ of error is made a *supersedeas* the plaintiff in error shall, on filing the record with the Clerk,⁵ at the same time order and direct a *scire facias* to issue to hear errors,⁶ and shall use reasonable diligence to have the same served ten days before the first day of the term to which the writ of error is made returnable; on

¹ Supreme Court Rule 5; Appellate Court Rule 5, 1st Dist., 2nd Dist., 3rd Dist. and 4th Dist.

² *Lytie v. People*, 47 Ill., 422; *Marshall v. Moses*, 40 Ill., 127.

³ *Cameron v. Savage*, 40 Ill., 124.

⁴ Supreme Court Rule 6; Appellate Court Rule 6, 1st Dist., 2nd Dist., 3rd Dist. and 4th Dist.

Security for costs—Dismissal for want of.—The defendant in error by filing an affidavit that any plaintiff in error is not a resident of this State and that no bond for costs has been filed may have a rule en-

tered against him, of which he shall take notice, to show cause why the writ shall not be dismissed. Supreme Court Rule 25; Appellate Court Rule 18, 1st Dist.; Rule 21, 3rd Dist.; Rule 22, 4th Dist.

The motion for dismissal for want of security for costs must be made in apt time. It will be waived if not made in trial court. *Buckman v. Allwood*, 40 Ill., 123; *Roberts v. Fabs*, 32 Ill., 474.

⁵ *Ante*, § 1051.

⁶ *Ante*, § 1054.

failing to do so, the defendant in error shall have the right to a hearing at the same term after joining in error,' without giving ten days notice as required in the last preceding section; *Provided*, if there be not ten days between the allowance of the *supersedeas* and the sitting of the court, the cause shall stand continued until the next term, unless by consent of parties it shall be otherwise ordered.¹

§ 1057. Pending writ of error, notice to purchasers and terre-tenants.—In all cases wherein guardians, executors, or administrators or others acting in a fiduciary character, having obtained an order or decree for the sale of lands in causes *ex parte* and a sale has been had under such decree or order, and the same shall be brought to a court of review for revision, the purchasers or terre-tenants of such lands, if known, *shall be suggested* to the court by affidavit of the plaintiff in error, and notice given them of the pendency of the writ of error ten days before the first day of the term of the court to which the writ of error is returnable, so that *terre-tenants* may appear and defend.²

§ 1058. Of what "authenticated copy of the record of the judgment appealed from," must consist.—A record is a memorial of a proceeding or act of a court of record entered upon a "roll," or proper place for the preservation thereof.³

What is commonly called the "transcript of the record," and what is, by the statute, required as an "authenticated copy of the record of the judgment appealed from," shall be

¹ *Post*, § 1065.

² Supreme Court Rule 7; Appellate Court Rule 7, 1st Dist., 2nd Dist., 3rd Dist. and 4th Dist.

Failure of plaintiff in such duty—Defendant's right.—If the plaintiff is not reasonably diligent in the performance of his duty to have the *scire facias* served in proper time, it will not entitle the defendant to have the cause dismissed, but he may join in error (*post*, § 1065), and

have the cause tried at the return term, without giving ten days' notice specified in § 1053 above. *Gibbs v. Blackwell*, 40 Ill., 51.

³ Supreme Court Rule 8; Appellate Court Rule 8, 1st Dist., 2nd Dist., 3rd Dist. and 4th Dist.

⁴ *Coke on Litt.*, 117-2; *Comyn's Dig.*, "Record," 208. *Croswell v. Byrens*, 9 Johns. (N. Y.), 287; *Baldwin v. McClelland*, 50 Ill. App., 645.

⁵ Rev. Stat., Chap. 110, ¶ 73, § 72.

certified to the court of review by the Clerk of the trial court in cases of *appeal*, or return to a writ of *error*, or *certiorari*, must, after the *placita*,¹ consist of the following:

1. A copy of the process;
2. The pleadings of the parties respectively;
3. The verdict in jury trials;
4. The judgment of the court below, whether tried by the court or jury;
5. All orders in the same cause made by the court;
6. The bill of exceptions, and
7. The appeal bond in cases of appeal.

In no case shall the Clerk insert in such transcript any affidavit, account, or other document in writing, or other matter which, according to the decisions of the court of review, has been held to constitute no part of the record of a cause.²

The arrangement of the several parts of the record shall be in their chronological order.³

It is the duty of the party taking a case up for review to have prepared a transcript of so much of the record as will enable the court of review to determine whether or not the trial court committed errors upon all and whether the complainant is entitled to the reversal which he asks.⁴ This is because a court of review cannot hear original evidence, but must try the case upon the record brought from the trial court and

¹ *The Placita*.—It is necessary that the transcript make it to appear before what court the cause was tried. Therefore in a case where the transcript contained on *placita*, or convening order of the court, so that it did not appear from the transcript before what judge the cause was tried, or whether it was in fact heard before the judge who signed the bill of exceptions, such defect was held to be ground for reversal. *Keller v. Brickley*, 63 Ill., 496.

Where, however, the *placita* appeared in the latter part of the transcript, or preceded the final

judgment in the case, it was held that the law was sufficiently complied with, which requires that the judgment must appear to have been rendered by a court regularly organized. *Rich v. City of Chicago*, 59 Ill., 286; *Truitt v. Griffin*, 61 Ill., 26.

² Supreme Court Rule 9; Appellate Court Rule 9, 1st Dist., 2nd Dist., 3rd Dist. and 4th Dist.

This rule does not apply to chancery or criminal cases. *Ib.*

³ Supreme Court Rule 10; Appellate Court Rule 10, 1st Dist., 2nd Dist., 3rd Dist. and 4th Dist.

⁴ *Miller v. Dyas*, 32 Ill. App., 385.

upon the record alone.¹ And it is therefore evident that the transcript must be a full and complete copy of the record, or the whole case will not be before the court for review.² Parties cannot, by stipulation, waive the necessity of a transcript of the record.³

If the record is not full and complete leave must be obtained to file a supplemental record.⁴ The omissions cannot be supplied by the court of review, but must be done by the court below.⁵

¹ Mutual Building and Loan Association v. Tascott, 144 Ill., 305; Roberts v. Fahs, 46 Ill., 268.

Affidavits, bills of particulars, copies of bonds, accounts and other instruments are not parts of a common law record; but the summons and return, the declaration and all subsequent pleadings, the verdict and the judgment are of a common law record. Bowlan v. Lambke, 57 Ill. App., 334.

As to presumptions in case of incomplete record, see Gordon v. Gordon, 25 Ill. App., 311; Bishop v. Morris, 22 Ill. App., 564; Henry v. Trustees, 15 Ill. App., 157; *ante*, § 1027, "Presumptions favoring bill of exceptions."

Objections to papers improperly incorporated in which the record will be considered upon the hearing, but a preliminary motion to execute them from the record will not be heard. Gecum v. Dean, 40 Ill., 92.

Original papers are sometimes desired for inspection by the court of review. In such a case the court of review will request the Clerk who has the custody of such papers, to send them up; but he cannot be compelled to do so and therefore no rule will be entered against him for that purpose. The application is addressed to the favor of the court and is made upon the inspection that

such original papers are important in determining the rights of the parties. It has been suggested, however, that upon proper application and a showing of a necessity for so doing the court of review might award a *subpoena duces tecum* requiring the Clerk to appear in person and produce the original papers for the inspection of the court. Sutphen v. Cushman, 40 Ill., 77; Anonymous, 40 Ill., 77; Cameron v. Savage, 40 Ill., 76.

² Bertrand v. Taylor, 87 Ill., 235; Freeland v. Supervisors, 27 Ill., 30; Rowan v. Bowles, 25 Ill., 113.

³ Moore v. People, 148 Ill., 48.

All files and orders must be copied—*Costs*.—In order that the transcript of the record may be complete and that the Clerk may certify to that fact as required by law all the files and orders must be copied, and although this may make the report unnecessarily voluminous the court of review cannot require the costs unnecessarily made to be paid by the plaintiff. Rowan v. Bowles, 25 Ill., 113.

Bond must be copied.—The appeal bond filed must be copied by the Clerk. He cannot certify that it was filed. Heffron v. Rice, 50 Ill. App., 332.

⁴ Goodrich v. Cook, 81 Ill., 41; Eliott v. Leaving, 54 Ill., 213.

⁵ Wilder v. House, 40 Ill., 92; Ber-

To constitute an "authenticated copy" what purports to be a copy must contain a certificate signed and sealed by the Clerk of the trial court that it is a transcript of the record in the case in question.¹

The certificate or authentication of the Clerk should be at the end of the transcript. Where matter followed the certificate and no certificate was appended to such matter following, a cause was not reviewed on account thereof.²

Amendments of the record must be made by the court from

gen v. Riggs, 40 Ill., 61; Balance v. Leonard, 40 Ill., 72.

Suggestion of diminution of the record.—Where the record is not full and complete, the opposite party may "suggest a diminution of the record," that is to say, he may suggest that the record has been diminished by the transcript not being complete. This suggestion should be made as soon as discovered, and before error is joined upon the record. Where, however, error has been joined, he may move to withdraw his joinder for the purpose of suggesting the diminution of the record; but the suggestion will not be entertained upon an application for a rehearing. Where deficiencies are shown in the record, they may be supplied by amendment, as shown in the text below, but omissions cannot be supplied on an application for a rehearing, unless under very special circumstances. Harris v. People, 138 Ill., 63; Allen v. LeMoyné, 101 Ill., 655; Gibbs v. Blackwell, 40 Ill., 66; Boynton v. Champlin, 40 Ill., 63.

The fact that the original record as filed in the case, was defective, will be immaterial, where the record has been completed by amendment and supplying the omissions before the time the objection is made. Dunham v. City of Chicago, 55 Ill., 358.

Where the errors assigned have been cured by an amendment of the record, the judgment will be affirmed. Schmid v. People, 161 Ill., 436.

¹ Glos v. Randolph, 130 Ill., 245; Hosmer v. People, 96 Ill., 53.

² Tolman v. Dreyer, 50 Ill. App., 243.

When original bill of exceptions may be incorporated in the transcript.—When the parties to the proceedings so stipulate, the original bill of exceptions may be made a part of the transcript of the record instead of a copy of the same. This is especially provided by the statute for the purpose of saving the costs accruing to the Clerk by copying the bill of exceptions. The original bill must, however, be made a part of the transcript, and cannot be made a part of the record by filing in the court of review as other than a part of the transcript made by the Clerk. Lake Shore, etc., Ry. Co. v. Hessions, 150 Ill., 546; Walker v. Pratt, 55 Ill. App., 297; Daube v. Tonnison, 54 Ill. App., 290; Rev. Stat., Ch. 53, ¶ 63, § 1. No other original paper than the bill of exceptions can be so made a part of the transcript and then only upon agreement of the parties. Cary v. Scherer, 55 Ill. App., 422.

which the record is brought. Parties cannot agree among themselves to make a change of the record.¹

Continuance for procuring amendment of the record may be had by filing a copy of the record in as perfect a form as practicable and then by suggesting a diminution of the record, procuring a writ of *certiorari* and moving the court for a continuance until the amendment can be procured in the court below.²

¹ *Harding v. Brophy*, 133 Ill., 39; *Illinois Cent. R. R. Co. v. Garish*, 40 Ill., 70; *Tolman v. Wheeler*, 57 Ill. App., 342; *Heffron v. Rice*, 50 Ill. App., 332; *Schwarze v. Spiegel*, 41 Ill. App., 351; *Sternberg v. Strauss*, 41 Ill. App., 147. When an amended transcript is filed it is regarded as a part of the transcript. *Anonymous*, 40 Ill., 58.

Supersedeas no obstacle to amendment.—An amendment of the record is not prevented by the suing out of a writ of error and making the same a *supersedeas*. The remedy assigned may be obviated by amendment. *Dunham v. South Park Comrs.*, 87 Ill., 185.

Omissions in matter of form can be supplied after appeal *nunc pro tunc*, in order to protect the record, but a new case for consideration cannot be made. *Stirlen v. Nuestadt*, 50 Ill. App., 378.

As to amendment of the record by the trial court at the judgment term and subsequent term, see *ante*, § —.

In the appellate court an order allowing an appeal to the Supreme Court cannot be amended at a subsequent term, to be entered *nunc pro tunc* as of the date of the order, merely on motion of the appellant supported by the unsworn statement of the minute clerk in the trial court that he made a mistake, so as to allow an appeal to the appellate

court. *Howe v. Warren*, 46 Ill. App., 325.

In the Supreme Court, at a subsequent term, a *motion* to vacate an order entered at a preceding term, denying a petition for the rehearing of a cause, will not be entertained. *Coates v. Cunningham*, 100 Ill., 463.

In the Supreme Court, reversing or setting aside the judgment on a rehearing is the only mode by which such judgment can be changed at a subsequent term. *Hollowbush v. McConnel*, 12 Ill., 203; see *post*, § 1087.

Where record is lost after an appeal is perfected appellant should, on proper notice, supply the same under an order of the court below at the next term; and if for any reason such application is not allowed he should obtain a continuance in the court of review to enable him to supply the lost record. *Palmer v. Gardiner*, 70 Ill., 143.

² *Ross v. Piano Steel Work*, 34 Ill. App., 323.

Further as to continuance for amendment and grounds therefor, see *Peck, Admr., v. Blight*, 40 Ill., 112; *Kelsey v. Berry*, 40 Ill., 69; *Brooks v. Bruyn*, 40 Ill., 64; *Bergen v. Riggs*, 40 Ill., 61.

Costs—Terms.—When an application is made to file an amended record the opposite party may move for judgment for costs. It is then within the discretion of the court to

Amendment of a record after judgment may be allowed within the discretion of the court of review, but to make the same with practical utility a rehearing must be obtained, for without obtaining a rehearing in the Appellate Court, a removal to the Supreme Court would only procure the consideration of the record in the Appellate Court at the time its judgment was pronounced.¹

§ 1059. Same.—When cause removed from Appellate Court to Supreme Court.—When the decision of an Appellate Court is sought to be reviewed in the Supreme Court,² it is not necessary for the Clerk of the Appellate Court to make out a certified *copy* of the original transcript of the record filed in the Appellate Court. It is sufficient, and it is the duty of the Clerk, to transmit the *original* transcript of the record filed in his office authenticating the same, with a true and perfect copy of all orders and proceedings appearing of record in said cause; which said copy of the record and proceedings, duly authenticated with the seal of said court, shall be transmitted to and filed in the Supreme Court.³

The judgment itself must be made to appear upon the record, because errors in it are alone to be considered. The opinion of the Appellate Court is no part of the record, because the Supreme Court will not reverse a judgment merely because the reasoning of the court below is unsound when the judgment is just.⁴

require the payment of the costs as a condition to the filing of the amended record. The motion will come too late if made after the amended record is filed. Toledo, etc., Ry. Co. v. Butler, 53 Ill., 323.

¹ Supreme Lodge K. of H. v. Dalberg, 138 Ill., 508.

² As to what cases may be so reviewed, see *ante*, § 1013.

³ Rev. Stat., Chap. 110, ¶ 89, § 88.

⁴ Christy v. Stafford, 123 Ill., 463; Pennsylvania Co. v. Versten, 140 Ill., 637. Further see *post*, § 1080.

Costs.—The Clerk is only entitled to fees for a certificate and the reasonable costs of sending the transcript and record from his office to the Clerk of the Supreme Court, either by mail or express. *Ib.*

The office of the Clerk of the trial court for making up the transcript for the appellate court are properly taxable as costs in the appellate court and not in the Supreme Court. Meacham v. Steel, 94 Ill., 593.

§ 1060. Clerk may be directed what to include in transcript.—The party or his attorney may, by *praecipe*, indicate to the Clerk and direct what of the files of the cause shall be copied into the record; and in such case, if the record shall be insufficient, it shall be supplied at his costs, but if unnecessarily voluminous, he shall pay the costs accrued on account of the copying of such unnecessary matters.¹ This is, however, merely a privilege whereby it is intended that the Clerk may be aided in determining what is a complete record. It does not change the statute. The parties cannot direct that less than the whole may be included. The transcript of the record must be complete.²

§ 1061. When transcript of record to be filed—Placing case on the docket.—The transcript of the record, or as it is generally termed, “the record,” must be filed in the office of the Clerk of the court in which the review is sought, on or before the *second* day of the succeeding term thereof:

Provided twenty days shall have intervened between the last day of the term at which the judgment appealed from was entered and the sitting of the court to which the appeal shall be taken; but if ten days and not twenty shall have intervened as aforesaid, then the record shall be filed as aforesaid on or before the *tenth* day of said succeeding term, otherwise the appeal shall be dismissed, unless *further time* to file the same shall have been granted by the court to which said appeal shall have been taken upon good cause shown.³

The time for filing the record is the same when a case is taken up for review on writ of error as when it is taken up by appeal.⁴

¹ Supreme Court Rule 11; Appellate Court Rule 11; 2nd Dist., 3rd Dist. and 4th Dist.

² North v. Alles, 50 Ill. App., 266.

³ Rev. Stat., Chap. 110, ¶ 78, § 72; Supreme Court Rule 12; Appellate Court Rule 11, 1st Dist., Rule 12, 2nd Dist., 3rd Dist. and 4th Dist.

⁴ Supreme Court Rule 18; Appellate Court Rule 12, 1st Dist., Rule

18, 2nd Dist., 3rd Dist. and 4th Dist.

Where a record is not filed within the time limited by the statute, the case must be dismissed. Speck v. Hickman, 5 Ill. App., 395; Chicago, B. & Q. R. Co. v. City of Aurora, 5 Ill. App., 395; Strong v. Allen, 40 Ill., 48.

Rule to make return to writ of

An extension of time in which to file a record must be applied for within the time prescribed by the statute for filing the same.¹ And furthermore, such application must be considered and acted upon within that time.²

The case will be placed upon the hearing docket when the record is filed within the time prescribed or the extended time allowed as above indicated and not otherwise, except in extraordinary cases and upon special application. Upon special application in extraordinary cases, when justice or the exigencies of the case require it, a court of review will place a case on the hearing docket, though the record be not filed in accordance with the rules above specified.³

The abstract and brief must likewise be filed within such time, as will be more fully hereinafter shown,⁴ and the assignments of error must be made upon the transcript before it is filed, as likewise hereinafter shown.⁵

It is the duty of the party, and not the obligation of the Clerk of the trial court, to file a transcript of the record within the time prescribed, when a case is brought up by writ of error and if the writ is to act as a *supersedeas*, such transcript of the record must be filed, together with the bond, before the writ issues.⁶ No time is fixed by statute in which a Clerk must make a return to a writ of error. It is the duty of the party, when suing out a writ of error, to take out a rule to have the record brought up.⁷

error.—A motion to file a transcript of the record within the time required therefor is ground for a rule upon the Clerk of the court below to make return to writ of error. *Strong v. Allen*, 40 Ill., 43.

As to voluntary filing a record sooner than is required by law, see *Williams v. Rutter*, 40 Ill., 40.

¹ *Leach v. People*, 118 Ill., 157; *Cook v. Cook*, 104 Ill., 98; *Adams v. Robinson*, 40 Ill., 40; *Illinois & W. R. R. Co. v. Gay*, 5 Ill. App., 393.

² *Palmer v. Gardner*, 70 Ill., 143.

³ *Supreme Court Rules 12 and 13; Appellate Court Rules 11 and 12, 1st*

Dist.; Rules 12 and 13, 2nd Dist., 3rd Dist. and 4th Dist.

⁴ *Post*, § 1075.

⁵ *Post*, §§ 1068, 1072.

⁶ See *ante*, § 1051.

⁷ *Challenor v. Milligan*, 110 Ill., 666; *Strong v. Allen*, 40 Ill., 43.

Removal of the records.—The Clerk will be held responsible for the safe keeping and production of the records. The record, after being filed in the court of review, cannot be removed except upon leave granted for that purpose. To obtain leave therefor application must be made to the Clerk or his deputy.

§ 1062. **Assignment of errors.**—The errors assigned must be such as appear upon the record, for it is an elementary rule that nothing can be assigned for error which contradicts the record.¹

The assignment of errors must be made by the appellant or plaintiff in error in writing, either upon the transcript of the record or attached thereto. If this be not done the case may be dismissed. By obtaining leave of court, upon good cause shown, other errors may be assigned after filing the record.²

The assignment of error in a court of review performs the same office as the declaration in the trial court. Therefore no objections will be considered except such as are assigned for error upon the record, and if no errors are so assigned, no question is presented to the court for review, and the judgment of the court below will be affirmed. Objections not assigned for error are considered to be waived.³

This application may be considered at any time in the discretion of the court. Disobedience to the rule must be by the Clerk promptly reported to the court. Supreme Court Rule 14; Appellate Court, rule 13, 1st Dist.; Rule 14, 2nd Dist., 3rd Dist. and 4th Dist.

In the second appellate district, a party desiring a transcript of the record for presentation to a Justice of the Supreme Court, on an application for *supersedeas*, made by himself or attorney, upon filing an affidavit to that effect with the Clerk, may be permitted to withdraw the record, by leaving his receipt therefor; but if such transcript of the record shall not be filed in the office of the Clerk of the Supreme Court within ten days after it is so withdrawn, the same shall be returned to the Clerk of the court from which it was withdrawn. Appellate Court Rule 14, 2nd Dist.

¹ Mains v. Cosner, 87 Ill., 536.

² Supreme Court Rule 15; Appellate Court Rule 14, 1st Dist.; Rule

15, 2nd Dist.; 3rd Dist. and 4th Dist.; Gage v. Brown, 125 Ill., 522; Anonymous, 40 Ill., 54; Gibbs v. Blackwell, 50 Ill., 51; Martin v. Russell, 3 Scam. (Ill.), 342.

Exception. — Where, however, orders had been assigned upon the abstract and brief, the court refused to dismiss the suit because of the failure to assign errors in the transcript of the record on condition that it should be done at once. Gibbs v. Blackwell, 40 Ill., 51.

No assignment of errors need be made on an amended record.—The assignment of errors on the original record is sufficient. Anonymous, 40 Ill., 53.

³ Rice v. Heap, Admr., 151 Ill., 264; Union Mutual Ins. Co. v. Kirchoff, 149 Ill., 536; Lancaster v. Waukegan & S. W. Ry. Co., 132 Ill., 492; Page v. People, 99 Ill., 418; Thayer v. Peck, 93 Ill., 357; Meyers v. Andrews, 87 Ill., 433; People v. Brislin, 80 Ill., 424; Protection Life Ins. Co. v. Foote, 79 Ill., 361; Jackson v. Warren, 32 Ill., 331; Leyenberger v.

An assignment of errors can only be made by a party to the suit, who has joined in the appeal or writ of error, and who is himself injuriously affected by the error of which he complains. One cannot assign errors affecting a co-defendant, nor can one assign errors which inure to his own advantage.¹ Furthermore, it is manifestly just that one cannot assign errors which he has himself committed or caused to be committed.²

Rebanks, 55 Ill., 441; Walker v. Pratt, 55 Ill. App., 297; Becker v. People, 54 Ill. App., 490; City of Paxton v. Frew, 52 Ill. App., 393; Lang v. Max, 50 Ill. App., 465; Bogue-Badenoch Co. v. Boyden, 33 Ill. App., 252.

Practice where no errors assigned.

—Where no errors are assigned the appellee or defendant in error should move to dismiss, or ask the court for a rule that the appellant or plaintiff in error assign errors on the record. Keiley v. People, 123 Ill., 437; Bennison v. Savage, 119 Ill., 135.

May be urged in adversary's brief.

—Where the defendant in error, or appellee, expressly insists in his brief that no errors are assigned upon the record he does not waive the point by filing his brief. Lang v. Max, 50 Ill. App., 465.

Leave to assign errors instantan.

—When the appellant or plaintiff in error has his attention called to the fact that no errors have been assigned, he may apply to the court at the earliest opportunity for leave to assign errors *instantan.* Bennison v. Savage, 119 Ill., 135; Ditch v. Sennot, 116 Ill., 289; Lang v. Max, 50 Ill. App., 465.

¹ Gage v. DuPuy, 134 Ill., 132; Smith v. Kimball, 128 Ill., 583; Borders v. Murphy, 125 Ill., 577; City of Chicago v. Cameron, 120 Ill., 447; Martin v. Swift, 120 Ill.,

488; *In re Story*, 120 Ill., 244; Farnan v. Borders, 119 Ill., 228; Agnew v. Fults, 119 Ill., 296; Howe v. South Park Commissioners, 119 Ill., 101; Gage v. Reid, 118 Ill., 35; Augler v. Clay, 109 Ill., 487; Stearns v. Cope, 109 Ill., 340; Thayer v. Allison, 109 Ill., 180; Frank v. Kaminsky, 109 Ill., 26; Jefferson v. Jefferson, 96 Ill., 551; Dickerson v. Hendryx, 88 Ill., 66; Pierson v. Hendrix, 88 Ill., 34; Kolb v. O'Brien, 86 Ill., 210; Robinson v. Brown, 82 Ill., 279; Clark v. Marfield, 77 Ill., 258; Fonville v. Sausser, 73 Ill., 451; Greenman v. Harvey, 53 Ill., 386; Douglas v. Soutter, 52 Ill., 155; Rhoads v. Rhoads, 43 Ill., 239; Cromine v. Tharp, Admr., 42 Ill., 120; Moore v. Moss, 14 Ill., 106; Arenz v. Reihle, 1 Scam. (Ill.), 340; Bailey v. Campbell, 1 Scam. (Ill.), 47; Loyd v. Kelly, 48 Ill. App., 554; St. Louis & P. R. R. Co. v. Kerr, 48 Ill. App., 496; Chicago, P. & St. L. R. R. Co. v. Leah, 41 Ill. App., 584; Kankakee Coal Co. v. Crane Bros. Mfg. Co., 28 Ill. App., 371; Cary-Lombard Lumber Co. v. Hunt, 54 Ill. App., 314.

² Illinois Cent. Ry. Co. v. Latimer, 123 Ill., 163; Clemson and Waters v. State Bank of Illinois, 1 Scam. (Ill.), 45.

One having permitted a voluntary nonsuit to be entered cannot assign error. Newman v. Dick, 23 Ill., 338.

A plaintiff who has wholly failed

One of several defendants may alone assign errors affecting himself, but must himself bear the expense of the proceedings in error as provided by the statute and hereinbefore more particularly stated.¹

The decision of the court below, which can be assigned for error is only such a final order or decree as will be capable of affirmance or reversal.² Interlocutory orders cannot be assigned for error, except when they determine matters of a substantial right.³ And no discretionary order can be assigned for error unless an abuse of such discretion is shown.⁴

Nothing is to be taken by intendment.—If a litigant allege error he must not only make error to appear, but he must show himself to be in a position to take advantage of it.⁵

to make out a cause of action upon the evidence cannot assign error upon the instructions. *Wilcox v. Raddin*, 7 Ill. App., 594.

One who has consented that judgment may be rendered cannot assign errors. *People v. Owners of Land*, 108 Ill., 442.

One cannot assign for error the giving of an instruction in favor of the adversary when he himself asked that the same instruction be given. *Illinois Cent. Ry. Co. v. Latimer*, 128 Ill., 163.

One who has consented to the giving of an instruction cannot assign the same for error, although it may incorrectly state a principle of law. *Emory v. Addis*, 71 Ill., 273.

One, after having abandoned his demurrer in the trial court, cannot assign for error the decision of the court in overruling it. *Snyder v. Gaither*, 3 Scam. (Ill.), 91; *Beer v. Phillips*, 1 Ill. (Breese), 44.

¹ *Ante*, § 1080; *Rev. Stat.*, Ch. 110; ¶ 71; § 70; *St. Louis & P. R. R. Co. v. Kerr*, 48 Ill. App., 497.

² *Dunham v. City of Chicago*, 55 Ill., 357; *Ante*, § 1018.

³ *Republic Life Ins. Co. v. Swigert*, 185 Ill., 150.

Refusal to allow a new plea to be filed in the trial court cannot be assigned for error where no showing is made as to the grounds of the request. *Douglas v. Maston*, 35 Ill. App., 538.

⁴ *Ante*, § 1018.

Refusal to grant a new trial cannot be assigned for error. *Clemson v. Krupper*, 1 Ill. (Breese), 210; *Ante*, § 976.

The modification or amendment of the record by the trial court at the term judgment is rendered, being within the discretionary power of the court, cannot be assigned for error. *Frink v. King*, 3 Scam. (Ill.), 144.

Swearing the jury is matter of form and if thought to be irregular error therein cannot be assigned unless the same was objected to at the time. *Cornelius v. Boucher*, 1 Ill. (Breese), 32.

⁵ *East St. Louis Electric R. R. Co. v. Cauley*, 49 Ill. App., 810; *Monroe v. Snow*, 33 Ill. App., 230; *Alley v. Limbert*, 35 Ill. App., 592; *Rogers v. Hall*, 3 Scam. (Ill.), 5; *Lee v. Town*

§ 1063. **Same—In Supreme Court when reviewing Appellate Court decision.**—Likewise when a case is brought to the Supreme Court from an Appellate Court, the appellant or plaintiff in error is required to assign errors upon the record from the Appellate Court which assignment must be upon the record itself or attached to it. It is not sufficient that it be shown in the abstract.¹ Furthermore no errors can be assigned upon the rulings of the trial court, unless the same were assigned and considered by the Appellate Court, because the Appellate Court can only pass upon such errors as are assigned on the record before it and the judgment of that court cannot be impeached for error which was not considered because not assigned therein.²

Where it is insisted in the Supreme Court that the Appellate Court erred in not affirming the judgment of the trial court, all questions of law presented by the assignment of errors in the Appellate Court will be open for discussion in the Supreme Court.³

§ 1064. **Same—Form of assignment of errors.**—No particular form is prescribed for the assignment of errors and no particular restriction is placed upon the number of errors that may be assigned. It has, however, been said that the practice of assigning an excessive number of errors and of making briefs of undue length will not be encouraged.⁴ The assignment of errors may be in the following form:

of Mound Station, 118 Ill., 304;
 Garrity v. The Hamburger Co., 136
 Ill., 499.

Statute of limitations does not
 apply to assignments of error on the
 record, either in cases of appeal or
 writ of error. Errors or cross-
 errors may be assigned after the
 expiration of five years. Land Co.
 v. Peck, 112 Ill., 434; Atwood v.
 Buck, 113 Ill., 271.

¹ Benneson v. Savage, 119 Ill., 135.

² Hansen v. Miller, 145 Ill., 538;
 Dunham Towing and Wrecking Co.
 v. Dandelin, 143 Ill., 409; Hyslop v.
 Finch, 99 Ill., 171; Lichtenstadt v.
 Rose, 98 Ill., 643; Redlich v. Bauer-
 lee, 98 Ill., 134.

³ People v. Seeleye, 146 Ill., 189.

⁴ Harding v. Sandy, 43 Ill. App.,
 442.

NO. 373.—FORM OF ASSIGNMENT OF ERRORS.

C..... D.....
 (Plaintiff in error,)¹
 v.
 A..... B.....
 (Defendant in error.)

And now comes the said C..... D..... and says that in the proceedings aforesaid there is manifest error in this, to wit:

First. The court erred in submitting the following instructions to the jury: (*Here state the objectionable instructions identifying them by their proper numbers.*)

Second. The court erred in refusing to submit to the jury the following instructions: (*Here state in the same manner*)

Third. The said verdict is manifestly against the evidence in the case.*

Fourth. That the declaration does not support the judgment rendered in the cause.*

Fifth. The said judgment was given in favor of the said A..... B....., whereas by the laws of the land it ought to have been given in favor of the said C..... D.....,⁴ wherefore the said C..... D..... prays that (*supersedeas* may issue and that) the said judgment may be reversed, annulled and held for nothing, and that he may be restored to all things which he has lost by reason thereof.⁵

By R..... S....., his Attorney.

¹ If the case be taken up by appeal, say, "appellant" and "appellee."

² "That the court erred in refusing to grant a new trial" as an assignment the error is sufficient on which the plaintiff in error may urge the reduction of proper evidence; the admission of proper evidence; the admission of improper instructions; the giving of improper instructions; the refusing of proper instructions, and that the evidence does not sustain the verdict, this is because they are all grounds for granting a new trial. *Chicago & R. I. R. R. Co. v. Northern Ill. Coal & Iron Co.*, 36 Ill., 60.

³ This is a proper assignment of error without regard to what may have been the course of pleading and demurring in the court below. *Chicago, M. & St. P. R. Co. v. Hoyt*, 50 Ill. App., 583.

⁴ The words whereas by the laws of the land it ought to have been given in favor of the said C..... D....., are merely the "conclusion" which, by the practice, follows the error assigned. They do not call attention of the court to any other specific error in the record. *Lichtenstadt v. Rose*, 98 Ill., 643.

⁵ *When errors assigned will not be considered.*—Where the appellant assigned four errors, to wit:

1. the court erred in giving improper instructions for the appellee;

2. The court erred in refusing to give proper instructions asked by the appellant;

3. *The court erred in overruling a motion for a new trial*; and

4. The court erred in rendering judgment for the appellee, it was held that inasmuch as the record contained no motion for a new trial, or decision of the court in overrul-

§ 1065. **Assignment of cross-errors.**—Cross-errors may be assigned by the appellee or defendant in error within two days after the record is filed in the court,¹ and not afterwards, except upon special leave obtained of the court. An assignment of cross-errors likewise must be in writing upon or attached to the record. The cross-errors assigned will be disposed of by the court in the same manner as in other cases of assignment of error.²

Cross-errors, like errors,³ can only be assigned upon a final order or decree which is capable of affirmance or reversal and by a party to the appeal or writ of error who is injuriously affected by such cross-error and furthermore no alleged cross-error can be considered by the court unless there is an assignment of the same upon the record. The assignment of cross-errors is the pleading of the defendant in error, or appellee, and whatever defense he may have must be predicated therein. Likewise where no cross-errors are assigned it will be presumed the defendant in error, or appellee, is satisfied with the rulings of the court.⁴

The defendant in error or appellee is under no obligation to assign cross-errors. If he chooses not to assign cross-errors, he may prosecute an appeal or writ of error separate and independent of that and of his adversary, but if he assigns cross-errors he cannot thereafter prosecute a writ of error on the same record.⁵ But where one party prosecutes a writ of error from the "appellate" court to the trial court and the defendant in error afterwards sues out a writ of error in the Supreme Court and presents the same question as by the first writ pre-

ing the motion, and no exception thereto, that the court could not consider the errors assigned. *Illinois Central R. R. Co. v. O'Keefe*, 49 Ill. App., 320.

¹ *Ante*, § 1061.

² *Rev. Stat.*, Chap. 110, ¶ 79, § 78; *Supreme Court Rule* 15; *Appellate Court rule* 14, 1st Dist.; *Rule* 15, 2nd Dist., 3rd Dist. and 4th Dist.

³ *Ante*, § 1063.

⁴ *Peabody v. Kendall*, 145 Ill.,

519; *Vose v. Strong*, 144 Ill., 109; *Capek v. Kropik*, 129 Ill., 509; *St. Louis Bridge, etc., R. R. Co. v. People*, 127 Ill., 627; *Steele v. Grand Trunk Junction Ry. Co.*, 125 Ill., 385; *Howe v. South Park Comrs.*, 119 Ill., 101; *Hurd v. Ascherman*, 117 Ill., 501; *Drainage Com'rs v. Hudson*, 109 Ill., 659; *Wiggins Ferry Co. v. People*, 101 Ill., 446.

⁵ *Page v. People*, 99 Ill., 418.

sented to him; or if it is his duty to cause such question to be presented by cross-errors, the judgment of affirmance on the writ issuing from the Appellate Court will be a bar to the error assigned on the writ issuing from the Supreme Court, but otherwise it will be no bar.¹

§ 1066. Effect of omission to join in error.—Under the present practice no judgment, order or decree shall be reversed by the court of review upon appeal or writ of error for want of joinder in error; but upon error being assigned, if the opposite party does not plead in proper time, the case shall be treated as if error had been joined.²

§ 1067. Time to plead when defendant prefers not to join in error.—In all cases where the defendant in error or appellee desires to plead and not to join in error, he shall file his plea in the office of the Clerk at least five days before the cause stands for trial, and the issue thereon must be made up before the day the cause does stand for trial.³

§ 1068. Abstract—Preparing and filing.—The party bringing a case to a court of review must furnish a complete abstract or abridgment of the record. He must, in his abstract, refer to the appropriate pages of the record by numerals in the margin and must have his abstract printed in a neat and workmanlike manner, with small pica type and leaded lines.

The abstract to be filed in the Supreme Court or in the Appellate Court of the second, third, or fourth district must be printed on one side of white paper only, but if it is to be filed in the Appellate Court of the first district it may be printed on both sides of the paper. The size of the page, when to be filed in the Supreme Court or the Appellate Court of the third or fourth district is not prescribed. In the Appellate Court of

¹ Page v. People, 99 Ill., 418.

Motion to dismiss an appeal must be made before there is a joinder in error. *McCall v. Leshner*, 2 Gilm. (Ill.), 246.

² Rev. Stat., Chap. 110, ¶ 80, § 79.

³ Supreme Court Rule 16; Appellate Court Rule 16, 4th Dist.

the first district the pages must have the same measures and margins as the volumes of Bradwell's Reports and when it is to be filed in the Appellate Court of the second district it must be upon foolscap paper, leaving a margin at least two inches in width on the left of each sheet. The abstract must be bound in (book) pamphlet form.

When a case is brought upon an Appellate Court to the Supreme Court abstracts which were used in such Appellate Court and printed under the rules thereof may be used in the Supreme Court by changing the name of the court, term, etc., on the cover thereof and filing therewith a printed abstract of the record of the Appellate Court.

The number of copies of the abstract to be filed is, in the Supreme Court, ten—one for each of the Judges, one for the defendant in error or appellee, one for the Reporter and one to be filed with the record; in the Appellate Court of the first district, six—one for each of the Justices, one for the defendant in error, one for the Court Reporter, and one to remain on file with the record; in the Appellate Court of the second, third and fourth districts, five—one for each of the Judges, one for the defendant in error, or appellee, one to be filed with the record. Furthermore, in the Appellate Court of the fourth district, one copy of the abstract must, as soon as printed be delivered or sent by mail, properly addressed, to the opposite counsel and proof thereof shall be made and filed either by the receipt of such counsel or by affidavit of the fact.¹

§ 1069. Same—What it shall contain.—The printed abstract must show everything on which error is assigned, for the court of review will look to the abstract alone and not to the record for the purpose of determining the merits of the controversy.² All affidavits must be shown in the abstract and the whole series of instructions given in order that the court may see that the instruction refused was not in effect

¹Supreme Court Rule 26; Appellate Court Rule 19, 1st Dist.; Rule 20, 2nd Dist.; Rule 22, 3rd Dist.; and Rule 23, 4th Dist.

²City Electric Ry. Co. v. Jones, 161 Ill., 47; Strohm v. People, 160 Ill., 582; Heidenbluth v. Rudolph, 50 Ill. App., 242.

given in others or that the improper one was not corrected by other and proper instructions.¹

The court of review will not consider a case wherein no abstract is filed; nor will it consider a case where the abstract fails to set out the matters upon which the error is assigned. Referring to the pages of the record is not an abstract; it is merely an index and will not be sufficient. The court is not required to look into the record and hunt for the error. It is the duty of the plaintiff in error or appellant to prepare an "abstract" of the record making the alleged error to appear to the court without it having to examine a voluminous record. The abstract as presented by the plaintiff in error or appellant will be considered to be sufficiently full and accurate to present all the errors upon which he relies for a reversal. And if there be omissions therein the court will not look into the record to supply them.*

While a court is not compelled to look into the record, yet in order to get at an intelligible understanding of the case it

¹ Chapman v. Chapman, 129 Ill., 386; Woven Cord Bed Spring Co. v. Coxedge, 50 Ill. App., 334; Lindgren v. Swartz, 49 Ill. App., 488; Illinois Central R. R. Co. v. O'Keefe, 49 Ill. App., 320; Truby v. Case, 41 Ill. App., 153.

² Wilson v. Dresser, 152 Ill., 387; Chicago, P. & St. L. Ry. Co. v. Wolf, 137 Ill., 360; Chavis v. Reed, 40 Ill., 55; Shackelford v. Bailey, 35 Ill., 387; Kelleher v. Tisdale, 23 Ill., 405; Illinois Central Ry. Co. v. Creighton, 53 Ill. App., 45; Richey v. Dunham, 50 Ill. App., 246; Allison v. Allison, 34 Ill. App., 385; Parry v. Arnold, 33 Ill. App., 622; Lake v. Lower, 30 Ill. App., 500; Israel v. Town of Whitehall, 2 Ill. App., 509.

What is not an abstract.—The following purported to be an abstract of the record, but the court held that it was a mere "index" and not an abstract in the sense as required by the rules of the court:

"ABSTRACT OF RECORD."

Page.

1. Placita—*Procipe*.
2. Summons, service and return.
- 3-6. Declaration in assumpsit.
7. Motion to rule plaintiff to a bond for costs.
8. Bond for costs.
9. Plea of Statute of Limitations.
10. Replication to plea.
11. Demurrer to replication.
12. Answer to demurrer.
- 13-14. Bill of exceptions.
- 17-19. Appeal bond duly approved.
20. Orders of court and judgment.
- 21-22. Copy of order book.
23. Assignment of error.
25. Certificate of Clerk of county court.

Spain v. Thomas, 49 Ill. App., 249.

is sometimes done so, yet in such cases the costs on reversal have been taxed to the appellant.¹

The evidence need not be printed in the abstract in full, as it was embodied in the bill of exceptions, or certificate of evidence, but may be condensed so as to present substance of such evidence clearly and concisely.²

The "abstract" must be an *abridgment* of the record, and a writing purporting to be such, which consists largely of conclusions of counsel as to the substance and effect of testimony, interspersed with arguments and remarks of counsel, will not suffice.³

The abstract shall contain the names of counsel filing the same.⁴

§ 1070. Same—When abstract to be filed—Default.—

The rule is general that the abstract (and brief)⁵ must be filed in the office of the Clerk of the court of review on or before the time required for filing the transcript of the record.⁶ And in case the abstract (or brief) is not filed within the time prescribed, the judgment of the court below will, on the call of the docket, be affirmed.⁷

It is within the discretion of the court where the case has been reached upon the call docket and neither person has fur-

¹ *Sternheim v. Burcky*, 149 Ill., 241.

Upon reversal in such case costs will be taxed to the appellant. *Sternheim v. Burcky*, 149 Ill., 241.

² Supreme Court Rule 27.

³ *Folger v. Bishop*, 48 Ill. App., 526.

⁴ Supreme Court Rule 29; Appellate Court Rule 21, 1st Dist.; Rule 22, 2nd Dist.; Rule 24, 3rd Dist.; Rule 25, 4th Dist.

⁵ See *post*, § 1072.

⁶ *Ante*, § 1061.

⁷ *Lancaster v. Waukegan & S. W. Ry. Co.*, 132 Ill., 492; Supreme Court Rule 35.

In the appellate court of the second and fourth districts the time

may be extended for good cause shown. Appellate Court Rule 26, 2nd Dist.; Rule 30, 4th Dist.

But it is required by rule in the first district and by good practice elsewhere, that before such time will be granted there must be notice to the opposite party and a showing of sufficient circumstances by affidavit, of which a copy has been served with a notice, or there must be a stipulation of parties. Appellate Court Rule 34, 1st Dist.

Further and particular provisions are made in the other appellate courts. Appellate Court Rule 25, 1st Dist.; Rule 28, 3rd Dist., and Rule 29, 4th Dist.

nished an abstract, to continue the case or dismiss it.¹ Where the plaintiff in error, or appellant, omits to file an abstract of the record, the defendant, or appellee, may prepare the cause for hearing *ex parte*. The second calling of the cause the defendant may have the cause continued or dismissed at the discretion of the court.² The defendant, or appellee, has a right to have the cause dismissed for failure of the plaintiff in error, or appellant, to file their abstract in brief, unless the delay is excused upon circumstances shown to the court.³

No objection can, by the defendant, be taken to the plaintiff's failure to file abstract and brief until the case is called.⁴ And notwithstanding the time, as required by the rule for filing the abstract, has expired, yet it may be filed thereafter, unless the plaintiff has been put in default by motion.⁵

When an *insufficient number* of printed abstracts are filed by the plaintiff, a short rule may be taken upon him to file the proper number.⁶

§ 1071. Same—Further abstract.—Where the presentation of the cause by abstract of the plaintiff in error, or appellant, is unsatisfactory, counsel for the defendant, or appellee, will be permitted to furnish the Justices of the court of review with such further abstracts as he shall deem necessary to the full understanding of the merits of his cause.⁷

¹ Bostwick v. Williams, 40 Ill., 113; Gibbs v. Blackwell, 40 Ill., 51.

² Chavis v. Reed, 40 Ill., 55; Getaty v. Kersten, 44 Ill. App., 440.

³ Hoshier v. Hesterman, 51 Ill. App., 75.

⁴ Gibbs v. Blackwell, 40 Ill., 51.

⁵ Ball v. Peck, 40 Ill., 105.

In criminal cases, notwithstanding the omission to file abstracts briefs and arguments, the Supreme Court has carefully examined the record and failing to find error, has affirmed the judgment of the court below and fixed the time for execut-

ing the sentence of death. Burklow v. People, 89 Ill., 123.

⁶ Spear v. D'Clercy, 40 Ill., 56.

⁷ Supreme Court Rule 23; Appellate Court Rule 20, 1st Dist.; Rule 21, 2nd Dist.; Rule 23, 3rd Dist.; and Rule 24, 4th Dist.; Phelps v. Funkhouse, 40 Ill., 27; Yazel v. Palmer, 88 Ill., 597; Caswell v. Caswell, 24 Ill. App., 548.

The costs in such a case will be awarded in the discretion of the court. Where the judgment below was affirmed the costs were placed upon the appellant. *Id.*

§ 1072. Brief—Preparing and filing.—Printed briefs are required to be filed in all cases whether the argument is to be made orally, in full or in part only, or when the cause is to be submitted on briefs without oral arguments.

The brief must contain a short, clear statement of the points and authorities in support thereof; and in citing cases from the published reports, such citations must not only give the book and page, but also the names of the parties as they appear in the title of the reported case; and the names of the counsel filing the brief must appear to the same.

The filing of the printed brief will not, however, preclude the party from filing full printed or written arguments in support of his brief or points and authorities provided he does so within the time his printed brief is required to be filed.¹

It is required by rule in the Appellate Courts of the third and fourth districts—and the same is the proper practice in the other courts of review—that the brief of the appellant or plaintiff in error shall contain in the beginning a concise statement of the case, including, in a general way, the form of the

¹ Supreme Court Rule 29; Appellate Court Rule 21, 1st Dist.; Rule 22, 2nd Dist.; Rule 24, 3rd Dist., and Rule 25, 4th Dist.

Typewritten briefs are not in compliance with the rule and if filed they will be ordered to be stricken from the files and the judgment reversed *pro forma* under Appellate Court Rule 27, First District. *Carroll v. Holmes*, 19 Ill. App., 564.

Offensive and disrespectful language in a brief will cause it to be stricken from the files and cause a judgment of reversal to be entered *pro forma*. *Chicago & A. R. R. Co. v. Bragonier*, 13 Ill. App., 467.

Must abide by brief.—It is a general rule that the appellant, or plaintiff in error must abide by the cause made in his opening brief;

and if sufficient ground for reversal of the judgment is not shown he cannot thereafter complain, because the judgment of the court below is affirmed. Grounds not suggested in the trial court, but raised the first time by way of reply, will not be considered. *People v. Hanson*, 150 Ill., 122.

Reply brief.—The plaintiff in error, or appellant, is, in practice, permitted to file a brief in reply to the brief of the defendant in error, or appellee, but it must be merely a "reply." New grounds for reversal not suggested in the trial court must not be mentioned, nor must any other matter not in reply, for it is then too late for the other side to be heard upon it. *People v. Hanson*, 150 Ill., 122.

evidence omitting the names of witnesses and all other details, the judgment and the rulings of the trial court complained of.¹

¶ In cases taken to the Supreme Court from an Appellate Court by appeal or writ of error the party removing the same, may file in the Supreme Court, and without asking special leave for that purpose, the briefs used in the Appellate Court,² but he shall cause to be printed, either as an appendix to his brief, or otherwise, the opinion filed in the case by the Appellate Court, including the statement of facts prepared by that Court, if any such shall be filed.³

Printed briefs are required in all cases, whether the argument is printed or to be delivered orally⁴ and a failure to file a brief in compliance with the rules of the court will be cause for reversal.⁵

The judgment of the court below will be reversed *pro forma*, unless the court, upon examination of the record, shall deem it proper to decide the case upon its merits.⁶

The error on which the plaintiff relies for reversal must be by his brief called to the attention of the court or it will not be noticed. If he makes no mention in his brief of the matters assigned for error, the same will be deemed to have been abandoned.⁷ And if the error to which he has called attention has been obviated by amendment of the record,⁸ the

¹ Appellate Court Rule 24, 3rd Dist.; Rule 25, 4th Dist.

² Devine v. Edwards, 100 Ill., 473.

³ Supreme Court Rule 29.

Ten copies of such opinion shall be filed in the Supreme Court. *Ib.*

⁴ Gillespie v. Rout, 40 Ill., 58; Anonymous, 40 Ill., 57.

⁵ Wenz v. Tirrill, 48 Ill. App., 41; Peoria County Fair Ass'n v. Union Brewing Co., 36 Ill. App., 563; Parson v. Haskell, 30 Ill. App., 444.

Where a cause is brought up on writ of error without *supersedeas* and submitted without oral argument, it was continued because the plaintiff in error failed to furnish a printed brief. Anonymous, 40 Ill., 59.

⁶ Wenz v. Tirrill, 48 Ill. App., 41; Asher v. Mitchell, 7 Ill. App., 127; Terre Haute V. & I. R. R. Co. v. Goodwin, 4 Ill. App., 165; Cox v. City of Tuscola, 2 Ill. App., 628; Appellate Court Rule 27, 2nd Dist.; Rule 30, 3rd Dist.; and Rule 31, 4th Dist.

⁷ Harris v. Shebek, 151 Ill., 287; Golfe v. Werner, 151 Ill., 551; Gaffner v. People, 161 Ill., 21; Chicago City Ry. Co. v. Van Vleck, 143 Ill., 480; City of Mattoon v. Bowles, 48 Ill. App., 528; Armstrong & Co. v. Barrett, 46 Ill. App., 193; Scaton v. Ruff, 29 Ill. App., 235.

⁸ *Ante*, §§ 1028, 1058.

court will not search for other errors in the record, but will affirm the judgment even though other numerous errors are assigned.¹

§ 1073. **Same—When brief to be filed.**—The brief, like the abstract, must generally be filed within the time required for filing the transcript of the record;² but further and different times are specified in which the brief may be filed in the Northern, Central and Southern Grand Division of the Supreme Court;³ in the Appellate Court for the first district,⁴ for the second district,⁵ for the third district,⁶ and for the fourth district,⁷ which need not be herein set forth.

A motion to strike briefs from the files is proper on the part of the defendant in error, or appellee, where the plaintiff in error, or appellant, has failed to file his brief within the time required by the rule.⁸ But it is within the discretion of the court, upon showing a good cause therefor, to allow further time for filing a brief when such brief is not filed within the time required by the rules.⁹ It is good practice in all courts, however, and an absolute requirement of the Appellate Court of the first district that no extension of time to file brief should be granted, except upon the written stipulation of the parties, or upon notice to the opposite party and consideration by the court, by circumstances shown by affidavit, of which a copy has been served with the notice.¹⁰ Furthermore, the extension of time for filing a brief must be obtained within the time in which the party may file his brief without extension.¹¹

The plaintiff is not required to file a brief or abstract, unless the other party is in court. If there has been no service of

¹ *Gaffner v. People*, 161 Ill., 21.

² *Ante*, § 1061.

³ Supreme Court Rule 35.

⁴ Appellate Court Rule 25, 1st Dist.

⁵ Appellate Court Rule 26, 2nd Dist.

⁶ Appellate Court Rule 28, 3rd Dist.

⁷ Appellate Court Rule 29, 4th Dist.

⁸ *Goudy v. City of Lake View*, 27 Ill. App., 505.

⁹ Appellate Court Rule 26, 2nd Dist.; Rule 30, 4th Dist.

¹⁰ Appellate Court Rule 34, 1st Dist.

¹¹ *Frink v. Phelps*, 3 Scam. (Ill.), 580.

scire facias on the writ of error, the plaintiff is not in default for want of a brief when the case is called.¹

§ 1074. Same—Number of copies of brief to be filed.—The number of copies of the printed brief that is required to be filed is, in the Supreme Court, ten—one for each of the Judges, one for the opposite party, one for the Reporter, and one to be filed with the record; in the Appellate Court of the first district, six—one for each of the Justices, one for the opposite party, one for the Reporter and one to be filed with the record; in the Appellate Court of the second, third and fourth districts, five—one for each of the Justices, one for the opposite party and one to be filed with the record.² In the Appellate Courts of the second and fourth districts, one copy of the brief shall be sent to the opposite counsel by mail properly addressed, or otherwise, as soon as the same is printed.³

§ 1075. Docketing and hearing the cause.—It is a general rule in courts of review that causes in which the people are a party and in which they have a direct interest in the decision shall be placed at the head of the docket, and that all other cases shall be docketed and called for argument in the order in which the record shall have been filed with the Clerk. *Provided*, however, that causes, which, in the judgment of the court, involve important public interests, may be advanced on the docket.⁴

The calling of the docket of cases for trial shall be in their numerical order and the causes shall be argued, continued, or otherwise disposed of, as they are called, unless, for good cause shown, they are placed at the foot of the docket; all

¹ Blair v. Reading, 96 Ill., 130.

Supplemental brief.—Upon leave obtained a party may file a supplemental brief, but he cannot, by so doing, procure the Supreme Court to consider and determine matters not presented to the appellate court and to which the appellee has had no chance to reply. *McDanel v. Logi*, 143 Ill., 487.

² Supreme Court Rule 30; Appellate Court Rule 22, 1st Dist.; Rule 23, 2nd Dist.; Rule 25, 3rd Dist., and Rule 26, 4th Dist.

³ Appellate Court Rule 24, 2nd Dist., and Rule 26, 4th Dist.

⁴ Supreme Court Rule 31; Appellate Court Rule 23, 1st Dist.; Rule 26, 3rd Dist., and Rule 27, 4th Dist.

unexpired rules shall terminate upon the call of the cause for hearing. *Provided*, that if the court shall give time to either party without the consent of the other, the cause shall not lose its precedence on the docket.¹ In the Appellate Court for the first district, particularly stipulations of parties or their attorneys to place causes at the foot of the docket or otherwise change the order in which the causes are to be called, will not be recognized.²

§ 1076. Argument of counsel in courts of review.—In courts of review, as well as in trial courts,³ oral argument of counsel of the several parties is a matter of right where the rules of such court have been complied with in the filing of abstracts and briefs. Where, however, counsel argue the case orally a printed argument in addition thereto will not be received from him unless the same shall have been filed within the time especially prescribed for the filing of his printed brief.⁴ When counsel choose to present to the court of review an argument, such argument must call the attention of the court to all the matters alleged to be erroneous, for such argument will be deemed to present the party's whole case and any errors which have been assigned and not mentioned in the argument when presented, will be deemed to have been abandoned.⁵

¹ Supreme Court Rule 84; Appellate Court Rule 24, 1st Dist., Rule 25, 2nd Dist., Rule 27, 3rd Dist., and Rule 28, 4th Dist.

² Appellate Court Rule 24, 1st Dist.

³ *Ante*, § —.

⁴ Supreme Court Rule 36; Appellate Court Rule 26, 1st Dist.; Rule 28, 2nd Dist.; Rule 31, 3rd Dist., and Rule 32, 4th Dist.

In the appellate court of the first district a further exception is made that the appellant or plaintiff in error shall be at liberty to file a written or printed reply, at any time before the argument of the case is commenced. Appellate Court Rule 26, 1st Dist.

In the appellate court of the third and fourth districts in case the appellant, or plaintiff in error, does not argue the case orally, he shall be allowed three days after the call to file a brief in reply. Appellate Court Rule 31, 3rd Dist., and Rule 32, 4th Dist.

⁵ *City of Mt. Carmel v. Howell*, 137 Ill., 91; *Calumet Furniture Co. v. Reinhold*, 51 Ill. App., 323; *Chicago Public Stock Exchange v. McClaughry*, 50 Ill. App., 358; *East St. Louis Electric R. R. Co. v. Stout*, 47 Ill. App., 546; but see *Purinton v. Akhurst*, 74 Ill., 490.

Argument of counsel in a court of review is a matter of right and not of necessity. Counsel may, if they choose, submit the case upon abstracts and briefs without argument, or they may submit the cause upon abstracts, briefs, and printed or written argument, without oral argument when entitled thereto.

The oral argument of counsel for the different parties must be made consecutively. One will not be allowed to make an oral argument on the first call of the document and the other on the second call.¹ If, however, the plaintiff in error has argued his case orally upon the regular docket and the defendant in error has omitted so to do, the latter may, nevertheless, and as a matter of course, file a written argument.²

In the argument of a cause in a court of review, counsel will be required to use the same decorum that is required of counsel in the argument of cause in the trial court.³ And, furthermore, the court of review will protect the Judges of the trial court from such like aspersions as Judges will prohibit when directed against themselves.⁴

§ 1077. Same—No oral argument heard upon motion or rehearing—Exception.—An oral argument will not be heard upon any motion; nor upon the rehearing of a cause, unless specially directed by the court.⁵

In an *original* proceeding in the Supreme Court an oral argument cannot be made upon a *demurrer*, except where the cause is submitted for final consideration on such demurrer.⁶

§ 1078. Same—Time allowed for oral argument.—The time generally allowed for such oral argument is restricted to

¹ Comstock v. Hitt, 40 Ill., 121.

² Bentley v. Lill, 40 Ill., 58.

The opening argument of the plaintiff in error, or appellant, should state all the grounds which he desires to urge for a reversal so as to give the opposite party a chance to reply. Purington v. Akhurst, 74 Ill., 490.

³ *Ante*, §§ 906, 909.

⁴ Mutual Benefit Life Ins. Co. v. Robertson, 59 Ill., 123.

⁵ Supreme Court Rule 37; Appellate Court Rule 27, 1st Dist.; Rule 29, 2nd Dist.; Rule 32, 3rd Dist..

⁶ People v. Hughes, 101 Ill., 652.

one hour, unless otherwise specially permitted;¹ but in the appellate court of the first district the closing argument is restricted to thirty minutes, unless otherwise specially permitted, and if the appellant, or plaintiff in error, makes no open argument, the appellee, or defendant in error, will be allowed but fifteen minutes.² And in the Appellate Court of the fourth district where the appellant, or plaintiff in error, makes no argument the appellee, or defendant in error will be limited to twenty minutes.

§ 1079. Judgment in courts of review.—Courts of review can, as hereinbefore stated, only determine or pass judgment upon questions of law, and that upon the record, as presented. They will not examine the facts in the case except to determine whether the trial court committed an error in matter of law in basing a judgment upon such facts and such facts will not be considered unless they appear upon the record. In courts of review, when questions arise involving facts outside the record, the case must be sent to some other court of appropriate jurisdiction where the issue can be tried by a jury and the verdict of such jury certified back to a court of review.³

Generally speaking a court of review may render a final judgment in either one of four ways; that is to say the judgment may be either of the following:

1. Judgment of affirmance;
2. Judgment of reversal in whole;
3. Judgment of reversal in part; or
4. Judgment of dismissal,

Each of which will be considered in the order named.

¹ Supreme Court Rule 38; Appellate Court Rule 27, 1st Dist.; Rule 30, 2nd Dist.; Rule 33, 3rd and 4th Dist.

² Appellate Court Rule 27, 1st Dist.

³ National Bank v. LeMoynes, 127 Ill., 253; People v. Young, 40 Ill., 87; Austin v. Bainter, 50 Ill., 308; Rev. Stat., Ch. 110, ¶ 90, § 89.

Entry of judgment nunc pro tunc

after death of party.—Where, in a court of review, arguments have been made and the cause submitted for decision, and the entry of judgment is delayed purely for the convenience of court, or some of its members, and a party dies, judgment may be subsequently entered as of a day before his death. O'Sullivan v. People, 144 Ill., 504.

§ 1080. Same—(1) Judgment of affirmance—Execution.—In considering the judgment of an inferior common law court of general jurisdiction a court of review will always presume that such court determined correctly the questions of law presented to it and will affirm such judgment, unless an error of law therein is made affirmatively to appear. The court of review will not consider questions of fact for the purpose of the determination thereof and if no question of law is presented for review the judgment of the court below will be affirmed. The facts presented to the trial court for determination are only examined by the court of review for the purpose of ascertaining from the facts so found whether the judgment rendered thereon ought to have been so rendered in the court below.¹

Furthermore when the facts are so considered it must clearly appear to the court of review that the judgment entered thereon was *not* warranted, and that injustice has been done, or the judgment will be affirmed. Where the facts do not clearly show that another judgment should have been entered—in other words where the evidence is irreconcilable and conflicting and where the decision can be sustained upon any grounds fairly deducible from the pleadings and evidence—the judgment will be affirmed. The reason of the Judge in arriving at the decision will not be considered; nor is it material that bad reasons for rendering the judgment was given, or that errors have been committed in the admission of improper testimony, or the giving or refusing of instructions, where the same has worked no injury to the objecting party.²

¹ Michigan Mut. Life Ins. Co. v. Hull, Admr., 160 Ill., 488; Manistee Lumber Co. v. Union Nat. Bank, 143 Ill., 490; Libby, McNeill & Libby v. Scherman, 146 Ill., 540; Exchange Nat. Bank v. Chicago Nat. Bank, 131 Ill., 547; Flaningham v. Hogue, 162 Ill., 129; s. c., 59 Ill. App., 315; Ives v. McHard, 103 Ill., 97.

² Pennsylvania Co. v. Keane, 143 Ill., 172; Chicago & E. I. R. R. Co. v. Vivans, 142 Ill., 401; Pennsylvania

Co. v. Versten, 140 Ill., 637; Christy v. Stafford, 123 Ill., 463; Darlington v. Chamberlin, 120 Ill., 585; Field v. Chicago D. & V. R. R. Co., 68 Ill., 367; Lafayette, B. & M. R. R. Co. v. Winslow, 66 Ill., 219; Chicago & Alton R. R. Co. v. Clampt, 63 Ill., 95; Jacquin v. Davidson, 49 Ill., 82; First Nat. Bank v. Mansfield, 48 Ill., 494; Bunker v. Green, 48 Ill., 243; Scarritt v. Carruthers, 29 Ill., 487; Schwarz v. Schwarz, 26 Ill., 81;

An affirmance by the Appellate Court of the judgment of the trial court implies that a finding of facts is the same as in the trial court and they will not be further inquired into by the Supreme Court.¹

An affirmance of the judgment of the court below is a final determination and the matters determined become *res adjudicata*. If the Supreme Court reverses the judgment upon some points and affirms it in other respects the judgment of affirmance has forever settled the matters affirmed. It is as to them *res adjudicata*.²

Execution may be issued by the court of review on its final judgment or the cause may be remanded to the inferior court in order that an execution may be there issued.³ When the judgment is affirmed and upon a copy of the order (judgment) of the court of review being filed in the office of the Clerk of the court from which the case was originally removed, an exe-

Bloom v. Crane, 24 Ill., 48; Young v. Silkwood, 11 Ill., 36; Evans v. Fisher, 5 Gilm. (Ill.), 569; Webster v. Vickers, 2 Scam. (Ill.), 295; Leyenberger v. Rebanks, 55 Ill. App., 441; Gasch v. Niehoff, 54 Ill. App., 680; Delfosse v. Thomas, 54 Ill. App., 635; Slemmons v. Walfield, 53 Ill. App., 497; Funk v. Howard, 52 Ill. App., 405; Garretson v. Becker, 52 Ill. App., 255; Hart v. Morgan, 49 Ill. App., 516; O'Bannon v. Vigus, 48 Ill. App., 84; Shea v. Wagner, 29 Ill. App., 193; Kelly v. Dandurand, 28 Ill. App., 25; Hamburger Co. v. Levy, 27 Ill. App., 570; Fadner v. Filer, 27 Ill. App., 506; Chicago City Ry. Co. v. Robinson, 27 Ill. App., 26; London, Liverpool & Globe Ins. Co. v. Saunders, 26 Ill. App., 559; McDermott v. Gubbing, 25 Ill. App., 541; Beardsley v. Beardsley, 23 Ill. App., 317; Lowe v. Ravens, 21 Ill. App., 630; Radeke v. Cook, 21 Ill. App., 595; Haldema v. Sennett, 21 Ill. App., 230; Fletcher v. Patton, 21 Ill. App., 228; Illinois

Agricultural Co. v. Cranston, 21 Ill. App., 174; Hirsch v. Hahn, 20 Ill. App., 330; West Chicago Alcohol Works v. Sheer, 8 Ill. App., 367; Smith v. Bingman, 3 Ill. App., 65.

A judgment of affirmance may always be procured by an amendment of the record in regard to the errors assigned; that is to say, the errors assigned may be obviated by amendment. Schmid v. People, 161 Ill., 436.

¹ Ohio & M. Ry. Co. v. Wangelin, 152 Ill., 138; Pennsylvania Co. v. Keane, 143 Ill., 172; Chicago, R. I. & P. Ry. Co. v. Lewis, 109 Ill., 120; Rogers v. C. B. & Q. Ry., 117 Ill., 115; Thomas v. Fame Ins. Co., 108 Ill., 91; Carr v. Miner, 92 Ill., 604. Further as to certificate of facts when found differently from on the trial court; see *ante*, § 1020. "Removal from the appellate court to Supreme Court," and *post*, § 1081.

² Osburn v. McCartney, 121 Ill., 458.

³ Rev. Stat., Chap. 110, ¶ 81, § 80.

cution may issue therefrom and other proceedings may be had thereon in all respects as if no appeal or writ of error had been prosecuted.¹ The filing of the order operates as a *procedendo* and reinvests the jurisdiction in the trial court to the same extent as though no appeal had been taken or writ of error prosecuted.²

§ 1081. Same. (2) Judgment of reversal in whole—Execution.—While courts are reluctant to disturb the findings of juries on mere questions of fact, as indicated in the above section, yet if the finding is so manifestly contrary to the weight of the evidence as to show that it must have been the result of passion, prejudice, or undue sympathy, and injury to the plaintiff has resulted therefrom, it is the duty of the court of review to reverse such judgment. Where the verdict is manifestly against the evidence and instructions, and wholly violates the plaintiff's rights, the judgment will be reversed. Courts will interfere with verdicts in order to prevent manifest injustice.³ Likewise, courts of review will not ordinarily interfere with the exercise of the discretionary power of a trial court, and yet cases do arise in which it is their duty to interfere for the promotion of justice.⁴

The effect of wholly reversing a judgment against a defendant is to restore such defendant to all he has lost by the erroneous judgment, if the title to property has not passed, by the execution of the judgment, to a third party; and if such be the case the defendant will then have an action against the plaintiff for full damages.⁵

Execution may be issued by a court of review on its final judgment, or the cause may be "remanded" to the inferior court in order that an execution may be there issued or that other proceedings may be had thereon.⁶

¹ Rev. Stat., Ch. 110, ¶ 83, § 82.

² Smith v. Stevens, 133 Ill., 183.

³ Udell v. Howard, 28 Ill. App., 124; Chicago & N. W. Ry. Co. v. Cummings, 20 Ill. App., 333; Lake Shore & Michigan Southern Ry. Co. v. Kuhlman, 18 Ill. App., 222; Fer-

riman v. Shepherd, 14 Ill. App., 515;

Norris v. Brown, 13 Ill. App., 606;

Osborne v. Dwyer, 13 Ill. App., 377;

Moore v. Mauk, 3 Ill. App., 114.

⁴ Allen v. Hoffman, 12 Ill. App., 573.

⁵ Hays v. Cassell, 70 Ill., 669.

⁶ Rev. Stat., Chap. 110, ¶ 81, § 80.

Upon reversal in the Appellate Court when the finding of facts, in whole or in part, is different from the finding of facts in the trial court, it is the duty of the Appellate Court to recite in its *final* order or judgment the facts found. If it does not do this the reversal must be because an error of law in the trial court, or the judgment of the Appellate Court will be erroneous. In other words the Appellate Court can render no valid judgment of *reversal*, except for errors in law, unless it recites in its final judgment its finding of fact. Furthermore, when it recites such a finding of fact that finding is final and conclusive upon the Supreme Court.¹ Where, however, there is no finding of facts it will be presumed that the reversal was for errors of law appearing in the record and not because of a finding of facts different in whole or in part from the finding of the trial court.²

The rule does not apply to a judgment reversing and remanding the cause for a new trial. It only applies in cases where the judgment of the Appellate Court is final.³

The Appellate Court cannot render final judgment for the plaintiff on reversal, except where there is a total want of evidence to support the issues for the defendant and where, without conflicting testimony and with all warrantable inferences drawn in favor of the testimony it is so insufficient to support a finding for the defendant that the trial court should have found for the plaintiff, but failed so to do.⁴

Further as to "Remandment," see *post*, § 1084.

¹ Rev. Stat., Chap. 110, ¶ 88, § 87; Siddall v. Jansen, 143 Ill., 537; Northwestern Brewing Co. v. Manion, 145 Ill., 182; Scovill v. Miller, 140 Ill., 504; People v. Soucy, 122 Ill., 335; Brown v. City of Aurora, 109 Ill., 165; Coal Field Co. v. Peck, 98 Ill., 139.

The appellate court is not required, or even authorized, to incorporate a special finding of facts in the record, except in cases of re-

versal and where the finding of facts is *different*, in part at least, from the finding in the trial court. Gammon v. Huse, 100 Ill., 234.

When a finding is made it becomes a part of the judgment in like manner as recitals in decrees in chancery. Neer v. Illinois Central R. R. Co., 138 Ill., 29.

² Capes v. Burgess, 135 Ill., 61.

³ Caswell v. Fitzimmons, 9 Ill. App., 78.

⁴ Scovill v. Miller, 140 Ill., 504.

§ 1082. Same. (3) Judgment of reversal in part—Remittitur—Execution.—When the parts of a judgment are several, a court of review has power to reverse a part only of the judgment of the inferior court before it for review when the promotion of justice so requires. The reversal of a part only of a judgment is equivalent to an affirmance of the remainder.¹

In case of a partial reversal the court of review shall give such judgment as the inferior court ought to have given and for that purpose may allow the entering of a *remittitur*, either in term time or in vacation, or may “remand” the cause to the inferior court for further proceedings, as the case may require.² A *remittitur* in general terms is sufficient. It is not necessary that the plaintiff should state specifically upon the record for what the *remittitur* is made.³

A judgment entered against several defendants whose interests are several may be reversed as to part and affirmed as to the rest; but a judgment against *joint* defendants, whose

¹ *Martin v. Swift*, 120 Ill., 488; *Washburn Moen Mfg. Co. v. Chicago Galv'd Wire Fence Co.*, 119 Ill., 30; *Henning v. Eldridge*, 146 Ill., 305; *Snell v. Warner*, 91 Ill., 472. Further as to “affirmance” see *ante*, § 1080.

² *Rev. Stat.*, Chap. 110, ¶ 82, § 81; *United Workmen v. Juhlke*, 129 Ill., 298; *North Chicago Street R. R. Co. v. Wrixon*, 150 Ill., 532; *Pixley v. Boynton*, 79 Ill., 351; *Nixon v. Halley*, 78 Ill., 611; *Hart v. Morgan*, 49 Ill. App., 516; *Epley v. Eubanks*, 11 Ill. App., 272.

Further as to “Remandment” see *post*, § 1084. Further as to “Execution” see *ante*, § 1081.

³ *City of Elgin v. Joslyn*, 136 Ill., 525.

Costs.—Where the cause of the appellee is sustained as to the principal matter involved in the controversy, but is reversed and remanded

on some point of minor importance, each party should be left to pay his own costs in the court of review. *Northrop v. Phillips*, 99 Ill., 449.

Costs on remittitur.—Where the error is removed by *remittitur* the costs up to such time and including the entry of the *remittitur* will be taxed against the appellee, or defendant in error. The party entering *remittitur* having been the cause of the accruing of the costs will have it to pay. *Bristow v. Catlett*, 92 Ill., 17; *Dowty v. Holtz*, 85 Ill., 525; *Pixley v. Boynton*, 79 Ill., 351; *Nixon v. Halley*, 78 Ill., 611.

Exception.—In one case where the judgment was affirmed after a great portion of the damages recovered was remitted, each party was required to pay his own costs which had accrued in the court of review. *Chicago, B. & Q. R. R. Co. v. Dickson*, 88 Ill., 431.

interests are joint, must stand as entered, or be reversed *in toto*.¹

§ 1083. Same. (4) Judgment of dismissal—Execution.—

The court of review may dismiss the appeal or writ of error when it deems that such is the requirement of justice; and when the same is dismissed, and upon filing in the office of the Clerk of the court from which the case was originally removed a copy of the order (judgment) of the court of review, an execution may issue from the trial court upon the judgment entered therein, and other proceedings may be had thereon in all respects as if no appeal or writ of error had been prosecuted.² The filing of the order operates as a *procedendo* and reinvests the trial court with jurisdiction to proceed in all respects as though the cause had never been removed.³

§ 1084. Remanding cause—Re-trial—When unnecessary.—When the court of review reverses the judgment of the trial court on account of errors in its ruling on questions of law that arose on the trial, the cause should be remanded for a new trial.⁴ Where, however, the error in the judgment below is merely in computation of the amount of the damages, such error will be corrected and final judgment entered in the court of review.⁵ And where no judgment could, in justice,

¹ Jansen v. Varnum, 89 Ill., 100; Kimball & Ward v. Tanner, 63 Ill., 519; Tompkins v. Wiltberger, 56 Ill., 385; Rees v. City of Chicago, 38 Ill., 322.

² Rev. Stat., Chap. 110, ¶ 83, § 82.

³ Smith v. Stevens, 133 Ill., 183.

Motion to dismiss.—A motion to dismiss an appeal in the Supreme Court must be made before joinder in error. McCall v. Leshner, 2 Gilm. (Ill.), 46. Further as to motions, see *post*, § 769.

⁴ Siddall v. Jansen, 143 Ill., 537; Scovill v. Miller, 140 Ill., 504.

When a final judgment.—A reversal and remandment by the Appellate Court, generally without in-

structions, is not a final judgment upon which an appeal or writ of error will lie. But where no further proceedings can be had in the trial court, except to carry out the directions of the court of review, the judgment is final and an appeal may be had from the Appellate Court to the Supreme Court in conformity with the statute. Henning v. Eldridge, 146 Ill., 305. Rev. Stat., Chap. 110, ¶ 91, § 90.

⁵ Linder v. Monroe, 33 Ill., 388; Hall v. Jackson, 5 Ill. App., 609; Compare Dowling v. Stewart, 3 Scam. (Ill.), 193; Pearsons v. Bailey, 1 Scam (Ill.), 507.

Where the judgment was in excess

have been entered in the trial court against the defendant, no remandment is necessary, a final judgment of reversal is proper; but if the grounds on which the case is reversed do not go to the extent of denying a right of recovery, the cause may be properly remanded.¹

Remanding the cause without ordering a new trial is proper where the only error is subsequent to the verdict, and the verdict is sufficient to sustain a judgment. It is only necessary to award a *venire facias de novo* where the verdict is insufficient to sustain a judgment, because of being insufficient in itself or improperly rendered.² Where a verdict is improper, judgment cannot be entered thereon either by the trial court, or the court of review, although all the evidence is before it in the record.³ The reversal of a judgment does not affect a verdict rendered before the error is committed on which the judgment was reversed, and a judgment after reversal may properly be entered on such verdict.⁴ When a cause is re-

of the *ad damnum* clause in the declaration and the plaintiff had filed a *remittitur* as to such excess, the Supreme Court having the data before it, entered judgment for the sum remaining after the *remittitur* was entered. *Linder v. Monroe*, 33 Ill., 388.

¹ *Hately v. Pike*, 162 Ill., 241; *Senger v. Town of Harvard*, 147 Ill., 304; *Scovill v. Miller*, 140 Ill., 504; *Neer v. Illinois Central R. R. Co.*, 138 Ill., 29; *Price v. Dime Savings Bank*, 124 Ill., 317; *Toledo, W. & W. R. R. Co. v. Durkin*, 76 Ill., 395.

Remanding of cause by "Appellate" Court—Practice—Second appeal.—When a cause is remanded by the Appellate Court for a new trial the rule that it must recite in its final order or judgment the facts found by it when the same are different in whole or in part from the facts found by the trial court, does not apply. The rule only applies to final judgments of reversal. *Casael v. Fitzsimmons*, 9 Ill. App., 78.

When an "Appellate" court remands a case for further proceeding the trial court on the new trial may receive further and material evidence, and if it does so, then, on a second appeal to the Appellate Court, such additional evidence must be considered in connection with the evidence previously before it and the case must be decided upon all the evidence thus appearing in the record, but if there be no further and material evidence, the decision on the first appeal would be conclusive. *Elston v. Kennicott*, 52 Ill., 272.

² *McNulta v. Ensich*, 134 Ill., 46; *Meyer v. Village of Teutopolis*, 131 Ill., 552; *Martin v. Barnhardt*, 39 Ill., 9.

³ *Ross v. Taylor*, 63 Ill., 215.

⁴ *Hill v. Harding*, 116 Ill., 92.

A second verdict and judgment being rendered without a former verdict having been set aside, will work no injury, although the same is irregular. *Walsh v. Walsh*, 114 Ill., 655.

manded without specific directions, the trial court has power to allow amendments to the pleadings and permit the introduction of other evidence so long as the same is not inconsistent with the principles announced in the opinion of the court of review, and do not introduce grounds that did not exist at the former hearing.¹ When "the cause is remanded for further proceedings consistent" with the opinion, the mode of proceeding indicated by such opinion and no other, must be followed.² Therefore, where the opinion stated that the action was prematurely brought, a dismissal of the cause was the only proceeding that the trial court could take.³ And where a cause was remanded with leave to the party recovering the judgment to enter a *remittitur* for a portion of the sum recovered, the court below had no discretion, upon the *remittitur* being entered, but to enter a judgment for the amount of the former judgment, less the amount so allowed to be remitted.⁴ Likewise, where a cause is remanded for other and further proceedings, with specific directions, the proceedings of the trial court must be within the scope of such instructions.⁵

§ 1085. Same—Practice when case remanded for re-trial.

—When any cause is remanded to a court of review for a new trial or hearing by the court in which such cause was originally tried, the court of review shall issue its mandate reversing, and remanding such cause directly to such trial court; and upon a transcript of the order of the court of review remanding the same being filed in the court in which such cause was originally tried, and not less than ten days notice thereof being given to the adverse party or his attorney, the cause or proceeding shall be reinstated therein. If, however, there be non-resident parties or parties who cannot be found, so that personal notice cannot be served upon them, the notice may be given as in cases in chancery or as may be directed by the

¹ Cable v. Ellis, 120 Ill., 135; Village of Brooklyn v. Orthwein, 140 Ill., 620; Perry v. Burton, 126 Ill., 599.

² Parker v. Shannon, 121 Ill., 452.

³ Osburn v. McCartney, 121 Ill., 408.

⁴ Winchester v. Grosvenor, 48 Ill., 515.

⁵ Mix v. People, 122 Ill., 641.

court.¹ The filing of the transcript of the remanding order gives the trial court jurisdiction of the subject matter and no more. The jurisdiction over the person of the adverse party can only be acquired by the service of notice as provided.²

The remanding order, *i. e.*, the transcript of the judgment of the court of review, in remanding the cause, shall be filed within two years from the time of making such order, or the cause will be considered as abandoned and no further action shall be had therein.³

Either party may procure the record from the Supreme Court, of the cause remanded, and have the case placed on the docket of the trial court for further proceedings. After notice is given to the adverse party of the intention to file a transcript of the remanding order he is presumed to know that the case is returned and docketed without notice being given to him of that fact. It has been suggested as matter of good practice that the trial court should cause notice of the filing of the record in such cases to be given; yet the Supreme Court is without power to make a rule to that effect.⁴

§ 1086. Rehearing. (a) Petition for.—A rehearing of a cause in a court of review will be granted for good cause shown by proper petition duly presented. It is required that the petition should briefly state the grounds for a rehearing and the authorities relied on in support thereof. Counsel can,

¹ Rev. Stat., Chap. 110, ¶ 84, § 83; As to the service of notice in chancery cases, see Rev. Stat., Chap. 22, ¶¶ 12-14.

² *Austin v. Dufour*, 110 Ill., 85.

Ten days notice of the intention of filing the remanding order will be sufficient, although it expire during the term. It is not necessary that it should expire before the first day of the term. *Smith v. Brittanham*, 94 Ill., 624.

³ Rev. Stat., Chap. 110, ¶ 85, § 84; *Austin v. Dufour*, 110 Ill., 85; *Koon v. Nichols*, 85 Ill., 155.

In one case the remanding order

was stricken out by mutual consent of the parties and the cause was thereafter appealed; the court declined to examine the merits of such appeal. *Jansen v. Siddall*, 51 Ill. App., 74.

⁴ *Murray v. Whittaker*, 17 Ill., 230.

⁵ *Practice in the Appellate Court.*—A motion for a re-hearing in the Appellate Courts is not generally proper where the cause is reviewable by the Supreme Court. Appellate Court Rule 29, 1st Dist.; Rule 32, 2nd Dist.; Rule 36, 4th Dist.

If the cause is not reviewable in the Supreme Court then counsel has

in such petition, make reference to the original argument submitted, on the points upon which the rehearing is desired, but nothing further.¹ There may be a new citation of authorities and this will not be deemed a re-argument of the cause. The petition must be signed by counsel.²

A party has no legal right to a rehearing. The matter rests wholly within the discretion of the court.³ And it will never be allowed, except on a petition for a rehearing in the manner prescribed by the rule.⁴ The requirements of the rules cannot be waived by stipulation. A compliance with them is a jurisdictional prerequisite.⁵

An application for a rehearing will be entertained in the Appellate Court of the first, second and fourth districts in that class of cases only in which the decision of the Appellate Court

his option to petition for a rehearing in the Appellate Court or pray the Judges of the Appellate Court to certify that the case involves questions of law to such importance, either on account of principal or collateral interests as that it should be passed upon by the Supreme Court. *Oberne v. Bunn*, 39 Ill. App., 12. Furthermore, where the petition for a rehearing can be disposed of within the time limited by the statute for taking an appeal to the Supreme Court, counsel may first file such petition for a re-hearing and if it is denied he may then pray the Appellate Court for a certificate of importance. *Oberne v. Bunn*, 39 Ill. App., 12.

¹ New points or objections made for the first time on the petition for a rehearing, will not be considered. *Hime v. Klasey*, 9 Ill. App., 190.

² Supreme Court Rules 41 and 42; Appellate Court Rule 29, 1st Dist.; Rule 33, 2nd Dist.; Rule 35, 3rd Dist., and 4th Dist.

Second petition for rehearing.—When one petition for a rehearing

is stricken from the files because of not being in compliance with the requirements of the rules of court, a new petition for a rehearing of the same cause cannot be presented unless leave is granted by the court of *its own motion*. Supreme Court Rule 42.

Where an order, inconsistent with the opinion of the court, was entered by mistake of the Clerk, the court granted a rehearing of its own motion. *Chicago, etc., Co. v. Merchants' Nat. Bank*, 97 Ill., 299.

Likewise a court, of its own motion, vacated a judgment which was entered on a misapprehension of the facts and ordered a proper judgment entered. *Stafford v. C. B. & Q. R. Co.*, 114 Ill., 244.

³ *Supreme Lodge K. of H. v. Dalberg*, 138 Ill., 508.

⁴ *Union Nat. Bank v. International Bank*, 123 Ill., 512; *Norton v. Mosher*, 114 Ill., 146; *Smith v. Brittenham*, 94 Ill., 624.

⁵ *Bernard v. Brown*, 31 Ill. App., 385.

cannot be reviewed by the Supreme Court;¹ unless, as is stated by the Appellate Court of the fourth district, the court, in the exercise of its discretion in exceptional cases, determine to the contrary.²

The adverse party may also apply for a rehearing, if the same can be done within the time prescribed by the rule, where a different judgment has been rendered on the rehearing granted to the first petitioner.³

§ 1087. (b) **Notice—Filing.**—Within the number of days limited by the rule of the court of review,⁴ after the opinion of such court is filed, a party desiring a rehearing shall give actual notice in writing to the opposite party or his attorney of his intention to make such application; and shall also, within the time limited therefor⁵ file a copy of such notice with the Clerk of the court of review in which the cause is pending,⁶ and within the time limited therefor⁷ after the filing of the opinion shall place on file in the Clerk's office the number of printed copies of the petition,⁸ required by the rule of the court.⁹ In the Appellate Court of the second district he shall also deliver one copy of the petition through the mail or otherwise to the opposite party or his attorney, if the address of such party, or his attorney, can, upon reasonable inquiry, be ascertained.¹⁰

¹ Appellate Court Rule 29, 1st Dist.; Rule 32, 2nd Dist.; Rule 36, 4th Dist.

² Appellate Court Rule 36, 4th Dist.

³ Brant v. Gallup. 117 Ill., 640.

⁴ This is in the Supreme Court and the Appellate Court for the second, third and fourth districts, 15 days; and in the Appellate Court of the first district, 10 days.

⁵ This is 15 days in the Supreme Court, and 10 days in the Appellate Court of the first district.

⁶ In the Appellate Court of the first district proof of the day service of such notice must be filed with a copy of the notice.

⁷ This is in the Supreme Court, 30

days; in the Appellate Court of the first district, 10 days, and in the Appellate Court of the second, third and fourth districts, 30 days.

⁸ These are in the Supreme Court, 10; in the Appellate Court of the first district, 6; in the Appellate Court of the second, third and fourth districts, 5.

⁹ Supreme Court Rule 41; Appellate Court Rule 29, 1st Dist.; Rule 32, 2nd Dist.; Rule 36, 3rd and 4th Dist.

¹⁰ Appellate Court Rule 32, 2nd Dist.

Oral arguments will not be heard upon a rehearing of a cause in the Appellate Court of the fourth district,

Further time for filing the petition for a rehearing may be obtained under special circumstances, or the time may be extended by consent of parties.¹

§ 1088. (c) No re-argument permitted in the support of petition.—When an application is made for rehearing by filing a petition therefor no re-argument will be permitted in support thereof; but reference may be made to the original argument submitted and counsel may cite new authorities in support of his case.²

§ 1089. (d) Supersedeas or stay of proceedings.—Where a petition for a rehearing and judgment has been submitted to the court in term time, any two of the Justices of such court may in vacation, issue an order which shall operate as a *supersedeas* whenever a re-argument in such case shall, in their opinion, be advisable.³

Whenever the decision of the court shall have been filed in vacation and the petition for a rehearing is presented to either of the Justices of such court and he shall certify that there are probable grounds for granting a rehearing, all further proceedings authorized by the judgment of such court, shall be stayed until the next term thereof.⁴

The effect of the entry of a "stay order" is nothing other than to stay the execution of the judgment while the petition is pending. It does not affect what has already been done under the judgment of the court of review, and upon the petition being overruled, the judgment is left in full force as at the date of its rendition.⁵

unless specially directed by the court. Appellate Court Rule 21, 4th Dist.

¹ Mills v. Lockwood, 40 Ill., 130.

² Supreme Court Rule 42; Appellate Court Rule 29, 1st Dist.; Rule 33, 2nd Dist.; Rule 35, 3rd Dist., and Rule 36, 4th Dist.

³ Supreme Court Rule 43; Appellate Court Rule 30, 1st Dist.; Rule 34, 2nd Dist.; Rule 37, 3rd Dist. and 4th Dist.

⁴ Supreme Court Rule 44; Appel-

late Court Rule 31, 1st Dist.; Rule 35, 2nd Dist.; Rule 38, 3rd Dist. and 4th Dist.

The rule of the Appellate Court of the first district does not require that the decision of the court shall have been rendered in vacation. It only requires that the petition shall be presented to the Justice in vacation.

⁵ Lester v. People, 150 Ill., 408; Montague v. Wallahan, 84 Ill., 355.

§ 1090. (e) Redocketing case when rehearing granted.—When a rehearing has been granted the case shall be placed for hearing at the foot of the docket.¹

Notice is required by rule in the Appellate Court of the third district to be given to the opposite party of the time when the rehearing will be had.²

§ 1091. (f) Record, Abstract, Brief and Argument.—Where a rehearing is granted the case will be considered upon the records, abstracts and briefs originally filed and the petition for the rehearing will stand as the printed argument of the party in whose favor it is granted.³

§ 1092. (g) Reply to petition.—The opposite party has a right to file a reply to the petition within a certain number of days limited therefor.⁴

The reply brief must, when the party wishes to avail himself of the permission to argue orally, be filed on or before the calling of the cause in the Supreme Court.⁵

In the Appellate Court of the first district six copies of the reply to the petition is required to be filed within ten days after the order granting the rehearing is entered of record.⁶

¹ Supreme Court Rule 59; Appellate Court Rule 36, 4th Dist.

The rules of the appellate courts for the first and third districts do not especially provide for the placing of the case upon the docket and without special provision the case must take its place at the foot of the docket, unless a special time is set for the hearing.

The Clerk of the appellate court of the second district is required to keep a separate docket at each term of all petitions for rehearing. Appellate Court Rule 36, 2nd Dist.

² Appellate Court Rule 35, 3rd Dist.

³ Supreme Court Rule 59; Appellate Court Rule 29, 1st Dist.; Rule 36, 4th Dist.

In the Appellate Court of the first

district six printed copies of the petition (and answer thereto) shall have been filed with the Clerk thereof within ten days after the order granting a rehearing is entered of record. Appellate Court Rule 29, 1st Dist.

The number of copies required to be filed of the petition has been hereinbefore indicated. *Ante*, § 1087.

⁴ Supreme Court Rule 59, Appellate Court Rule 29, 1st Dist.; Rule 36, 4th Dist.

This is in the Supreme Court ten; in the appellate court of the 1st district and 4th district, ten. *Ib.*

⁵ Supreme Court Rule 59.

⁶ Appellate Court Rule 29, 1st Dist.

Furthermore, the practice in the several courts will require the same number of printed replies to the petition to be filed as are required to be filed of the petition as hereinbefore specified.¹

§ 1093. (h) Closing argument of petitioner.—After the party against whom a petition for a rehearing has been granted has filed his reply to such petition, the petitioner has a certain time within which to file his reply brief.²

§ 1094. (i) Oral arguments—Conclusion.—On the rehearing of a cause in a court of review, the oral arguments on both sides, when allowed, shall close the arguments of the case.³

§ 1095. Motions in courts of review.—Upon the convening of a court of review and immediately after the decisions are announced, motions may be made, but at no other time, unless in case of necessity, or in relation to a cause when called in course.⁴

The order in which motions are to be made in the Supreme Court and Appellate Court of the third district, is as follows:

First by the Attorney General, next by the oldest practitioner at the bar, and so on to the youngest.⁵

Special motions shall all be in writing and filed with the Clerk, together with the reasons in support thereof, at least

¹ *Ante*, § 1087.

² Supreme Court Rule 59; Appellate Court Rule 36, 4th Dist.

In the Supreme Court this must be done before the calling of the cause.

³ Supreme Court Rule 59.

Rehearing at subsequent term.—If the application is made within the time limited by the rule, the rehearing may be had at a subsequent term. Furthermore, a rehearing is the only mode by which a final decision of a case in the Supreme Court can be reversed or set aside at a subsequent term. *Hollowbush v. McConnel*, 12 Ill., 203.

Costs on rehearing.—The only additional costs which can be properly taxed upon a rehearing of a cause in a court of review are the costs of the orders which were made necessary by such rehearing and the costs of filing any papers incident to the rehearing. *Swartout v. Evans*, 37 Ill., 442.

⁴ Supreme Court Rule 21; Appellate Court Rule 15; 1st Dist.: Rule 17, 2nd Dist., 3rd Dist.; Rule 18, 4th Dist.

⁵ Supreme Court Rule 22; Appellate Court Rule 18, 3rd Dist.

one day before they shall be submitted to the court, and (in the Supreme Court) at least one day before the cause stands for trial.¹ In the Appellate Court of the first district it is especially required by rule that a copy of such motion, and also of the affidavits on which the same is founded, shall be served on the opposite party, or his attorney, at least one day before they shall be submitted to the court;² and the same is required by the rules of good practice in all courts.

Objections to motions must also be in writing.³

Affidavits of facts must be filed supporting the motion when the motion is based on matters which do not appear by the record.⁴

Motions of course.—Motions for orders of course will be entered by the Clerk, with orders of course made thereon (*viz.*: For hearing, taking under advisement and entering decisions) in such manner that a perfect record may be kept of each step in the cause.⁵

§ 1096. Change of venue in courts of review.—In all civil cases docketed in one grand division, where the parties desire to change the venue to either of the other grand divisions, the same may be done only under an order of the court where the cause has been docketed.⁶

By agreement of the parties to a cause within the jurisdiction of one of the districts of the Appellate Court, such cause may be taken for review to an Appellate Court of another district.⁷

¹ Supreme Court Rule 23; Appellate Court Rule 16, 1st Dist.; Rule 18, 2nd Dist.; Rule 19, 3d Dist., and 4th Dist.

² Appellate Court Rule 16, 1st Dist.

³ Supreme Court Rule 23; Appellate Court Rule 16, 1st Dist.; Rule 18, 2nd Dist.; Rule 19, 3rd and 4th Dists.

⁴ Supreme Court Rule 24; Appellate Court Rule 17, 1st Dist.; Rule 19, 2nd Dist.; Rule 20, 3rd and 4th Dists.

⁵ Appellate Court Rule 15, 1st Dist.; Rule 17, 2nd Dist.; Rule 18, 4th Dist.

⁶ Supreme Court Rule 39.

⁷ *Ante*, § 1018, note.

PART XI.

MISCELLANEOUS WRITS AND
PROCEEDINGS.

ARTICLE I.

MANDAMUS.

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|---|--|
| <p>§ 1097. Definition and nature.</p> <p>1098. When granted or denied. (a) Generally.</p> <p>1099. (b) To an inferior court or tribunal.</p> <p>1100. (c) To a state officer.</p> <p>1101. (d) To a county officer.</p> <p>1102. (e) To township officers.</p> <p>1103. (f) To municipal corporations or officers.</p> <p>1104. (g) To boards of education and school officers.</p> <p>1105. (h) To private corporations.</p> <p>1106. Parties. (a) The relator or petitioner.</p> <p>1107. (b) The respondent.</p> | <p>§ 1108. The petition—Notice required in the supreme Court.</p> <p>1109. Summons to show cause—When returnable.</p> <p>1110. Answer—Default—Peremptory writ.</p> <p>1111. Peremptory writ—Judgment—Costs.</p> <p>1112. New parties defendant—Not interpleaders.</p> <p>1113. Proceedings not abated by death of defendant, etc.</p> <p>1114. Review of <i>mandamus</i> proceedings.</p> <p>1115. How writ of <i>mandamus</i> enforced.</p> |
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§ 1097. **Definition and nature.**—*Mandamus* is the emphatic word in the Latin form in the writ of that name, and signifies “we command you.” It is a command directed to some person, corporation, or inferior court, requiring the performance of some particular thing therein specified which appertains to its office or duty, and which the court has previously determined, or at least supposes to be consonant to right and justice.¹

Mandamus was formerly a *prerogative writ* flowing from the king himself,² but in this country it has been shorn of much of its prerogative character,³ until in this State, under our statute, it has become nothing more than an ordinary action at law in cases where it is the appropriate remedy.⁴

The writ of *mandamus* is not a writ of right, but is discretionary with the courts which act upon existing facts while

¹ 3 Bla. Com., 110; And. Law Dict.

² Rex v. Barker, 1 Wm. Bla., 253.

³ Wheeler v. Irrigation Co., 9 Col., 253.

⁴ Board of Supervisors v. People, 159 Ill., 242; Dement v. Rokker, 126 Ill., 174; People v. Weber, 86 Ill., 283.

viewing the whole case with due regard to the consequences of their action.¹ The writ is only available to compel a party to act when it is his duty to act without it. Therefore it confers upon a party no new authority, but only commands him to do that which his duty theretofore required of him.²

It has been said that a writ of *mandamus* issuing to direct the action of a legal tribunal, proceeding in the course of justice is in the nature of an *appellate* action and is an exercise of supervisory judicial control, and that in other cases it is generally, if not always, an exercise of original jurisdiction.³

§ 1098. When granted or denied. (a) Generally.—The Supreme Court of the State, having unlimited jurisdiction, has power to issue writs of *mandamus* and a Circuit Court likewise has power to issue the writ and enforce its performance within the bounds of its territorial jurisdiction.⁴

Under the common law a writ of *mandamus* is a high prerogative writ; under the statute it is an action at law. In all cases it is awarded in the discretion of the court and will not be properly issued unless the party applying for it makes it to appear that he has a clear, legal right to have the thing done which he seeks by it to compel to be done in the manner and by the person or body sought to be coerced. Furthermore, to be an effectual remedy, if enforced, it must be within the power of the coerced party and also his duty to do the act sought to have done. If the right to have the thing done is doubtful the writ will be refused, and if it is physically impossible, from any cause, for the defendant to perform the act, or if it is clear that it would prove unavailing, the writ will not be granted. It is not sufficient that the act sought

¹ *People v. Ketchum*, 72 Ill., 212.

² *People v. Hatch*, 33 Ill., 9; *People v. Dubois*, 33 Ill., 9.

Mandamus and injunction compared.—*Mandamus* and *injunction* are not co-relative remedies where the established distinctions between common law and equity are observed. The choice of which writ is to be resorted to for redress in a par-

ticular case depends upon whether there is an *excess* of action to be restrained or a defect to be supplied. *Fletcher v. Tuttle*, 151 Ill., 41. *Pittsburgh, F. W. & C. Ry. Co. v. Chicago*, 159 Ill., 369.

³ *Barrett v. Bacon*, 18 Mich., 247.

⁴ *School Inspectors v. People*, 20 Ill. 525.

to be enforced is lawful and proper in itself. It must also be one that the *defendant* may lawfully do.¹

It is only the performance of specific duty imposed by law that can be enforced by *mandamus*. It is not an appropriate remedy to compel the performance of executory contracts.* Furthermore, it is available only to enforce the performance of a duty of one who occupies an official or *quasi* official position.²

The common law writ of mandamus could only be obtained where there was no adequate remedy at law and where without it there would be a failure of justice.⁴ But by force of the statute in this State a proceeding for a writ of *mandamus* shall not be dismissed, nor the writ denied, because the petitioner may have another specific legal remedy, where such writ will afford a proper and sufficient remedy.⁵ Where the

¹ *People v. McConnell*, 146 Ill., 532; *Illinois Watch Case Co. v. Pearson*, 140 Ill., 423; *Mississippi & O. R. R. Co., v. People*, 132 Ill., 559; *Brokaw v. Comrs. of Highways*, 130 Ill., 482; *People v. Garrett*, 130 Ill., 340; *Chicago & A. R. R. Co. v. Suffern*, 129 Ill., 274; *Ohio & Miss Ry. Co. v. People*, 120 Ill., 200; *People v. Comrs. of Highways*, 118 Ill., 239; *Board of Supervisors v. People*, 118 Ill., 459; *People v. Village of Hyde Park*, 117 Ill., 462; *Klokke v. Stanley*, 109 Ill., 192; *People v. Johnson*, 100 Ill., 537; *People v. Masonic Benevolent Ass'n*, 98 Ill., 635; *People v. Davis*, 93 Ill., 133; *People v. Klokke*, 92 Ill., 134; *People v. Village of Crotty*, 93 Ill., 180; *Christman v. Peck*, 90 Ill., 150; *People v. Lieb*, 85 Ill., 484; *City of St. Clair v. People*, 85 Ill., 396; *Springfield & Ill. S. E. Ry. Co., v. Clark*, 74 Ill., 27; *People v. Glann*, 70 Ill., 232; *Commissioners v. People*, 66 Ill., 339; *People v. Ill. Cent. R. R. Co.*, 62 Ill., 510; *County Court of McCoupin Co. v. People*, 58 Ill., 191; *People v. Chicago & A. Ry. Co.*, 55 Ill., 96; *People v. Mayor of Chica-*

go, 51 Ill., 17; *People v. Wyant*, 48 Ill., 263; *People v. Hatch*, 33 Ill., 9; *People v. Dubois*, 33 Ill., 9; *People v. Filmer*, 5 Gilman (Ill.), 242; *People v. Forquer, Sec'y of State*, 1 Ill. (Breese), 104; *People of Village of Chapin*, 48 Ill. App., 643; *People v. Trustees of Schools*, 42 Ill. App., 60; *Commissioners of Highways v. Snyder*, 15 Ill. App., 645; *Board of Supervisors v. People*, 16 Ill. App., 305; *Johnson v. People*, 8 Ill. App., 395.

² *People v. Dulaney*, 96 Ill., 503; *Haines v. People*, 19 Ill. App., 354.

³ *Haines v. People*, 19 Ill. App., 354.

⁴ *People v. Huntoon*, 71 Ill., 536; *People v. Common Council, etc.*, 53 Ill., 424; *People v. Cover*, 50 Ill., 100; *City of Ottawa v. People*, 48 Ill., 233; *People v. Hatch*, 33 Ill., 9; *People v. Dubois*, 33 Ill., 9; *School Inspectors of Peoria v. People*, 20 Ill., 525.

⁵ *Rev. Stat., Ch. 87, ¶ 9, § 9*; *Brokaw v. Commissioners of Highways*, 130 Ill., 482; *Ohio & M. R. R. Co. v. People*, 121 Ill., 483; *People v. Village of Crotty*, 93 Ill., 180.

statute provides a means for compelling an officer to perform his duty, it does not interfere with the common law right already existing, but creates an additional remedy.¹

It has been frequently said that *mandamus* will not lie to compel the performance of a discretionary act; but while this assertion is generally true, it does not state the whole truth. The true rule is this: When the act to be performed by an inferior officer or tribunal is discretionary the performance of it will not be interfered with by *mandamus*, except in very rare cases and where injustice will result. It is said that where a subordinate tribunal or officer may exercise judicial or discretionary power *mandamus* is a proper writ to compel them to act when they refuse so to do; but it is never an appropriate remedy to compel them to act in a particular manner, for therein lies their discretion. If such officer or tribunal has acted erroneously *mandamus* is not the proper writ by which to seek redress. A writ of *mandamus* was not designed to serve the office of a writ of error.²

Mandamus will only be granted where substantial interests are involved, otherwise it might become the means of encouraging petty litigation. It will not be granted to compel a public officer to settle a trifling account, even though the claim be undoubtedly just.³

A writ of *mandamus* will not be granted to try the title to a public office; nor to try the question of a corporate existence, for these matters are triable by *quo warranto* proceedings.⁴

¹ Hall v. Rogers, 57 Ill., 307.

² Brokaw v. Commissioners of Highways, 130 Ill., 482; People v. Garnett, 130 Ill., 340; People v. Anthony, 129 Ill., 218; Dental Examiners v. People, 123 Ill., 227; People v. McCormick, 106 Ill., 184; County of St. Clair v. People, 85 Ill., 396; Village of Glencoe v. People, 78 Ill., 382; People v. Williams, 55 Ill., 178; People v. Pearson, 2 Scam. (Ill.), 189; People v. Commissioners of Highways, 52 Ill. App., 442; People

v. Trustees of Schools, 42 Ill. App., 60.

³ People v. Hatch, 33 Ill., 9; People v. Dubois, 33 Ill., 9.

⁴ Post, § 1124.

As to social and religious associations, voluntarily created for the advancement of religious, moral or social principles, or merely for amusement, the courts will not generally interfere by *mandamus* to control the enforcement of their by-laws. Such organizations will

§ 1099. (b) **To an inferior court or tribunal.**—*Mandamus* is the proper writ to set an inferior court or tribunal in motion, but it is not the proper proceeding to retrace its steps, or to compel any particular conclusion. It is only where such inferior court or tribunal refuses to perform its duty lawfully that a writ of *mandamus* can be properly directed against it. When such inferior tribunal is invested with judicial discretion, then it cannot be directed, by writ of *mandamus*, how it shall act, but when it wholly refuses to act, the writ is the proper proceeding to coerce it to action.¹ For example, where a bill of exceptions has been properly prepared and presented within the proper time to the circuit Judge, he may, upon refusal or neglect, within the whole time allowed therefor, be compelled to sign and seal such bill of exceptions, because the party having done everything within his power to do, it is then the duty of the court to sign the bill; but inasmuch as the court has judicial discretion regarding the bill of exceptions, such court cannot be directed to sign a bill which he believes does not contain the truth; nor can he be directed what statements or exceptions such bill shall contain.² A writ of *mandamus* may be awarded to compel a Judge to decide a motion for a new trial where he has refused to do so, but he must be left to his judicial discretion in the manner of the decision, and it must be made clearly and unequivocally to appear that it is his legal duty so to do, upon which duty he has refused to act.³

be left to enforce their rules and regulations by such motions as they may adopt for their government. It is only when such institutions contravene public or private rights that their action will be limited or coerced. *People v. Board of Trade*, 80 Ill., 134

¹ *People v. Pearson*, 3 Scam. (Ill.), 270.

² *Hawes v. People*, 129 Ill., 123; *Hawes v. People*, 124 Ill., 560; *Hulett v. Ames*, 74 Ill., 253; *Underwood v. Hossack*, 40 Ill., 96; *People v. Cloud*, 2 Scam. (Ill.), 362; *People*

v. Pearson, 2 Scam. (Ill.), 189; *People v. Hawes*, 30 Ill. App., 94; *People v. Anthony*, 25 Ill. App., 532.

Judge compelled to sign a particular bill.—Where a Judge struck out material portions of a bill of exceptions, a writ of *mandamus* was granted by the Supreme Court to compel such trial Judge to sign the bill of exceptions, as originally presented to him. *People v. Pearson*, 2 Scam. (Ill.), 189.

³ *People v. McConnell*, 146 Ill., 532.

To compel the administration of

Where a trial court improperly granted a continuance when there was no statutory cause therefor, the Supreme Court compelled it by *mandamus* to rescind the order for a continuance and proceed with the cause upon the merits.¹ But a writ of *mandamus* will not lie to compel an inferior court to enter an order granting a change of venue in a cause pending in such court. That would be an interference with judicial discretion.² Neither will the Supreme Court take jurisdiction to enforce by *mandamus* obedience to a writ of *habeas corpus* issued by a lower court. The remedy is within such lower court.³

Where a court of superior jurisdiction grants a writ of *mandamus*, which is delivered to a Judge or other person to whom it is directed, and such court or person refuse to obey it, an attachment may issue against such Judge or person as for contempt of court.⁴

Error, and not *mandamus*, is the proper remedy where the error is disclosed upon the record, but where the matters complained of are not disclosed on the record, and are special in their nature, such as the dismissal of a special motion, or the vacation of an interlocutory order not touching the merits, *mandamus* is the proper remedy. Where the remedy sought is the reversion of a final judgment on matters of record a writ of error is proper, but where there is no other efficient remedy to review the affirmative judicial action of an inferior court a writ of *mandamus* may be procured for that purpose.⁵

§ 1100. (c) To a state officer.—*Mandamus* is a proper remedy to compel a state officer to perform an unquestionable and legally defined ministerial duty, but not to compel the

an oath by an inferior court where it has refused so to do, *mandamus* is an available proceeding. *People v. Fletcher*, 2 Scam. (Ill.), 482.

¹ *People v. Pearson*, 1 Scam. (Ill.), 473. Compare *People v. Gibbons*, 161 Ill., 510.

² *People v. McRoberts*, 100 Ill., 458.

³ *People v. Edwards*, 66 Ill., 59.

⁴ *People v. Pearson*, 3 Scam. (Ill.), 270.

⁵ *Lloyd v. Wayne Circuit Judge*, 56 Mich., 236; *Olson v. Muskegon Circuit Judge*, 49 Mich., 85; *Cheevers v. Circuit Judge*, 45 Mich., 6; *Miller v. Bay Circuit Judge*, 41 Mich., 236; *Stall v. Diamond*, 37 Mich., 429; *Worth v. Hand*, 30 Mich., 264; *Comstock v. Judge of Wayne*, 30 Mich., 98.

performance of an executive discretionary act.¹ It is the proper remedy at law to compel the performance of a legal act and the expenditure of public funds.² And it, and not *assumpsit*, is the appropriate remedy to recover an amount payable out of a particular fund after an account has been audited by the proper officer.³

However, *mandamus* will not lie to compel a state officer to perform an act⁴ which he has of record admitted that he is willing to perform. The law will not do a useless thing.⁵

Furthermore, the Supreme Court will not, by *mandamus*, interfere with the executive acts of the Governor. One department of the government has no power to proceed in such a way against a co-ordinate branch of the government. Nevertheless, should a Governor distinctly and without reason, refuse to perform his executive duty, he may be proceeded against in the Supreme Court, but he cannot be coerced by *mandamus*.⁶

§ 1101. (d) **To a county officer.**—A court of superior jurisdiction may issue a writ of *mandamus* to compel a county officer to perform his apparent ministerial duty. Such a writ may be issued by a circuit court, but a writ of *mandamus* issued by a circuit court will not operate beyond the limits of the circuit in which it was issued.⁷

It may be stated as a general rule that *mandamus* will lie to compel a county treasurer or other public disbursing officer to pay an order legally drawn upon the funds in his hands subject to the payment of such order. Furthermore, the fact that through inadvertence or mistake such disbursing officer has paid the amount to one not legally entitled to it will not change the rule.⁸

¹ Ayres v. Butler, 60 Mich., 40.

² School Directors v. Wright, 43 Ill. App., 270.

³ Illinois State Hospital v. Higgins, 15 Ill., 185.

⁴ People v. Dulaney, 96 Ill., 503.

⁵ People v. Cullom, 100 Ill., 472; People v. Yates, 40 Ill., 126; People

v. Hatch, 33 Ill., 9; People v. DuBois, 33 Ill., 9.

⁶ Welch v. Byrns, 38 Ill., 20.

⁷ People v. Johnson, 100 Ill., 537.

⁸ That *assumpsit* will not lie to recover payment out of a particular fund, see *ante*, § 1100.

At the petition of the commissioners of highways a writ of *mandamus* may issue to compel a county board to make an appropriation for the construction of a bridge.¹

Likewise a county board may be compelled, by *mandamus*, to provide a proper jail when it is made clearly to appear that the finances of the county are such as to justify the construction of one; for it is then the duty of such board to build it, but the court cannot interfere with the discretion of such board and direct the kind of jail that shall be provided.²

A county court may be compelled, by *mandamus*, to perform its duty when it refuses so to do. For example it may be compelled, by *mandamus*, to grant an appeal as provided by statute.³

A county Judge who refuses to perform a ministerial duty imposed upon him by the statute, as the appointment of appraisement to assess damages under an act concerning rights of way, may, by *mandamus*, issuing from the Supreme Court, be compelled to perform it.⁴

It must be remembered that while *mandamus* will lie to compel the performance of official duties, which are ministerial, there is no proceeding whatever by which official actions may be refused when the same are performed without wrong and in the course of official discretion.⁵

§ 1102. (e) To township officers. — *Mandamus* is the proper remedy against any township officer who refuses to do his duty. It will lie against the township to compel it to pay an indebtedness. An action of assumpsit against the treasurer is not the proper remedy.⁶ But *mandamus* will not lie against a treasurer of a school district to compel the payment of a

¹ People v. Madison County, 125 Ill., 334. See, further, as to the practice in such case, *Ib.*

² People v. La Salle County, 84 Ill., 303.

³ People v. Pendergrast, 117 Ill., 588.

⁴ Illinois Cent. R. R. Co. v. Rucker, 14 Ill., 353.

⁵ Cicotte v. County of Wayne, 59 Mich., 509; Mixee v. Supervisors of Manistee County, 26 Mich., 423.

⁶ Marathon v. Oregon, 8 Mich., 372; Township of Dayton v. Rounds, 28 Mich., 82; see further *ante*, § 1000.

judgment recovered against the district where no order has been given by the directors or court of competent jurisdiction for the payment of school funds. The treasurer is not in duty bound to pay such fund except upon orders properly drawn.¹ It will lie to compel a township officer to perform his prescribed statutory duty of approving an official bond.² And where a writ has issued against a township officer and his term has expired before the writ has been obeyed, an alias writ may be issued against his successor in office. Since it was the duty of the officer first commanded, to execute it, it is the continuing duty upon him and his successors in office until it is performed.³

Commissioners of highways are vested with discretionary powers to a certain extent, and while they may, by *mandamus*, be compelled to do some merely ministerial act, yet any act which is to be or not to be performed according to their judgment, cannot be compelled by *mandamus*; neither can they be compelled to perform any act until all the prerequisites to the making of it their ministerial duty are shown to have been fulfilled. They cannot be compelled to open a highway before the right of way has been obtained, either by grant, release, or condemnation; nor can they be compelled to do an act which is not legal, as for example, the removal of an obstruction to a highway, which removal could not be effected without committing a trespass. But if the statute expressly make it the duty of such commissioners of highways to do the act, as the removing of the obstructions, then such act is lawful in itself, although special damages may be occasioned thereby to the adjacent owner.⁴ The commissioner of highways may,

¹ Watts v. McLean, 28 Ill. App., 537.

² Ross v. People, 78 Ill., 375.

³ People v. Supervisor, 100 Ill., 332. See further *post*, § 1113.

⁴ Brokaw v. Commissioners of Highways, 130 Ill., 482; People v. Commissioners of Highways, 32 Ill. App., 164; Commissioner of High-

ways v. People, 19 Ill. App., 253; Commissioners of Highways v. People, 4 Ill. App., 391.

In one case where an indictment would afford a convenient and effectual remedy for the obstruction of a public highway, *mandamus* was not awarded. Commissioners, etc., v. People, 73 Ill., 203.

by *mandamus*, be compelled to make repairs when there is an entire neglect on their part so to do.¹

It must be shown to be the fixed and absolute duty of the commissioners of highways to perform the act sought to have performed before they will be, by *mandamus*, compelled to perform it. They cannot be compelled to issue an order upon the treasurer for damages done to lands, except upon a showing that there are funds in the treasury from which the same can be paid. It is only that the duty arises under the statute to pay such damages.² And the highway commissioners cannot be compelled, by *mandamus*, to levy an additional tax for roads and bridges as by the statute provided, for such matter is by statute left with the discretion of the commissioners.³

§ 1103. (f) To municipal corporations or officers.—Whenever the law imposes an absolute duty upon a municipal corporation or officer, of which there is a neglect or refusal to perform, *mandamus* is a proper remedy to compel it, but if the performance of the duty which the law imposes is discretionary with the corporation or officer, then it cannot be compelled.⁴ For example, where the law made it an imperative duty of a city to construct a certain kind of bridge, the

¹ Klein v. People, 31 Ill. App., 302.

² Commissioners of Highways v. Snyder, 15 Ill. App., 645.

³ Commissioners of Highways v. People, 19 Ill. App., 253; Rev. Stat., Chap. 121, ¶ 14, § 14.

Mandamus will not lie against a board of town auditors to compel it to audit and allow a claim of the commissioners of highways for reimbursement, where a judgment has been obtained against them for illegally digging a ditch by the side of a highway to the damage of an adjoining property owner. It is not the duty of the board of town auditors to reimburse highway commissioners for illegal acts. Board of Auditors v. People, 33 Ill. App., 239.

Names of parties to an action.—The commissioners of highways are a *quasi* corporation. Therefore a proceeding by *mandamus*, or any other action at law may properly be brought against them as “the commissioners of highways of the town of ———,” naming the town. Should the individuals composing the body be named, it will be treated as surplusage. Sheaff v. People, 87 Ill., 189.

⁴ People v. Crabb, 156 Ill., 155; City of Ottawa v. People, 48 Ill., 233; School Inspectors v. Grove, 20 Ill., 526; People v. Hilliard, 29 Ill., 413; People v. Gilmer, 5 Gilm. (Ill.), 242; Hildreth v. Heath, 1 Ill. App., 83.

same was compelled by *mandamus*.¹ A municipal corporation may be compelled, by *mandamus*, to pay a judgment obtained against it.² Furthermore, where there has been a written demand for the payment of a judgment and a neglect to comply therewith, *mandamus* is an efficient remedy to compel a municipal corporation to levy a tax to pay such judgment.³ *Mandamus* is the proper proceeding by which to obtain or recover an official or corporate seal, books, papers, muniments, etc., when they are improperly withheld by intrusion or otherwise, and when the title to the office is not disputed.⁴ *Quo warranto* is the proper proceeding to test the title of an office.

§ 1104. (g) **To private corporations.**—A voluntary corporation or society may be compelled by *mandamus* to perform its legal duty and act in accordance with its constitution when the party seeking to coerce it shows that a proper demand has been made and that such duty exists as to him.⁵

Mandamus will lie to compel a railroad company to stop all its regular passenger trains at a county seat for a sufficient length of time to enable passengers to get on and off the same

¹ *People v. Com'rs of Highways*, 158 Ill., 197; *People v. Com'rs of Highways*, 118 Ill., 239; *City of Ottawa v. People*, 38 Ill., 233.

² *City of Chicago v. Sansum*, 87 Ill., 182; *City of Olney v. Harvey*, 50 Ill., 453.

This may be done at the relation of an assignee of the judgment. *City of Chicago v. Sansum*, 87 Ill., 182.

An execution cannot be levied upon the property of a municipal corporation. Therefore there is no adequate remedy other than mandamus. *City of Olney v. Harvey*, 50 Ill., 453.

³ *People v. Getzenderer*, 137 Ill., 234; *City of Cairo v. Everett*, 107 Ill., 75.

To compel a municipal corporation by a peremptory writ of *mandamus* to issue a license when the

applicant has tendered the amount provided by a pretended ordinance, the passing of such ordinance must have been an exercise of the powers vested in such municipal corporation by the statute. *Village of Crotty v. People*, 3 Ill. App., 465.

Mandamus will not compel an act which the party cannot legally perform. *Mandamus* will lie to compel a comptroller to issue his warrant on a city treasurer for the sum paid to the collector by a purchaser at a sale of real estate, which was not authorized by law. *Taylor v. People*, 66 Ill., 323.

⁴ *Delahanty v. Warner*, 75 Ill., 185; *People v. Kilduff*, 15 Ill., 492.

⁵ *Illinois Cent. R. R. Co. v. People*, 143 Ill., 434; *People v. Mechanic's Aid Society*, 22 Mich., 86; *People v. Walker*, 9 Mich., 329.

when the party applying for the writ shows he has a personal interest and a legal right to have such act performed.¹

Mandamus will lie to compel a railroad company to restore a switch which has been discontinued contrary to the legal rights of the petitioner.²

Mandamus is a proper proceeding to compel a railroad company to build a sewer in accordance with the requirements of the city ordinance duly passed in the exercise of the powers vested in such city by its charter.³ A *mandamus* is a proper remedy to compel a railroad to deliver grain to a consignee when such company is in possession of the grain as a carrier and such grain is consigned to the petitioner.⁴

§ 1105. (h) **To boards of education and school officers.**—A court of superior jurisdiction will, by *mandamus*, compel a board of education or school officers to act when it is clearly made to appear that it is their duty so to do. *Mandamus* will lie to compel the trustees of schools to form a new school district; but it must be upon the petition of one who shows himself to be a resident of the district proposed to be made. The relator must show that the duty exists as to him. Furthermore, a judgment in *mandamus* requiring the trustees of schools to lay out a new school district is conclusive not only upon the parties to that suit, but also upon all subordinate school officers and the public at large.⁵

§ 1106. **Parties. (a) The relator or petitioner.**—The plaintiff in a *mandamus* or *quo warranto* proceeding is called the relator. The relator is considered to be the real party and his right to the relief sought, must be clearly made to appear.⁶

Who shall be the relator in an application for a writ of *mandamus* depends upon the object to be attained by the

¹ Illinois Cent. R. R. Co. v. People, 143 Ill., 434.

² Chicago & A. R. R. Co. v. Suf-fern, 27 Ill. App., 404.

³ Ohio & M. Ry. Co. v. People, 32 Ill. App., 69.

⁴ Chicago & N. W. Ry. Co. v. People, 56 Ill., 365.

⁵ School Directors v. School Directors, 135 Ill., 464; School Trustees v. People, 71 Ill. 559; Trustees of Schools v. People, 25 Ill. App., 25.

⁶ County of Pike v. People, 11 Ill. 202; People v. Commissioners of Highways, 53 Ill. App., 442.

writ. When the writ is sought to enforce a private right the relator must show himself to be interested and clearly entitled to the relief sought. Where, however, the purpose of the writ is to compel the enforcement of a public right the people are regarded as the real party and the relator need not show that he has any legal interest other than that of a citizen entitled to have the laws executed and the particular right in question enforced.¹ A private citizen may procure a *mandamus* to enforce a public duty and if such duty is not due to the government as such he may procure it without the intervention of a government law officer.² A citizen of a school district may become the relator to compel, by *mandamus*, those in charge of public schools in such district to admit any child or pupil who has been directly or indirectly excluded therefrom on account of color or otherwise.³

§ 1107. (b) **The respondent.**—The *respondent* is the party who files an answer in a cause; but since in practice, the relator is more frequently called the petitioner the term “respondent” is not universally used, but only when the party seeking redress is called the relator. The respondent is commonly called the defendant.

In proceedings by *mandamus* against a public officer merely as an officer, the party “respondent” (defendant) is not changed by the expiration of the term and a change of incumbency. The duty is a continuing one and may be enforced against the successor in office.⁴ As an example it may be stated that a writ directing the action of a judicial tribunal is to be regarded as directed to the Judge officially, and as binding upon the incumbent, whoever he may be, and not merely . . .

¹ *People v. Board of Education*, 127 Ill., 613; *Hall v. People*, 57 Ill., 307; *Ottawa v. People*, 48 Ill., 233; *County of Pike v. State*, 11 Ill., 202.

² *Chicago & A. R. R. Co. v. Sufferin*, 129 Ill., 274.

³ *People v. Board of Education*, 127 Ill., 613.

A father is a proper relator in

such case. *People v. Detroit Board of Education*, 18 Mich., 400. But in Illinois he is not the necessary relator. *People v. Board of Education*, 127 Ill., 613.

⁴ *People v. Supervisors*, 100 Ill., 332; *Reeder v. Wexford County Treasurer*, 37 Mich., 351. See further *post*, § 1113.

to the Judge, who refused to perform the duty demanded of him and who has since ceased to hold office.¹

Where it is sought by *mandamus* to compel town officers to perform a ministerial duty, they, as relators, may answer individually, because in such case it is the individual, and not the municipal, corporation as such who are required to act.²

§ 1108. The petition—Notice required in the Supreme Court.—Under the statute in this State the petition for the writ of *mandamus* takes the place of an alternative writ under the common law practice. No alternative writ is issued under the statutory practice, but a petition is filed asking for a writ of *mandamus*, which writ is peremptory. The rule is imperative that the petition must distinctly set forth all the material *facts* (not conclusions of law) on which the relator relies, so that the same may be traversed or admitted. It must indicate a *clear* and undoubted right on the part of the relator to have the act performed, and it must set forth every material fact showing it to be the duty of the person sought to be coerced to perform such act. And if no duty is imposed upon the respondent (defendant) until he is requested to make performance, then the petition must show that a previous demand has been made upon such respondent (defendant).³

¹ *People v. Bacon*, 18 Mich., 247; *Compare Thompson v. United States*, 103 U. S. 480.

² *People v. Holden*, 91 Ill., 446. Further as to the "Answer," see *post*, § 1110.

³ *People v. Crabb*, 156 Ill., 155; *People v. Pavey*, 151 Ill., 101; *People v. Town of Mount Morris*, 145 Ill., 427; *People v. Pavey*, 137 Ill., 585; *People v. Mount Morris*, 137 Ill., 576; *People v. Getzendaner*, 137 Ill., 234; *People v. Davis*, 103 Ill., 133; *Laville v. Soucy*, 96 Ill., 467; *People v. Loomis*, 94 Ill., 587; *People v. Village of Crotty*, 93 Ill., 180; *People v. Davis*, 93 Ill., 133; *People v. Town of Oldtown*, 88 Ill., 202; *People v. Glann*, 70 Ill., 232;

County of Pike v. People, 11 Ill., 202; *People v. City of Chicago*, 27 Ill. App., 217; *People v. Soucy*, 26 Ill. App., 505.

Where a writ is sought to enforce the performance of an alleged statutory duty, the relator must show his own clear right, and the statute imposing the duty must be mandatory. *People v. Commissioners of Highways*, 53 Ill. App., 442.

A petition should contain proper allegations to bring the petitioner favorably before the court and to give him a status therein, that is to say, his own interests should be made to appear. *School Trustees v. People*, 71 Ill., 559.

The particular act sought to be coerced must be made clearly to

There must be a demand expressly and distinctly made upon the person for the performance of the act which it is sought to be coerced and there must be a refusal by him to comply with such demand before the filing of a petition for *mandamus* to compel the performance of an act of a private nature affecting only the right of the relator: but where the duty is of a public nature affecting the public at large and there is no one specially empowered to demand its performance, the law itself stands in the place of a demand and the neglect or omission to perform the duty stands in the place of a refusal. A previous demand is only necessary where the person aggrieved claims immediate and personal benefit of the act or duty which he seeks to have performed.¹

Since the petition takes the part of the alternative writ it becomes the foundation of all subsequent proceedings and must be governed by the same rules of pleading as are applicable to declarations in other cases at law,² and defects therein

appear. *People v. Dulaney*, 96 Ill., 503.

As to the requisites of a petition for a writ of *mandamus* against a county board to compel them to furnish aid to build a bridge, see *Supervisors of Kendall Co. v. People*, 12 Ill. App., 210.

As to requisites where the relator has furnished material to a municipal corporation, the payment for which has been refused, see *People v. Hastings*, 5 Ill. App., 436.

As to requisites when it is sought to compel commissioners of highways to pay damages, see *People v. Highway Comrs.*, 88 Ill., 141.

As to requisites when it is sought to compel highway commissioners to rebuild bridges, see *Commissioners of Highways v. People*, 19 Ill. App., 253.

As to requisites when it is sought to compel a city to lower certain sidewalks, see *People v. City of Chicago*, 27 Ill. App., 217.

As to requisites when it is sought

to compel a labor union to restore the relator to membership therein, see *Beesley v. Chicago Journeymen Plumbers' Assn.*, 44 Ill. App., 278.

As to compelling school directors to permit the use of certain text books, see *People v. Frost*, 32 Ill. App., 242.

¹ *People v. Crabb*, 156 Ill., 155; *People v. Mount Morris*, 137 Ill., 576; *People v. Board of Education*, 127 Ill., 613.

The time to object for want of a demand must be urged at the earliest opportunity. If it is not urged until the proceedings are being reviewed in the court above it will be deemed to have been waived. It cannot be urged in the Supreme Court, although a demand was material. *City of Chicago v. Sansum*, 87 Ill., 182.

² *People v. Supervisors, etc.*, 51 Ill., 191; *Silver v. People*, 45 Ill., 224; *People v. Hatch*, 33 Ill., 9; *People v. Dubois*, 33 Ill., 9; *Canal Trustees v. People*, 12 Ill., 248.

are to be taken advantage of accordingly,¹ at any time before the granting of the writ.*

Furthermore, it must be made by the petition to appear that the person sought to be coerced is under legal obligation to perform the acts sought to have performed and when such respondent (defendant) is a corporation, it must be affirmatively shown that such corporation has the power to do the act in the manner sought.* It is not, however, indispensable that the petition should state that the relator is without other adequate remedy. Even under the practice at the common law it was sufficient when such appeared to the court to be the fact.* And under the statute it is sufficient that *mandamus* is an appropriate remedy. The writ will not be denied or dismissed because the petitioner may have another specific legal remedy.*

The petition must be verified by jurat or affidavit in some form.*

In the Supreme Court before an application for a writ of *mandamus* will be heard, the applicant must show that all of the parties interested in the subject-matter to be urged or affected by the issuance of the writ, have been notified in writing of the time and place of the intended application, at least ten days previous thereto unless the court, for special reasons, shall otherwise direct.*

The practice in the Supreme Court, while not governed by the statute, will be made to conform thereto as near as may be.*

¹ Rev. Stat., Chap. 110, ¶ 11, § 10; *People v. Davis*, 93 Ill., 133; *Dement v. Rokker*, 126 Ill., 174.

* *Dement v. Rokker*, 126 Ill., 174.

What rules not applicable.—The strict rules applicable to instruments declared on do not apply. *Illinois Mid. Ry. Co. v. Town of Barnett*, 85 Ill., 313.

³ *People v. Madison Co.*, 125 Ill., 354; *Village of Hyde Park v. Thatcher*, 13 Ill. App., 613.

⁴ *People v. Hilliard*, 29 Ill., 413.

⁵ Rev. Stat., Chap. 87, ¶ 9, § 9.

* *People v. City of Chicago*, 25 Ill., 483.

⁷ Supreme Court Rule 19.

Waiver.—An objection to the insufficiency of a notice will be waived by making answer (return) to the order to show cause (alternative writ) and cannot thereafter be urged. Appearance and pleading cures all prior defects of that nature. *People v. City of Cairo*, 50 Ill., 154.

⁸ *People v. Thistlewood*, 103 Ill., 133.

Leave to file a petition in the Supreme Court must be obtained or a summons will not be issued thereof.¹ Leave to file a petition is sufficient without moving that a summons be awarded.² The application to the Supreme Court must be by petition verified by affidavit. A mere motion for an order to show cause is not sufficient.³

In the Supreme Court in a *mandamus* proceeding, if issues of fact arise they are referred to the proper trial court for determination. The Supreme Court cannot try issues of fact.⁴ Where, however, the facts are undisputed, the Supreme Court will pass on the questions of law.⁵ But facts alleged by the plaintiff and denied by the defendant, unless proved, can never be the basis of a recovery.⁶

§ 1109. Summons to show cause—When returnable.—Upon the filing of a petition for a *mandamus*, the Clerk of the court shall issue a summons, in like form as in other suits at law, commanding the defendant to appear at the return term thereof and show cause why a writ of *mandamus* should not be issued against him. If the summons is issued in vacation, it shall be returnable on the first day of the next term, or if in term time, it may be made returnable on any day of the term not less than five days after the date of the writ.⁷

§ 1110. Answer—Default—Peremptory writ.—Every defendant who shall be served with summons shall be held to show cause by answer to the petition, or to demur thereto, on the return day of the summons, or within such further time as may be allowed by the court; and in default thereof

¹ People v. Thistlewood, 103 Ill., 139.

² Blackford v. Newberry, 100 Ill., 484.

³ People v. Thistlewood, 103 Ill., 139; People v. Loomis, 94 Ill., 587.

⁴ People v. Hyde Park, 117 Ill., 464.

⁵ Launtz v. People, 113 Ill., 144.

⁶ The People v. City of Danville, 147 Ill., 127.

If the court renders judgment on the petition, refusing to render judgment on the pleadings without evidence, such judgment must be based on allegations of the answer; not denied by the pleas. People v. Maxon, 139 Ill. 306.

⁷ Rev. Stat., Chap. 87 ¶ 1, § 1; Chap. 110, ¶ 11, § 10.

judgment may be taken *nil dicet* and the peremptory *mandamus* shall be allowed against the defendant.¹

The answer or plea to the petition performs the office, under our practice, that was performed by an alternative writ under the old practice. The respondent (defendant) must either deny the facts alleged in the petition on which the relator's claim is founded, or it must set up other facts sufficient in law to defeat such claim and must state these facts positively and distinctly so that the relator may traverse the same. All the material facts alleged in the petition and not denied in the pleadings by the respondent (defendant) must be taken as true. Greater certainty is required than in an ordinary plea of bar.² On the principle that a pleading will be considered most strongly against the pleader, every intendment will be made against a return which does not answer important facts.³

When the respondent (defendant) sets forth matter in abatement in his answer (his return to the writ) and also sets up facts in defense upon the merits and asks judgment thereon he thereby waives his plea in abatement and elects to try the cause upon its merits.⁴

An amendment may be allowed to an answer to a petition for *mandamus* (which answer takes the place of a return of

¹ Rev. Stat., Ch. 87, ¶ 2, § 2; *Dement v. Rokker*, 126 Ill., 175.

² *Chicago & A. R. R. Co. v. Suffern*, 129 Ill., 274; *People v. Supervisors*, 51 Ill., 191; *Board of Trade v. Nelson*, 62 Ill. App., 541; *People v. Horton*, 46 Ill. App., 434.

³ *People v. Kilduff*, 15 Ill., 492.

Demurrer to petition.—Where a respondent demurs to the petition and the same is overruled and he thereafter answers to the merits, he will thereby waive his grounds for demurrer and cannot urge such objection after a trial on the merits. *Illinois Cent. R. R. Co. v. People*, 143 Ill., 434.

As to the general rules regarding demurrers, see *ante*, Vol. I, § 632.

Where facts set forth in an answer (return) were, in the nature of a demurrer and a motion was entered to quash the answer (return), the court treated all the questions presented as arising on the demurrer. *County Court of Madison County v. People*, 58 Ill., 456.

Further as to demurrer to petition see *People v. Commissioners of Highways*, 29 Ill. App., 115; *Watts v. McLean*, 28 Ill. App., 537.

Plea of payment may be interposed in *mandamus* proceedings and when so pleaded a judgment rendered thereon will be conclusive between the parties. *City of Chicago v. Sansum*, 87 Ill., 182.

⁴ *Silver v. People*, 45 Ill., 224.

a writ) within the discretion of the court. Furthermore, the relator cannot object to the allowance of such an amendment, where he has shown no right to the writ.¹

Issues are made up in proceedings by *mandamus* by answering, pleading, or demurring to the petition, as in other cases.²

Issues of fact may be raised by the answer (return) to show cause (alternative writ) either by way of traverse, special plea, or plea of confession and avoidance; *issues of law* may arise upon the sufficiency of the allegations of the writ, either with or after demurrer.³

Further time may be allowed to a petitioner or any defendant to answer, plead, reply, rejoin, or demur, as shall be deemed just and equitable.⁴

Pleadings to answer.—The petitioner may plead or traverse all or any of the material facts contained in the answer, or demur thereto, to which the defendant shall reply, take issue and demur, and like proceedings shall be had as in other cases.⁵

When the answer to the petition is sufficient in law, an issue of fact should be formed upon it, even though it traverse the allegations of the petition, and especially so when it introduces new matter.⁶ If the answer is not sufficient in law it is proper to interpose a demurrer, which demurrer will be governed by the general rules regarding demurrers.⁷ A demurrer to an answer (return) to a show cause summons (alternative

¹ Cristman v. Peck, 90 Ill., 150.

Where the supervisor and clerk of a township are sought to be compelled to perform an alleged official act enjoined on them by the statute, they may answer the petition separately. In such a case the rule does not apply requiring a municipal corporation to answer in the name of the corporation; it is the individual officers who are sought to be required to perform a duty and not the municipal corporation as such. People v. Holden, 91 Ill., 446.

² Rev. Stat., Chap. 110, ¶ 11, § 10.

³ People v. Salmon, 46 Ill., 383.

⁴ Rev. Stat., Chap. 87, ¶ 3, § 3.

This provision only refers to causes wherein a *prima facie* case is made out by the petition, and the issue found by the verdict is material. When the court denies a writ, notwithstanding the verdict may be in favor of the petitioner, it is equivalent to arresting the judgment in an ordinary action at law. People v. Commissioners of Highways, 52 Ill., 498.

⁵ Rev. Stat., Chap. 87, ¶ 4, § 4.

⁶ Commissioners of Highways v. People, 19 Ill. App., 253.

⁷ Ante, Volume I, § 632.

writ) admits the truth of the allegations of such answer (return).¹

Demurrer to the answer (return) will operate as a demurrer to the writ and will question its sufficiency; for *mandamus* is no exception to the rule that the demurrer will be carried back so as to reach the first defect in the pleading.² When the answer (return) traverses all the material allegations of the petition (alternative writ) a demurrer thereto will be overruled. Furthermore, the permission will be granted to the relator to withdraw the demurrer and make an issue of fact upon the answer.³

Trial of issues of fact in *mandamus* proceedings in the Circuit Court, may be had before a jury as in other cases. Special findings may likewise be required of the jury in response to questions of fact propounded to them. Such special findings will not be treated as a "special verdict" in other cases,⁴ but they will nevertheless be considered as findings of fact on the issues submitted, and when inconsistent with the general verdict, will prevail over it.⁵ A submission to the jury of the issues of fact, made upon a petition and answer alone, without pleas should not be made. It is contrary to the well established practice and tends to confuse the jury by too great a number of issues. The issues should be narrowed down to the material facts in dispute.⁶ Where only the petition and answer have been filed the respondent (defendant) cannot avail himself of any affirmative facts alleged in his answer, unless he obtains a rule on the relator (plaintiff) to reply, or else move for judgment for want of replication.⁷

In the Supreme Court issues of fact formed upon the answer (return) may be tried in that court if the evidence rests upon

¹ *People v. Supervisors*, 47 Ill., 266.

² *People v. McCormick*, 106 Ill., 184; *People v. Hatch*, 33 Ill., 9; *People v. Dubois*, 33 Ill., 9.

³ *People v. Illinois Cent. R. R. Co.*, 62 Ill., 510.

⁴ *Ante*, § 951, "Special verdict."

⁵ *People v. Board of Education*, 127 Ill., 613.

⁶ *People v. Town of Waynesville*, 88 Ill., 470.

⁷ *People v. City of Dansville*, 147 Ill., 127; *People v. Hyde Park*, 117 Ill., 464; *Launtz v. People*, 113 Ill., 144. Further as to "trial," see *ante*, § 1108.

matters of record, but if the evidence rests on parol the issue of fact will be sent to some Circuit Court or other court of appropriate jurisdiction, for trial by jury, and when the facts are found by such court they will be certified back to the Supreme Court.¹

§ 1111. **Peremptory writ—Judgment—Costs.**—Upon the trial of the issues of fact made by the pleadings, if a verdict is found for the petitioner, or judgment is given for him upon demurrer, *nil dicit*, or for want of answer, or other pleading, he shall recover his damages and costs and a peremptory writ of *mandamus* shall be granted. If judgment is given for the defendant, he shall recover his costs.²

The writ of *mandamus* can only be awarded by the court. A Clerk of the court has no authority to issue it. It is granted only for good cause shown, and the return time is fixed by the court.³

The writ of *mandamus* must be certain and must clearly show upon its face, that it is the duty of the defendant to perform the act which it seeks to enforce. The mandatory clause must expressly state the duty required like the body of the writ.⁴ When the petition has asked the court to compel the performance of two different acts the peremptory writ may be issued as to one part and denied as to the other.⁵

Service of a writ of mandamus, like a rule of court, may be served by an attorney, or by other person.⁶ Appearance and answer waives any defects in the mode of serving the writ.⁷

¹ People v. Village of Hyde Park, 117 Ill., 462; People v. Supervisors, 40 Ill., 87.

² Rev. Stat., Chap. 87, ¶ 5, § 5; County of Pike v. People, 11 Ill., 202.

Objection for variance—When to be made.—An objection to the awarding of a peremptory writ of *mandamus* on the ground that it is variant from the prayer of the petition must be urged in the trial court. City of East St. Louis v. Underwood, 105 Ill., 308.

³ People v. Brooks, 57 Ill., 142..

⁴ People v. Brooks, 57 Ill., 142.

⁵ Illinois Watch Case Co. v. Pearson, 140 Ill., 423.

⁶ People v. Pearson, 3 Scam. (Ill.), 270.

⁷ People v. Barnett, 91 Ill., 422.

Excuse for not obeying writ.—It has been held to be a sufficient excuse on the part of commissioners of highways for not obeying a writ of *mandamus*, requiring them to open a certain road, that after the writ was awarded, and before it was

*Personal judgment cannot be rendered in mandamus proceedings against a public officer to compel the payment of money. A public officer can only be compelled by mandamus to perform his public duty.*¹

Judgment against the defendant ends litigation.—If damages are recovered against the defendant, he shall not be liable to be sued in other action or suit as for making a “false return.”²

Recovery by a proper relator is likewise conclusive, but *mandamus* proceedings begun by one not entitled thereto is no bar to a future action by the proper relator.³

§ 1112. New parties defendant—Not interpleaders.—It is provided by statute that if, after the filing of any petition for a writ of *mandamus*, any other person than the original defendant shall appear to the court to have or claim any right or interest in the subject matter, such person may be made a defendant and may be summoned, and appear and plead, answer and demur in the same manner as if he had been made a defendant to the original action.⁴

This provision of the statute does not provide for the admission of an interpleader as a plaintiff. The only purpose of the statute seems to be to make a party defendant of any person against whom the writ might properly issue. If there is in fact any other person than the relator who is entitled to the writ, such fact is a matter of defense and not available by way of interpleader.⁵

§ 1113. Proceedings not abated by death of defendant, etc.—The death, resignation, or removal from office, by lapse of time or otherwise, of any defendant shall not have the

issued and served, the road thereby directed to be open was vacated by an order of the same commissioners, made in pursuance to their statutory authority so to do. Commissioners of Swan Township v. People, 31 Ill., 97.

¹ Rogers v. People, 68 Ill., 154.

² Rev. Stat., Chap. 87, ¶ 6, § 6.

³ Brownell v. Gratiot Supervisors, 49 Mich., 414.

Where payment is pleaded and urged upon the trial in *mandamus* proceedings, it is conclusive between the parties. Chicago v. Sansum, 87 Ill., 182.

⁴ Rev. Stat., Chap. 87, ¶ 7, § 7.

⁵ Winstanley v. People, 92 Ill., 402.

effect of abating the suit, but his successor may be made a party thereto and any peremptory writ may be directed against him.¹

§ 1114. Review of mandamus proceedings.—Appeals and writs of error may be taken and prosecuted in the same manner, upon the same terms, and with like effect in *mandamus* suits as in other civil cases.²

In the Supreme Court the respondent will waive a formal issue by submitting a cause on printed briefs without any formal issue of law or fact, or taking steps for a rule on the relator, or to plead to the answer in the proceedings or to insist on a default. Therefore he will be no more entitled to the benefit of the affirmative facts alleged by him than if they had been formally traversed. Upon such waiver of formal issue, the court will treat the answer as a demurrer to the petitioner.³

§ 1115. How writ of mandamus enforced.—Obedience to the writ of *mandamus* is enforced by process for contempt of court where the writ has pointed out the precise thing to be done.⁴

However, the mere failure to make a return (answer) to an order (summons) to show cause is not a basis upon which to support a fine for contempt.⁵

¹ Rev. Stat., Ch. 87, ¶ 8, § 8.

² Rev. Stat., Ch. 87, ¶ 10, § 10; Board of Sup'rs v. People, 159 Ill., 242; Dement v. Rokker, 126 Ill., 174; ante, § 1015, "How review obtained," and § 1051, "Practice in courts of review."

At common law a writ of error would not lie to review a judgment awarding a peremptory *mandamus*, for the reason that such judgment was not final. Hammond v. People, 32 Ill., 446.

³ People v. City of Danville, 147 Ill., 127.

⁴ People v. Salomon, 54 Ill., 39; Diamond Watch Co. v. Powers, 51 Mich., 145.

⁵ Fletcher v. Kalamazoo Circuit Judge, 39 Mich., 301.

The Statute of Limitations to *mandamus* proceedings is five years. Ments v. Reynolds, 62 Ill. App., 17.

ARTICLE II.

PROHIBITION.

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| § 1116. Definition and nature. | § 1120. Examples of cases in which it may be obtained. |
| 1117. <i>Prohibition</i> and injunction compared. | 1121. Not available to restrain an executive. |
| 1118. <i>Prohibition</i> and <i>mandamus</i> compared. | 1122. Service and return of the writ. |
| 1119. Practice in obtaining the writ. | 1123. The judgment. |

§ 1116. **Definition and nature.**—The writ of *prohibition* is of very ancient origin. In fact it may be said to be as old as the common law itself.¹ The writ has been seldom used in practice in this State, because the writ of injunction has been invoked from a court of equity in lieu of the common law writ of *prohibition* but that the latter is preferable in certain cases will be presently shown.²

The writ of *prohibition* may be defined to be an extraordinary judicial writ, issuing out of a court of superior jurisdiction and directed to an inferior court, for the purpose of preventing the inferior tribunal from usurping a jurisdiction with which it is not legally vested.³

“It is a proper remedy in cases where the court exceeds the bounds of its jurisdiction, or takes cognizance of matters not arising within its jurisdiction. It can only be interposed in a clear case of excess of jurisdiction, and may lie to a part and not to the whole. It simply goes to the excess of jurisdiction, and the application of the writ by either the plaintiff or defendant in the case, or, if more than one, by either where the excess of jurisdiction affects him. It can only be resorted to where other remedies are ineffectual to meet the exigencies of the case. It is a preventive, rather than a remedial, process, and cannot, therefore, take the place of a writ

¹ 3 Bla. Com., 111.

² Post, § 1117.

³ Thomas v. Mead, 36 Mo., 232; High Ext. Leg. Rem., 762.

of error or other mode of review. It must also appear that the person applying for the writ has made application in vain for the relief to the court against which the writ is asked. The writ is not granted as a matter of strict right, but must rest on sound discretion, to be granted or not, according to the peculiar circumstances of each particular case when presented.”¹

The province of a writ of *prohibition* is not necessarily confined to cases where the subordinate court is absolutely devoid of jurisdiction, but it extends also to cases where such tribunal, although rightfully entertaining jurisdiction of the subject matter in controversy, has exceeded its legitimate powers.²

§ 1117. Prohibition and injunction compared.—There are some points of similarity between the extraordinary remedy in courts of equity by injunction against *proceedings* at law and the writ of *prohibition*. Both have the common object of restraining illegal proceedings, and each is resorted to when all other remedies for attaining the desired result are unavailing. There is, however, this vital difference: An *injunction* against proceedings at law is directed only to the parties litigant without in any manner interfering with the court, while a writ of *prohibition* is directed to the court itself, commanding it to cease from the exercise of a jurisdiction to which it has no legal claim.³

¹ Bacon's Abr., title "Prohibition"; 3 Bla. Com., 111; High Ext. Leg. Rem., 773, 765; Hudson v. Judge of Superior Court, 42 Mich., 239, at 248; Bates v. Circuit Judge, 82 Mich., 291; Quimbo Appo v. People, 20 N. Y., 531; People v. Seward, 7 Wend. (N. Y.), 518; Arnold v. Shields, 5 Dana (Ky.), 21; Washburne v. Phillips, 2 Metc. (Mass.), 299; Clayton v. Heidelberg, 17 Miss., 623; *Ex parte* Hamilton, 51 Ala., 62; *Ex parte* Green, 29 Ala., 52; *Ex parte* Smith, 34 Ala., 456; *Ex parte* Brandlacht, 2 Hill (N. Y.), 267; State v. Judge, 11 Wis., 50; Wilson v. Berkstresser, 45 Mo., 283; United

States v. Hoffman, 4 Wall. (U.S.), 158.

Exception to rule that other relief must have been sought in vain. Where it can be made clearly to appear that an inferior tribunal intends to proceed in a matter from which it possesses no rightful jurisdiction, a writ of *prohibition* may be obtained. Prignitz v. Fischer, 4 Minn., 336.

² Bates v. Circuit Judge, 82 Mich., 91; State v. Ridgell, 2 Bailey (S. C.), 560; Quimbo Appo v. People, 20 N. Y., 531; High Ext. Leg. Rem., 780.

³ High Ext. Leg. Rem. § 763; People v. Circuit Judge, Court of Wayne County, 11 Mich., 393.

§ 1118. **Prohibition and mandamus compared.**—*Prohibition* may be said, in a certain sense, to be the exact counterpart of *mandamus*, since *mandamus* is an affirmative remedy commanding certain things to be done which ought to be done,¹ while *prohibition* is negative in its nature and forbids the doing of certain things which ought not to be done.²

§ 1119. **Practice in obtaining the writ.**—The usual practice in procuring a writ of *prohibition* is to apply by petition or motion (supported by affidavit if the facts do not appear on the record) in the manner that an application is made for a writ of *mandamus*. The application shall be verified by affidavit when it is based on extrinsic facts. The court will then enter a rule upon the opposite party to show cause why on a given day the writ should not issue. The entry and service of such rule will stay all proceedings in the case. If then the cause shown appears to the court to be sufficient the writ will be issued. The writ commands the court and party to whom it is directed to desist and refrain from further proceedings in the suit or matter, which it specifies, until the next term of said court, and the further order of such court thereon, and then to *show cause why* they should not be absolutely restrained from any further proceedings in such suit or matter. If issue is joined in the proceedings, the case takes the ordinary course.³

It would seem that before there could be “cause shown,” sufficient to warrant the issuing of the writ, that the want of jurisdiction must have been pleaded in the court below and the plea refused. This was the rule at common law and generally obtains in this country. At least where there has been no effort made to obtain relief in the court in which it is sought to be prohibited, the court of superior jurisdiction will

¹ *Ante*, § 1097.

² *Thomas v. Mead*, 36 Mo., 232; High Ext. Leg. Rem. § 763.

³ *Ex parte Williams*, 4 Ark. 537; *Prignitz v. Fischer*, 4 Minn. 366;

Withers v. Commissioners of Roads, 3 Brev. (S. C.), 83.

See practice in *mandamus*, *ante*, § 1108, *et seq.*

not grant a *prohibition*.¹ It has been lately well said that before a writ of *prohibition* will be granted, directed to a court it must be made to appear that a motion or suggestion made in such court, based on its lack of jurisdiction, must have been determined adversely against the petition.²

There is some conflict in the authorities as to the stage of the proceedings in the lower court at which it will be proper to make application to the higher court for the writ of *prohibition*. However, it is certain that where the defect or failure in jurisdiction is apparent upon the face of the proceedings, which it is sought to prohibit, the writ of *prohibition* may be interposed at any stage of such proceedings, even after verdict, sentence, or judgment. Furthermore, it is equally certain that where the inferior court has proceeded to verdict and judgment—the want of jurisdiction not appearing upon the record—the writ of *prohibition* will not issue.³ So long as any part of the unauthorized act remains unexecuted a writ of *prohibition* may issue to prevent further proceedings.⁴

Where the excess of jurisdiction is apparent by the record, *prohibition* will lie, even though part of a cause of action may have been within the jurisdiction of the inferior tribunal; this is because such inferior tribunal will not be permitted to make a jurisdiction for itself by coupling matter beyond its control with that on which it may rightfully adjudicate.⁵ An exception is, however, made where the applicant is guilty of laches in applying for a writ of *prohibition*.⁶ Furthermore, it is possible, by making it clearly to appear that the inferior court is about to proceed in some matter over which it possesses no rightful jurisdiction, to obtain a writ of *prohibition* before proceedings have been begun, but in such case the in-

¹ *Ex parte City of Little Rock*, 25 Ark. 52; *Ex parte McMeechen*, 12 Ark. 70; *Barnes v. Gottschalk*, 3 Mo. App., 111.

² *State v. District Court of Weston County (Wyo.)*, 39 Pac. Rep., 749.

³ *State v. White*, 2 Nott. & M. (S. C.), 174; *High Ext. Leg. Rem.*, § 774.

⁴ *State v. Elkin (Mo.)*, 30 S. W. Rep., 333.

⁵ *Evans v. Gwyn*, 5 Ad. & E. n. s., 844; *High Ext. Leg. Rem. Q.*, 774.

⁶ *Full v. Hutchins, Cowp.*, 422; *High Ext. Leg. Rem.*, § 774.

tention of the court to proceed must be clearly shown or the writ will not be granted.¹

The common law rules governing the practice in regard to writs of *prohibition* must be referred to in order to determine whether an appropriate case is presented for the exercise of the court's jurisdiction to issue and enforce a writ of *prohibition*. The statute not prohibiting a remedy and being silent regarding the jurisdiction and procedure, the rules of the common law obtain.²

§ 1120. Examples of cases in which it may be obtained.—*Prohibition* has been held to be a proper remedy in the following cases:

Where, pending an appeal from an inferior to a superior court, the former attempts to execute the judgment appealed from;³ where the inferior tribunal, regardless of the decision upon the appeal, still attempts to enforce its own judgment;⁴ to quiet a *supersedeas* improperly granted;⁵ to prevent an inferior tribunal from attempting by injunction, to exercise control over the books, records and seals of the superior tribunal;⁶ and to prevent a Probate Court to exercise a jurisdiction over an estate not within its territorial jurisdiction.⁷

It is likewise a proper remedy to stay a proceeding begun in one court to counsel a judgment entered by a court of coordinate jurisdiction.⁸

§ 1121. Not available to restrain an executive.—Following the well-established rule that the judiciary has no right to invade the province of an executive,—the three departments of our system of government being distinct and independent—*prohibition* in no event is a fit remedy to restrain the head of the executive department in the exercise of his duties. For example, it will not lie to restrain a governor from granting

¹ Prignitz v. Fischer, 4 Minn., 336.

² Board of Commissioners v. Spittler, 13 Ind., 235.

³ State v. Judge, 24 La. Ann., 598; State v. Judge, 21 La. Ann., 735.

⁴ Harrigan v. County Commissioners, 53 Me., 83.

⁵ Supervisors v. Gorrell, 24 Gratt. (Va.), 484.

⁶ Thomas v. Mead, 36 Mo., 232.

⁷ United States v. Shanks, 15 Minn., 369.

⁸ Maclan v. Wayne Circuit Judge, 53 Mich., 242.

a commission to a person claiming to be a duly elected public officer.¹

§ 1122. Service and return of the writ.—It has always been the common law practice to serve the writ upon the court and party to whom it is directed, in the same manner as writs of *mandamus*, and a return (answer) has been required to be made in like manner to the court from which the writ issued and such answer (return) has been deemed to be enforceable by attachment.²

§ 1123. The judgment.—The judgment entered in proceedings for a writ of *prohibition* and after hearing the proofs and allegations of the parties in support of the petition, answer (return), etc., is either (1) that a writ of *prohibition absolute*, restraining the court and party from proceeding in the suit or matter, do issue, or (2) that a writ of *consultation* issue authorizing the court and party to proceed in the suit or matter in question.

The costs may be obtained by the plaintiff where there has been a plea or demurrer interposed therein by the defendant; but if the plaintiff is nonsuited, non-pros'd, or suffers a discontinuance, or verdict is entered against him, the defendant shall recover costs.³

¹ *Grier v. Taylor*, 4 McCord (S. C.), 206.

That *mandamus* may not be directed against a governor, see *ante*, § 1100.

² As to the service and return of a writ of *mandamus*, see *ante*, §§ 1109, 1110, 1111.

Adopting return.—By the practice elsewhere not specifically adopted in this State the person who has been named as a defendant, along with the court, when the writ is permitted by an instrument in writing signed by him and annexed to the return, is

permitted to adopt the same as his return and rely upon the matters therein contained as a sufficient cause why such court should not be restrained as mentioned in the writ. Such party thereafter is deemed to be the defendant and the person prosecuting the writ takes issue or demurs to the matters relied on by such defendant and like proceedings are had as in the trial of issues of law or fact joined between the parties. Compare Howell's Stat. (Mich.), § 8673.

³ Rev. Stat., Chap. 33, ¶ 14, § 14.

ARTICLE III.

QUO WARRANTO.

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| <p>§ 1124. Origin, definition and nature.</p> <p>1125. When the writ may issue.</p> <p>1126. At whose instance the writ may issue.</p> <p>1127. How leave asked—Counter-showing.</p> <p>1128. Names of parties to the proceeding.</p> <p>1129. Requisites of the information.</p> <p>1130. Summons — When returnable.</p> | <p>§ 1131. Service of summons—How made.</p> <p>1132. Defendants must plead or demur—Default.</p> <p>1133. Replication and rejoinder—Demurrer.</p> <p>1134. Extending time to plead.</p> <p>1135. Issues and trial thereof.</p> <p>1136. Judgment—Ouster — Fine—Costs.</p> <p>1137. Review—Appeal or writ of error.</p> |
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§ 1124. **Origin, definition and nature.**—The origin of the writ may be traced to a very early date in the history of the common law. The earliest of which we have any record is said to have been in the ninth year of Richard I, A. D. 1189, and was issued against an incumbent of a church calling upon him to show *quo warranto* (by what right) he held the church.¹ The old writ of *quo warranto* was a high prerogative writ, in the nature of a writ of right for the king against one who usurped or claimed any office, franchise, or liberty of the Crown, to require by what authority he supported his claim, in order to determine the right. It was also granted as a corrective of the misuser of a franchise, and commanded the respondent to show by what right "*quo warranto*" he exercised the franchise, having never had any ground for it, or having forfeited it by neglect or abuse.²

The precise period of time when this ancient writ fell into disuse in England, and its purpose was effected by the more modern remedy of *information in the nature of a quo warranto*, cannot be definitely ascertained. The information

¹ Darley v. Regina, 12 Clark & Fin., 520. ² 3 Bla. Com., 262.

was itself a common law remedy of a very early date.¹ Blackstone attributes the substitution of the information in lieu of the original writ to the length of the process upon the proceeding in *quo warranto*, as well as to the fact that the judgment rendered therein (it being in the nature of a writ of right) was final and conclusive, even against the Crown.²

The original writ of *quo warranto* was strictly a *civil* remedy, prosecuted at suit of the king by his attorney general, and in case of judgment for the king, the franchise was either seized into his hands, if of such a nature as to subsist in the Crown, or a mere judgment of ouster was rendered to eject the usurper. No fine was imposed, nor was any other punishment inflicted, than that implied in the deprivation of the franchise, which had been improperly usurped or illegally exercised.³ The *information* was originally regarded as strictly a *criminal* proceeding, but in modern times it has entirely fallen into disuse as a criminal proceeding, and has come to be regarded as a purely civil remedy, which, though partaking in some of its forms an incident of the nature of a criminal process, is yet a strictly civil proceeding resorted to for the purpose of testing a civil right, by trying the title to an office or franchise and ousting the wrongful possessor.⁴ The modern *information* in the nature of a *quo warranto* may be defined to be an *information*, criminal in form, presented to a court of competent jurisdiction, by the public prosecutor, for correcting the usurpation, misuser, or nonuser of a public office or corporate franchise. The object of the *information*, as now employed both in courts of England and courts of America, is substantially the same as that of the ancient writ.⁵ In England, however, and in Illinois and many other of the United States, its scope has been enlarged and extended by legislative enactment, but in the absence of special legislation

¹ Crabb's English Law, Chap. XVIII, p. 277; Darley v. Regina, 12 Clark & Fin., 520.

² 3 Bla. Com., 263.

³ 3 Bla. Com., 263; State v. Ashle, 1 Ark., 279.

⁴ Attorney General v. Barstow, 4 Wis., 567; High Ext. Leg. Rem., 608.

⁵ High Ext. Leg. Rem., 591.

its application has been held to be limited to cases where the original writ would have been granted at the common law.¹

The relief to be obtained in this State by an information in the nature of a *quo warranto* has been somewhat extended beyond that obtainable under the common law writ, but it is still only applicable to obtain relief of a public nature. It cannot be invoked to aid a private citizen in his private rights alone; but private rights may be secured if the public is likewise interested. It can only be had at the instance of the public prosecutor or other authorized agent of the state. It cannot be resorted to as a matter of course, but the allowance of it is wholly discretionary with the court to which application is made for leave to file the information. But a court ought not arbitrarily to refuse leave. The discretion should be soundly exercised according to the principles of law.² The writ may be denied on the ground of public policy merely, although the statute of limitations applies to proceedings by information in the nature of a *quo warranto*.³

An information in the nature of a *quo warranto* is only available to try the right of an office or franchise. It does not create an office or franchise, but is merely declaratory of existing rights, the court being the medium for declaring and

¹ Commonwealth v. Murray, 11 Serg. & R. (Pa.), 73.

² People v. Cooper, 139 Ill., 461; People v. North Chicago Ry. Co., 88 Ill., 537; People v. Boyd, 132 Ill., 60; People v. Waite, 70 Ill., 25; People v. Callaghan, 83 Ill., 125; People v. City of Springfield, 60 Ill. App., 501; People v. Lake Street Elevated R. R. Co., 54 Ill. App., 348; People v. Drainage Comrs., 31 Ill. App., 219.

A private right in which public is not interested. A *quo warranto* was held to be properly refused where a private citizen complained of the extension of a street railway line when it was perceived by the court that the application was not made for the public good, but rather for selfish purposes and against the almost uni-

versal desire of the people of the town. People v. North Chicago Ry. Co., 88 Ill., 357; People v. Lake St. E. R. R. Co., 54 Ill. App., 348.

³ People v. Boyd, 132 Ill., 60; People v. Boyd, 30 Ill. App., 608.

Estoppel in pais.—While municipal corporations cannot in general be estopped, yet the doctrine of *estoppel in pais* is sometimes applied to them, even in *quo warranto* proceedings when it involves a question of public right. Such cases are, however, exceptional, and when only such arises, the public is held to be estopped only on account of especial circumstances making it highly inequitable or oppressive right to enforce public rights. Catlett v. People, 151 Ill., 16.

enforcing rights which already exist by law. Neither does it command the performance of official functions by an officer to whom it may run, because it is not directed to the *officer* as such, but always to the *person* holding the office or exercising the franchise, and then not for the purpose of dictating or prescribing his official duties, but only to ascertain whether he is rightfully entitled to exercise the functions claimed.¹

Quo warranto and *scire facias* are the only remedies to test the legality of a corporate existence. It cannot be done by *mandamus*.² The legal existence of a corporation cannot be questioned collaterally;³ nor can it be done by bill in chancery.⁴

§ 1125. When the writ may issue.—*Quo warranto* proceedings may be prosecuted in the Supreme Court or a Circuit Court having jurisdiction of the subject matter.*

A writ of *quo warranto* may issue in case any person shall usurp, or intrude into, or unlawfully hold or execute any office or franchise, or any office in any corporation, created by authority of this State (or any person shall hold or claim to hold or exercise any privilege, exemption or license, which has been improperly or without warrant of law, issued or granted by any officer, board, commissioners, court, or other person or persons authorized or empowered by law to grant or issue such privilege, exemption or license), or any public officer shall have done or suffered any act which, by the provisions of law, works a forfeiture of his office or any association or number of persons shall act within this State as a corporation without being legally incorporated, or any corporation does, or omits any act which amounts to a surrender or forfeiture of his rights and privileges as a corporation, or exercises powers not conferred by law, or if any railroad company doing busi-

¹ *People v. Whitcomb*, 55 Ill., 172; *Attorney General v. Barstow*, 4 Wis., 669, 773.

² *People v. Trustees*, 111 Ill., 171; *ante*, §§ 1097, 1099.

³ *McCarthy v. Navasche*, 89 Ill., 270; *President, etc., v. Thompson*,

20 Ill., 197; *Rice v. Rock Island R. R. Co.*, 21 Ill., 93.

⁴ *Renwich v. Hall*, 84 Ill., 162.

⁵ Const. 1870, Art. VI, § 12; Rev. Stat., Ch. 37, ¶ 8, § 8; *Snowball v. People*, 147 Ill., 260; further as to "Courts and their Jurisdiction," see *ante*, Vol. I, § 1, *et seq.*

ness in this State shall charge an extortionate rate for the transportation of any freight or passenger, or shall make any unjust discrimination in the rate of freight or passenger tariff over or upon its railroad.'

The information in the nature of a *quo warranto* is a proper proceeding to test the right to hold the office of a county judge;' to test the right of a police magistrate who exceeds his authority;' to test the right of a person assuming to act as a drainage commissioner;' or to test the right of any other person assuming to hold and exercise the functions of an office,' whether such person was first legally entitled thereto and has continued until after the expiration of his term, or whether he is a mere usurper.' It is a proper proceeding to test the right of a dram-shop keeper to exercise the franchise, privilege and license to keep a dram shop.' It is a proper proceeding to determine "by what right" a number of persons act who assume to act as a board of education,' school trustees,' drainage board," or other pretended organization."

However, it is not a proper proceeding to test the *constitutionality* of an act of the legislature when directed against a city in conformity with such act;" neither is it proper to test an election for the adoption of a charter by a city, town or

¹ Rev. Stat., Ch. 112, ¶ 1, § 1.

² *People v. Connell*, 28 Ill. App., 285.

³ *People v. Wyatt*, 34 Ill. App., 454.

⁴ *Smith v. People*, 140 Ill., 355.

⁵ *Hinze v. People*, 92 Ill., 406; *People v. Matteson*, 17 Ill., 167.

⁶ *Burgess v. Davis*, 138 Ill., 578.

⁷ *Swart v. People*, 109 Ill., 621; *People v. Matthews*, 53 Ill. App., 305; *Handy v. People*, 29 Ill., App., 99.

⁸ *People v. Board of Education*, 101 Ill., 308.

⁹ *Renwick v. Hall*, 84 Ill., 162.

¹⁰ *People v. O'Hair*, 29 Ill. App., 239.

¹¹ That persons ineligible were elec-

ted as trustees to a municipal corporation at the time of its organization, does not dissolve such corporation. The authority of such trustees to hold office is properly questioned by *quo warranto* proceedings. *President v. Thompson*, 20 Ill., 197.

The jurisdiction of the court to try the right of persons assuming to exercise the duties and powers of aldermen is not ousted by a municipal charter conferring power upon the council to judge of the qualification of its members. *People v. Bird*, 20 Ill. App., 568.

¹² *People v. Whitcomb*, 55 Ill., 172.

village;¹ nor will it lie at the instance and relation of a private individual against a municipal or public corporation, such as a city, village, town, county, township, or the like.²

§ 1126. At whose instance the writ may issue.—Upon petition presented to any court of record of competent jurisdiction, or any Judge thereof in vacation, by the Attorney General, or State's Attorney, of the proper county, either of his own accord, or at the instance of an individual relator, asking for leave to file an information in the nature of a *quo warranto* in the name of the People of The State of Illinois, such court or Judge, if he be satisfied that there is probable ground for proceeding, may grant the petition and order the information to be filed and process to issue.³ Furthermore, the information must be filed by the Attorney General, or State's Attorney, in his official capacity, under a sense of official duty. He must not merely lend his name for the use of a private individual. The proceeding must be an official act and not simply an act official in form, but private in fact.⁴

§ 1127. How leave asked—Counter-showing.—*Quo warranto* proceedings are usually instituted by the Attorney General, or State's Attorney, of the proper county submitting a motion based upon affidavits for leave to file an information in the nature of a *quo warranto*. The court then orders a rule *nisi* to be entered against the respondents requiring them to appear on a day fixed and show cause why leave should not be granted. The respondent may answer the rule by counter-affidavits. It is also within the power of the court

¹ City of Chicago v. People, 80 Ill., 496.

² City of Chicago v. People, 80 Ill., 496.

What is a user.—The taking of the oath of office by one claiming to be appointed town collector, and thereby obliging the party to discharge certain duties, has been held to be a sufficient "user" of the

office to warrant an information in the nature of a *quo warranto*. People v. Callahan, 83 Ill., 128.

³ Rev. Stat., Chap. 112, ¶ 1, § 1.

⁴ Hunt v. Chicago, etc., R. R. Co., 121 Ill., 638; People v. North Chicago Ry. Co., 88 Ill., 537; People v. Lake Street Elevated R. R. Co., 54 Ill. App., 348.

to grant leave to file an information upon an *ex parte* showing.¹ A suit will not be considered to have been commenced until leave of court has been obtained to file the information. Filing without leave is not sufficient for that purpose.²

§ 1128. Names of parties to the proceeding.—The proceeding must be prosecuted in the name of the People of the State of Illinois and the person at whose instance it is filed is properly called the relator, but under our practice is frequently called the plaintiff.³ The person against whom the information is filed is properly called the respondent but by our practice is commonly called the defendant. When an information is filed to test the right to exercise a corporate authority it should be directed against the individuals by name, for an information against a municipal corporation or private corporation by his corporate name admits the corporate existence thereof.⁴

The information may be amended.⁵

Several persons may be granted leave to join in the same information, in order to try their respective rights, to an office, franchise, privilege, exemption or license when it is made to appear to the court or Judge that the several rights of divers parties to the same office or franchise, privilege, exemption, or license, may properly be determined in the one information.⁶

§ 1129. Requisites of the information.—It is required by the Constitution that the information run “in the name and by the authority of the People of the State of Illinois.” The omission of these words will give ground for error or arrest of judgment.⁷ It is sufficient to state in general terms the facts that the defendant (respondent) unlawfully intrudes, usurps,

¹ *People v. McFall*, 124 Ill., 642; *People v. North Chicago Ry. Co.*, 88 Ill., 537; *People v. Waite*, 70 Ill., 25; *People v. Lake Street Elevated R. R. Co.*, 54 Ill. App., 348.

² *Lavalle v. People*, 68 Ill., 252.

³ *Wight v. People*, 15 Ill., 417;

People v. Mississippi & A. R. R. Co., 13 Ill., 66.

⁴ *Rolling Stock Co. v. People*, 147 Ill., 234; *People v. City of Spring Valley*, 129 Ill., 169.

⁵ See *post*, § 1129.

⁶ *Rev. Stat.*, Chap. 112, ¶ 1, § 1.

⁷ *Hay v. People*, 59 Ill., 94.

occupies, possesses, or exercises the rights of the office, franchise, privilege, exemption, or license without minutely and specifically stating all the acts which have been performed. But where such acts are specified and the same are not germane to the general allegation they will be disregarded. It is, however, absolutely necessary that facts should be set forth and not merely the statement of a conclusion. A cause of action must be shown and a sufficient statement of facts made that the court may determine what was done.¹ It is, however, not necessary that the relator should anticipate the defense which may be made by the defendant (respondent) and controvert such defense in advance by setting forth the facts in the information. Such facts are proper matter to be set forth in the replication.²

Rules of pleading applicable to declarations are also applicable to informations. Therefore if the information contain one good count it will be sufficient to sustain a judgment, although there are other counts which are insufficient.³

The information is amendable within the discretion of the court in view of our statute of amendments.⁴

¹ Rayfield v. People, 144 Ill., 332; People v. Cooper, 139 Ill., 461; Klinger v. People, 28 Ill. App., 575.

To test corporate existence.—Where individuals assume to act as a corporation, an information containing a general denial of their rights to do so will be sufficient to put them on their plea of justification. People v. Ottawa, etc., Co., 115 Ill., 281.

Where, however, an information attempts to set out their title, which when taken in connection with the public law, discloses such additional acts as make their title good, the information will be insufficient on demurrer. *Ib.*

² See *post*, § 1133.

³ People v. Cooper, 139 Ill., 461.

⁴ Hinze v. People, 92 Ill., 406. See

generally as to "Amendments," *ante*, Vol. I, § 740.

What not a sufficient information.—A pretended information which charged that the defendant "is unlawfully executing the duties and exercising the powers of supervisor of the village of Kahopia, etc., and that he hath since, etc., unlawfully executed and exercised the power of supervisor, etc., and received and enjoyed the emoluments thereof" was held to be entirely too indefinite and general, because it failed to charge the defendant with intruding into or usurping the office, or to specify in what way he unlawfully executed the duties and exercised the powers of his office. Lavalley v. People, 68 Ill., 252.

§ 1130. Summons—When returnable.—The statute controlling the practice in this State requires that the first process in all civil actions of record shall be by summons and *quo warranto* proceedings are no exception to the rule.¹ The writ shall run in the name of the people of the State of Illinois and shall be issued under the seal of the court.²

On the filing of an information in the nature of a *quo warranto* the Clerk of the court shall issue a summons in like form as other summons, commanding the defendant (respondent) to appear at the return term thereof to answer the relator (plaintiff) in an information in the nature of a *quo warranto*. If the information is filed in vacation the summons shall be made returnable on the first day of the next succeeding term; if in term time it may be made returnable on any day of the same term, not less than five days after the date of the writ, as shall be directed by the court.³ When the information is filed in vacation the defendant (respondent) is entitled to be summoned ten days prior to the first day of the term to which the writ is returnable.⁴

§ 1131. Service of summons—How made.—Summons may be served in the same manner as other summons in suit at law, but if any defendant reside out of the state, he may be served with a copy of the information in the same manner, and with like effect, and the service may be proved in the same way as provided in cases in bills of chancery.⁵ There is no way by which a court can acquire jurisdiction of the defendant (respondent) in *quo warranto* proceedings, except by service or voluntary appearance. The statute of Anne required this and ours does not substantially differ therefrom.⁶

§ 1132. Defendants must plead or demur—Default.—

¹ Lavalley v. People, 68 Ill., 252.

² Hambleton v. People, 44 Ill., 458.

³ Rev. Stat., Chap. 112, ¶ 2, § 2.

⁴ Lavalley v. People, 68 Ill., 252.

⁵ Rev. Stat., Chap. 112, ¶ 3, § 3.
As to service of bills in chancery, see Rev. Stat., Chap. 22, ¶ 14, § 14.

⁶ Hambleton v. People, 44 Ill., 458.

⁷ *Change of venue.*—A change of venue may be had in *quo warranto* proceedings when such proceeding is resorted to for the protection of the private and individual rights of the relator. People v. Shaw, 13 Ill., 581.

Every defendant who shall be served and summoned with a copy of the information as required by the statute, shall be held to demur or plead to the information on the return day of the summons, or when served with a copy of the information at the expiration of the time required to be given, or within such further time as may be granted by the court, or in default thereof, judgment may be taken *nil dicit*.¹ In *quo warranto* proceedings where the defendant (respondent) deems the information to be insufficient in law, he may demur in the same manner as in other proceedings.² Like demurring to a declaration, however, having a demurrer sustained to several counts of an information will be unavailing when there is another count sufficient for the purpose of testing the right in question.³

If the defendant (respondent) perceives no ground for demurrer he must then either disclaim having exercised the franchise, or usurped the office, or he must justify his act in having done so. A mere plea of "not guilty" is insufficient. The burden is upon him to show, either that he is not using the franchise or occupying the office, or that he has a legal right to do the act, because of which complaint is made and which he admits he is doing.⁴

A plea of justification admits the facts alleged in the information and raises only an issue of law upon which the Supreme Court may pass.⁵ When *quo warranto* proceedings are instituted for the purpose of testing a title to an office, the defendant (respondent) who seeks to justify must set out his title specifically and distinctly, and show on the face of his plea that his title to the office is valid. If he fails to show suffi-

¹ Rev. Stat., Chap. 112, ¶ 4, § 4.

² See general rule regarding demurrer, *ante*, Volume I, § 632.

³ *People v. Cooper*, 139 Ill., 461.

⁴ *Catlett v. People*, 151 Ill., 16; *Gunterman v. People*, 138 Ill., 518; *Carrico v. People*, 123 Ill., 198; *Swart v. People*, 109 Ill., 621; *Holden v. People*, 90 Ill., 434; *Illinois Mid. Ry. Co. v. People*, 84 Ill., 426.

As to what it is necessary for the defendants to show in their plea when an information in the nature of a *quo warranto* is filed against persons assuming to act as directors of a new union school district, claimed to have been formed, see *Carrico v. People*, 123 Ill., 198.

⁵ *Launtz v. People*, 113 Ill., 137.

cient authority for exercising its functions, the people will be entitled to judgment of ouster.¹ The same principle obtains when the proceedings seek to test the right to exercise a franchise, privilege, exemption, or license. The plea must show authority in the defendant (respondent), but when public interests are involved, technical objections will not be regarded.²

When the defendant (respondent) disclaims having usurped the office or exercised the privilege, franchise, or license, the people are at once entitled to judgment. They are not bound to show anything.³

§ 1133. Replication and rejoinder—Demurrer.—In *quo warranto* proceedings the relator (plaintiff) may demur to the pleas of the defendant (respondent) for the same reasons, in the same manner, and to the same effect as any other proceedings at law.⁴ Pleas not responsive to the information, but inconsistent therewith as being a departure therefrom, are obnoxious on demurrer.⁵ Likewise, the rule that one good plea will be a sufficient defense and that although other pleas may be bad on demurrer, they will be disregarded and the good plea maintained, applies equally well in *quo warranto* proceedings.⁶ Furthermore, the rule that a demurrer to a plea may be carried back and sustained to the information, is applicable in the same manner that demurrers to pleas may be carried back and sustained to the declaration in other suits at law.⁷

¹ Catlett v. People, 151 Ill., 16; Simons v. People, 18 Ill. App., 588.

² Crook v. People, 106 Ill., 237.

Where an information was filed averring that a Police Magistrate and Justice of the Peace held and exercised such office in East St. Louis, in St. Clair county, without warrant of law, a plea alleging in substance that the defendant (respondent), was a duly elected and qualified Police Magistrate in the village of New Brighton in the same

county of St. Clair, was, upon demurrer, held to be a sufficient plea of justification. People v. Wyatt, 34 Ill., 454.

³ Catlett v. People, 151 Ill., 16.

⁴ *Ante*, Vol. I, § 633.

⁵ People v. City of Spring Valley, 129 Ill., 169.

⁶ City of Chicago v. Leseth, 142 Ill., 642.

⁷ Brackett v. People, 72 Ill., 593; further as to carrying demurrer back, see *ante*, Vol. I, § 739.

A replication and rejoinder is necessary and available in *quo warranto* proceedings in the same cases and to the same extent as any other proceedings at law. The rules of pleading do not require that a pleader shall anticipate the defense that may be interposed. Therefore, after a defense is interposed, any reply which the party instituting the proceeding may desire to make to the pleadings interposed by the party against whom the proceedings is instituted, may be interposed by a replication. For example, where an information in the nature of a *quo warranto* is filed to question the defendant's (respondent's) title to an office it is not necessary that the relator shall anticipate that the defendant (respondent) will justify under an election, and it is not necessary that the relator shall show the validity of such election in advance. If the election is pleaded its invalidity is a matter to be shown by replication.¹ Again, where an information in the nature of a *quo warranto* is filed to test the legality of the formation of a village, the matters going to show the illegality of such formation need not be set out in the information, but may be set forth by the replication.²

A demurrer may be interposed to the replication according to the rules of pleading in other actions at law, and a demurrer to the replication may be likewise "carried back" to the plea. Where, however, a demurrer is interposed to a replication and overruled, such demurrer cannot be carried back and sustained to the plea. Such is not the rule of pleading regarding demurrers. If, however, the defendants (respondents) in such a case should stand by the demurrer and allow judgment to go against them on that issue and the replication is good, the error in carrying the demurrer back and condemning the plea will be harmless.³

§ 1134. Extending time to plead.—The court in which any information, as aforesaid, is filed, may allow the relator or any defendant (respondent) such convenient time to plead, reply, or demur, as it shall deem just and reasonable.⁴

¹ *People v. Cooper*, 139 Ill., 461.

² *Poor v. People*, 142 Ill., 309.

³ *Poor v. People*, 142 Ill., 309.

⁴ *Rev. Stat.*, Chap. 112, ¶ 5, § 5.

§ 1135. **Issues and trial thereof.**—In proceeding by information in the nature of a *quo warranto* the issues of fact and of law presented by the pleadings are tried and determined in accordance with the rules and law, in the same manner, and with the same degree of strictness, as in ordinary cases at law.¹ Where no defense is interposed a *prima facie* case must be made out by the allegations in the information.² If the defendant (respondent) interposes a plea of justification for exercising the rights of the office, franchise, privilege, exemption, or license, then the burden of proof will be upon him to show a valid legal title to the same. A defective title is no title whatever as against the public.³ If he disclaims the exercise of the same, the people are entitled to a judgment at once. The people are not bound to show anything.⁴ Where, however, the matters alleged in an information against a corporation to try its rights to exercise the privileges of a corporation, or alleged in the relator's replication, as grounds for the forfeiture of the charter of the corporation, are denied by plea or rejoinder the burden will rest upon the relator to prove by a preponderance of evidence that the defendant (respondent) has committed the act which amounts to a surrender or forfeiture of its rights and privileges as a corporation.⁵

Generally speaking, where the contest is over an elective office, the facts which show the defendant to be wrongfully in, show who shall fill the place; but where the office is only held by tenure or appointment this will not appear, and the relator will have the burden of showing his own title affirmatively. It will not be shown by default or by agreement of the defendant.⁶

The trial of the issues in proceedings by information in the nature of a *quo warranto* in the Supreme Court will be upon

¹ *People v. Lake Street Elevated R. R. Co.*, 54 Ill. App., 348.

² *Ante*, § 1129.

³ *Gunterman v. People*, 138 Ill., 518; *People v. Cooper*, 139 Ill., 461.

⁴ *Catlett v. People*, 151 Ill., 16.

As to what must be shown by

drainage commissioners in justification, see *People v. Cooper*, 139 Ill., 461.

⁵ *Rolling Stock Co. v. People*, 147 Ill., 234.

⁶ *Vrooman v. Michie*, 69 Mich., 42; *Frey v. Michie*, 68 Mich., 323.

the matters as they appear upon the face of the pleadings, like in the trial of issues in proceedings by *mandamus*. And if parol testimony is necessary to be taken to determine matters of fact, the issues will be sent down to a proper trial court where such matters of fact may be tried by jury, if necessary, and by the court certified back to the Supreme Court.¹

§ 1136. **Judgment—Ouster—Fine—Costs.**—The issue of the writ does not end the discretion of the court. If the writ has been improvidently issued under a misapprehension of the facts, it is competent for the court to vacate the order granting it at any time during the term.²

The relief that can be granted by a court in a proceeding in the nature of a *quo warranto* is limited to the pleadings of the parties.³

The only judgment that can be entered against a defendant (respondent) in proceedings by information in the nature of a *quo warranto* for usurping, entering into and unlawfully exercising the powers and duties of the office, etc., under our statute, when he is adjudged guilty, as charged in the information, is that of *ouster* from the office and a fine for unlawfully intruding into it. The only judgment that can be entered in favor of the relator in such a case is merely one for costs.⁴ The statute provides that in case any person or corporation, against whom an information in the nature of a *quo warranto* has been filed, is adjudged “guilty,” as charged in the information, the court may give judgment of ouster against such person or corporation from the office or franchise, and fine such person or corporation for usurping, intruding into, or unlawfully holding and executing such office or franchise, and also give judgment in favor of the relator for the costs of the prosecution: *Provided*, that instead of judgment of ouster from a franchise for an abuse thereof, unless the court is of the opinion that the public good demands such judgment, the

¹ *Ante*, § 1110.

² *Attorney General v. Chicago, etc., R. R. Co.*, 112 Ill., 520; *People v. Lake Street Elevated R. R. Co.*,

54 Ill. App., 348; *People v. Hamilton*, 24 Ill. App., 609.

³ *People v. Cooper*, 139 Ill., 461.

⁴ *Simons v. People*, 18 Ill. App., 588.

court may fine the person or corporation found guilty in any sum not exceeding \$25,000 for such offense. Whenever judgment is given for any defendant (respondent) in such information, the person or corporation to whom judgment is given shall recover costs against the relator.¹

The decision of the Supreme Court in reviewing proceedings in the nature of a *quo warranto* is conclusive of the case as presented by the record.²

§ 1137. Review—Appeal or writ of error.—Appeals and writs of error may be taken and prosecuted in *quo warranto* proceedings in the same manner and upon the same terms, and with like effect as in other cases.³

The State is not “interested, as a party or otherwise,” in a proceeding in the nature of a *quo warranto* to try the title of a person to an office, in any such sense as to give the Supreme Court jurisdiction to hear an appeal taken directly from the trial court. The interest which the State must have to permit such a direct appeal must be a substantial interest, as for example a monetary interest.⁴

In proceedings to test the title to an office a franchise is not involved. An office is not a franchise. Therefore, in such a proceeding, an appeal cannot be taken direct from the trial court to the Supreme Court. The appeal in the first instance should be taken to the Appellate Court.⁵

Where, after a full hearing is had in the Circuit Court, on

¹ Rev. Stat., Chap. 112, ¶ 6, § 6.

When a judgment of ouster is proper as against a board of education, see *Snowball v. People*, 43 Ill. App., 241.

As against a board of school directors who had been acting as such in a district improperly formed, see *Schaefer v. People*, 20 Ill. App., 605.

As against a city council for unlawfully approving the bond of a city treasurer, see *Sullivan v. People*, 18 Ill. App., 627.

As against persons purporting to be directors of a railway company,

see *Waterman v. Chicago & I. R. R. Co.*, 139 Ill., 658.

² *Soucy v. McCracken*, 21 Ill. App., 370.

³ Rev. Stat., Chap. 112, ¶ 7, § 7; *People v. City of Spring Valley*, 129 Ill., 169. Further as to appeals and writs of error, see *ante*, §§ 1030, 1036.

⁴ *McGrath v. People*, 100 Ill., 464; further as to appeal when State is interested, see *ante*, §§ 1017, 1032.

⁵ *McGrath v. People*, 100 Ill., 464; *People v. Holtz*, 92 Ill., 426; further as to appeal when a franchise is not involved, see *ante*, § 1018.

an application to file an information in the nature of a *quo warranto* upon affidavits and counter affidavits as to the facts relied upon, and after leave is refused, the judgment is affirmed by the Appellate Court, the Supreme Court cannot consider an assignment of error questioning the finding of facts by the Appellate Court.¹

¹ People v. McFall, 124 Ill., 642. assignment of error upon a finding of facts in the Appellate Court, see *ante*, § 1019.
As to when and only when the Supreme Court will consider an

ARTICLE IV.

HABEAS CORPUS.

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| <p>§ 1138. Definition.</p> <p>1139. Origin and nature of the writ.</p> <p>1140. What courts may issue the writ—When suspended.</p> <p>1141. Who entitled to the writ.</p> <p>1142. Application for the writ—How made.</p> <p>1143. Form of the petition.</p> <p>1144. "Probable cause" must be shown.</p> <p>1145. When the writ to be granted—Penalty.</p> <p>1146. Form of the writ.</p> <p>1147. Subpoena for witnesses—To be issued when.</p> <p>1148. Services of the writ. (a) Who may make.</p> <p>1149. (b) How service vacated.</p> <p>1150. The return of the writ—Form.</p> <p>1151. Proceedings on return. (a) Generally.</p> | <p>§ 1152. (b) When the prisoner held on process will be discharged.</p> <p>1153. (c) When the prisoner will not be discharged.</p> <p>1154. New commitment—Recognition of witnesses—Penalty for omission.</p> <p>1155. Remanding prisoner—Remanding order.</p> <p>1156. Second writ of habeas corpus—Limit of court's power.</p> <p>1157. Discharged person cannot be reimprisoned for same cause—Exceptions.</p> <p>1158. No review of habeas corpus proceedings.</p> <p>1159. Penalties. (a) For rearresting person discharged.</p> <p>1160. (b) For avoiding the writ.</p> <p>1161. (c) How penalties recovered.</p> |
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§ 1138. **Definition.**—The name of this proceeding, or writ, is two emphatic words of several common law writs issuing to bring the *person* into court for a designated purpose, the two words—*habeas corpus*—being equivalent to "have you the body" in the imperative, or, in other words, commanding "that you have the body." Of the six such writs enumerated in our laws¹—the last, "the great and efficacious prerogative writ" is commonly "*the writ of habeas corpus*." It is *habeas corpus ad subjiciendum*—that is to say that you have the body for submitting and receiving—"and commands the person who has another in detention to produce the body of the

¹ See And. Law Dict.; 1 Tidd's Pr. 296, 301.

prisoner, with the day and cause of his caption and detention, to do, submit to and receive whatever the Judge or court awarding the writ shall consider in that behalf.¹

§ 1139. **Origin and nature of the writ.**—It is said that the origin of the English writ of *habeas corpus* may be found in interdict *de libero homine exhibendo* of the Roman law.² True, it is at least, that the twenty-ninth section of Magna Charta reads like this: “No freeman shall be seized or imprisoned, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, except by the legal judgment of his peers, or by the laws of the land.” The Magna Charta was “smilingly, though reluctantly” signed by King John at Runnymede on the 15th day of June, A. D. 1215, and though he broke the charter immediately afterwards, this provision formed a basis for hundreds of years, on which prisoners unlawfully confined, could ground their demand for liberty.³ There has been much subsequent legislation, both in England and the United States, *but* the writ of *habeas corpus* for the relief of “every person imprisoned or otherwise restrained of his liberty, if it prove unlawful”—contrary to law, in this State being the offspring of the above and the only one with which we are immediately concerned, the intermediate provisions need not be considered.⁴ The writ of *habeas corpus* to bring a prisoner to testify⁵ is a direct descendent of the old writ of *habeas corpus ad testificandum*—

¹ 3 Bla. Com., 130; 1 Tidd's Pr., 296–301, 739; *Ex parte Bollman*, 4 Cranch (Cir. Ct.), 97; *Ex parte Yerger*, 8 Wall., 95.

² 3 Summary of the Roman Civil Law, p. 551, § 2374.

³ Halam's Const. History of England, 220.

Glandville, the earliest English law writer, who composed his treatise in the reign of Henry II, A. D., 1154–1189, details the particulars of a writ called *ded odio et atia*, which was used for liberating persons from prison on certain criminal charges;

but it, together with other similar ancient writs, gave place, subsequently to the signing of the great charter, to the writ of *Habeas Corpus*. Amos' English Const., 170; Church on *Habeas Corpus*, § 3a.

⁴ Rev. Stat., Chap. 65, ¶ 1, § 1.

⁵ Every restraint upon a man's liberty is, in the eye of the law, imprisonment, wherever may be the place, or whatever may be the manner in which the restraint is effected. 1 Kent's Com., 631.

⁶ Rev. Stat., Chap. 65, ¶ 34, § 34.

that you have the prisoner for testifying. It removes the prisoner from the place of detention that he may give testimony before a court.¹

The proceedings by petition for writ of *habeas corpus* is, in this State, a civil suit. It is not a criminal proceeding, although it be instituted to discharge a person from custody under criminal process.²

A writ of *habeas corpus* ranks in power above all other writs: consequently, from the moment the Sheriff receives a *habeas corpus*, the custody of the prisoner will be by virtue of the writ of *habeas corpus*, and not under, or by, the authority of any other writ, or writs, he may have previously received.³

§ 1140. What courts may issue the writ—When suspended.—The Supreme Court of the State has power to issue writs of *habeas corpus*, which power is one of the few cases in which the Supreme Court has original jurisdiction.⁴ Likewise Circuit Courts and the Superior Court of Cook County, have power to award throughout the State, and returnable in the proper county, writs of *habeas corpus*.⁵

The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.⁶

§ 1141. Who entitled to the writ.—It is provided by the statute of this State that every person imprisoned, or otherwise restrained of his liberty, except as otherwise provided by law, may prosecute a writ of *habeas corpus* in the manner hereinafter prescribed, to obtain relief from such imprisonment or restraint, if it prove to be unlawful.⁷

To bring up a prisoner, the writ may be invoked from any court having authority to issue such writ, when such prisoner is wanted to testify, or to be surrendered in discharge of bail or for trial upon any criminal charge lawfully pending in the

¹ *Ex parte* Marmaduke, 91 Mo., 228, 251. *Post*, § 1141.

² *Ex parte*, Tom Ton, 108 U. S., 556.

³ *Matson v. Swanson*, 131 Ill., 255.

⁴ Const. 1870, Art. VI, § 2; Rev. Stat., Ch. 37, ¶ 8, § 8.

⁵ Rev. Stat., Chap. 37, ¶ 63, § 28.

⁶ Const. 1870, Art. II, § 7.

⁷ Rev. Stat., Chap. 65, ¶ 1, § 1.

same court; and the writ may run into any county in the State and there be executed and returned by any officer to whom it is directed.'

The writ will of course be properly invoked in all cases in which a prisoner under process may be discharged, which cases will hereinafter be enumerated.'

The writ may issue to compel the production of a prisoner, who is held within this State by an agent of another state, when such prisoner is, by such agent, being removed from this State, in pursuance with the United States Statutes, as a fugitive from justice.'

However, where a prisoner is in custody of a United States officer acting under the color of the United States laws, under a judgment of the United States Court, the state court should not grant a *habeas corpus* when the application makes such facts to appear; but if the petition does not make such fact to appear, the state court may inquire into the cause of the imprisonment. Furthermore, it is the duty of a Federal officer having custody of a prisoner, to show, by a proper return, the authority under which he holds such prisoner. When such authority is shown, the jurisdiction of the state court is ended. The United States officer may keep the prisoner.'

Any person imprisoned for contempt of court for the non-performance of any order or decree for the payment of money, shall be entitled to a writ of *habeas corpus*, and if it shall ap-

¹ Rev. Stat., Ch. 65, ¶ 34, § 34.

Prisoner remanded or punished.

—After such prisoner shall have given his testimony, or been surrendered, or his bail discharged, or he has been tried for the crime for which he is charged, he shall be returned to the place of confinement, whence he was taken for the purpose aforesaid: *Provided*, if such prisoner is convicted of a crime punishable by death, or imprisonment in the penitentiary, he may be punished accordingly; but in any

case where the prisoner shall have been taken from the penitentiary and his punishment is by imprisonment, the time of such imprisonment shall not commence to run until the expiration of the time of service under any former sentence. Rev. Stat., Chap. 65, ¶ 35, § 35.

² *Post*, § 1152.

³ *Robb v. Connelly*, 111 U. S., 624.

⁴ *Tarble's Case*, 13 Wall., 397; *Albeman v. Booth*, 21 How. (U. S.), 506.

pear, on full examination of such person and such witnesses and other evidence as may be adduced, that he is unable to comply with such order or decree, or to endure the confinement, and that all persons interested in the order or decree, have had reasonable notice of the time and place of trial, the court or Judge shall operate to release the lien of such order or decree, but the same may be enforced against the property of such person by execution.'

A writ of *habeas corpus* will not lie to review alleged error in a judgment at law. Therefore, where a person, properly within the jurisdiction of the court, has been confined and imprisoned for contempt of court, the act of the court cannot be reviewed on writ of *habeas corpus*.¹

To determine the right of custody of a child a writ of *habeas corpus* is frequently sued out. In all such cases, however, the welfare of the child is the question of primary importance and its feelings will be consulted, but not necessarily allowed to prevail.'

If a child is confined in the reform school without fault on his part, he may be released by *habeas corpus* proceedings.'

A prisoner cannot be removed from the county on *habeas corpus* within fifteen days next preceding the term of court at which such prisoner ought to be tried, unless the removal is for the purpose of conveying him into the county where the offense with which he stands charged is properly cognizable.'

The custody of the prisoner cannot be changed, when so in the custody of any Sheriff, or other officer, or person, upon commitment of any criminal or supposed criminal matter; nor can he be removed therefrom into any other prison, or

¹ Rev. Stat., Ch., 65, ¶ 36, § 36.

² *In re Smith*, 117 Ill., 68.

To bring up a prisoner held on *capias ad satisfaciendum* in a civil suit, the writ is frequently employed, but the fact that one has been sued civilly by his Christian name only, and held upon *capias ad satisfaciendum* is no ground for

the issuance of a writ of *habeas corpus*. *Hammond v. People*, 32 Ill., 446.

³ *People v. Porter*, 23 Ill. App., 196.

⁴ *People v. Turner*, 55 Ill., 280; Compare *In re Ferrier*, 103 Ill., 367.

⁵ Rev. Stat., Ch. 65, ¶ 28, § 28.

custody, unless it be by *habeas corpus*, or some other legal writ, or when it is expressly allowed by law.¹

§ 1142. **Application for the writ—How made.**—Application for the writ of *habeas corpus* shall be made to the court or Judge authorized to issue the same, by *petition*, signed by the person for whose relief it is intended, or by some person in his behalf, and verified by affidavit.²

§ 1143. **Form of the petition.**—The petition shall state in substance :

1. That the person in whose behalf the writ is applied for is imprisoned or restrained of his liberty and the place where—naming all the parties, if they are known, or describing them, if they are not known.

2. The cause or pretence of the restraint, according to the best knowledge and belief of the applicant, and that such person is not committed or detained by virtue of any process, judgment, decree, or judgment specified hereinafter.³

3. If the commitment or restraint is by virtue of any warrant, or writ, or process, a copy thereof shall be annexed, or it shall be averred that, by reason of such prisoner being removed or concealed before application, a demand of such copy shall not be made, or that such demand was made, and the legal fees thereof tendered to the officer or person having such prisoner in his custody, and that such copy was refused.⁴

¹ Rev. Stat., Ch. 65, ¶ 29, § 29.

Penalty.—If any person shall remove, or cause to be removed, any prisoner so committed, except as above provided, he shall forfeit to the party aggrieved a sum not exceeding \$300. *Ib.*

² Rev. Stat., Chap. 65, ¶ 2, § 2.

³ Post, § 1153, "When prisoner shall not be discharged."

⁴ Rev. Stat., Chap. 65, ¶ 3, § 3.

Penalty for refusing copy of mittimus.—Any Sheriff or other officer or person, having custody of any prisoner committed on any civil or

criminal process, or any court or Magistrate, who shall neglect to give such prisoner a copy of the process or order, or commitment by which he is imprisoned, within six hours after demand made by the prisoner, or any one in his behalf, shall forfeit to the prisoner, or party aggrieved, a sum not exceeding five hundred dollars. Rev. Stat., Chap. 65, ¶ 4, § 4.

The names of the witnesses must also be endorsed on the copy of the *mittimus*. Rev. Stat., Chap. 33, ¶ 371, § 25.

NO. 374.—GENERAL FORM OF PETITION FOR WRIT OF HABEAS CORPUS.

TO THE HONORABLE, _____, Judge of the Supreme Court (or other proper name of court) of the State of Illinois.

The petition of _____ respectfully shows unto your Honor that he is now a prisoner,¹ confined in the custody of _____, Sheriff of the county of _____, in the County Jail,² in the _____ of _____, in said county, for a supposed criminal offense,³ to wit: (*name it*).

And your petitioner avers that to the best of his knowledge and belief, he (or _____, as the case may be) is not committed or detained by virtue of any process, issued by any court or Judge in the United States, in a case where such court or Judge has exclusive jurisdiction; nor by virtue of any final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree, the time for which detention is unexpired; nor for any treason, felony, or other crime, committed in any other state or territory in the United States, for which he ought, by the constitution and laws of the United States, to be delivered up to the executive power of such state or territory.⁴

Your petitioner also shows that such confinement is by virtue of a warrant, a copy of which is hereto annexed (*if copy cannot be obtained, state that the demand therefor was made and that legal fees therefor were tendered to the officer or person having such prisoner in his custody, and that such copy was refused, or that such demand could not be made here*).

And your petitioner further states that he is advised by counsel, R. _____, Esquire, residing at _____, and so believes the truth to be, that his said imprisonment is illegal and that said illegality consists in this, to wit: (*state what*).

Wherefore your petitioner prays a writ of *habeas corpus* to the end that he may be discharged from custody (or "bailed out" or "for trial" or as the case may be).

STATE OF ILLINOIS, }
_____ County. } ss.

_____, being duly sworn, says that he is the petitioner named in the foregoing petition, subscribed by him,

¹ If the petition be made by one for another, say "your petitioner _____, respectfully shows, etc., that _____ is now a prisoner."

² If restrained by private individual, state what person and where; "that he is not detained for any criminal or supposed criminal matter," and proceed immediately with prayer, "wherefore, etc."

³ Where the commitment is on an original process in a civil action in which the person is liable to arrest

and imprisonment, state on what process, and add, "that excessive and unreasonable bail is required." Aver ability to give sufficient bail and conclude immediately with prayer for the writ, "wherefore, etc."

⁴ The copy of the warrant showing affirmatively the cause of detention, may render these negative averments unnecessary, but lest there be no such copy, it is well to include them.

that he has read the same, or "heard the foregoing petition read," and knows the contents thereof, and that the statements therein made, he believes to be true.

Subscribed and sworn to before me
this day of, A. D.

Notary Public.

NO. 375.—FORM OF PETITION FOR WRIT OF HABEAS CORPUS
AD TESTIFICANDUM.

IN THE COURT OF COUNTY.

A..... B..... }
v. }
C..... D..... } Assumpsit (or as the case may be.)

STATE OF ILLINOIS, }
..... County. } ss.

A..... B....., the plaintiff above named, being duly sworn, says, that this action is brought upon a contract (or as may be) and that the defense to the said action is as follows: (state it.)

The affiant further says that E..... F....., who is now a prisoner in the custody of the Sheriff of the county of under an execution on a final judgment (or stating for what he is in custody), will be a material witness for this affiant on the trial of said cause as affiant is advised by R..... S....., Esquire, his counsel, and verily believes to be true; and that he cannot safely proceed to the trial of the said cause without the testimony of the said E..... F....., as he is also advised by counsel and verily believes.

This affiant further states that his said action stands ready for trial upon the calendar of the said court and has been called for trial to be had before Judge, to be held at the court-house in, in county, on the day of, A. D.

Wherefore your petitioner prays for a writ of *habeas corpus* to the end that the said E..... F..... may be brought before said court on said day, there to testify to the truth, according to his knowledge in said cause.

Subscribed and sworn to, etc., (usual jurat).

§ 1144. "Probable cause" must be shown.—The decisions in both the English and American courts establish the rule that probable cause must be shown to obtain the writ, whether it be granted at common law, or under the statute. This rule is followed in the United States by both the state and

federal courts, and is maintained by a multitude of authorities.' After varying decisions as to whether the writ was a writ of right resting within the discretion of the court or Judge, the rule seems to be well established as laid down by the Court of King's Bench, that, whether the court granted a *habeas corpus* under the common law or under a statute, there ought always to be a proper ground laid before the court has jurisdiction to grant it. The opinion states that "it is not to be granted, as a matter of course, at all events, but the party seeking to be brought up by *habeas corpus* must lay such a case on affidavit before the court as will be sufficient to regulate the discretion of the court in that respect. The court will not, in the first instance, grant a *habeas corpus* when they see that in the result they must inevitably remand the party."¹

The principle of practice involved in the last sentence, as quoted above from Hobson's case, is found in many cases. Chief Justice Marshall said, "the cause of imprisonment is shown as fully by the petitioner as it could appear on the return of the writ; consequently the writ ought not to be awarded if the court is satisfied that the prisoner would be remanded to prison."² Chief Justice Shaw said that requiring probable cause to be shown "does not restrain the full and beneficial operation of this writ, so essential to the protection of personal liberty. The same court must decide whether the imprisonment complained of is illegal; and whether the inquiry is had in the first instance on the application, or subsequently on the return of the writ, or partly on one and partly on the other, it must depend upon the same facts and principles, and be governed by the same rule of law."³

Furthermore, our own court (when deciding another principle of practice) has said that "having adopted the substance of the British acts in our statute, we may reasonably look to their courts for the practice that has obtained under the com-

¹ Church on *Habeas Corpus*, § 92 and cases cited.

² Hobson's Case, 2 Chitt. Rep., 211.

³ *Ex parte Tobias Watkins*, 3 Peters (U. S.), 101.

⁴ Sim's Case, 7 Cush. (Mass.), 293.

mon law and their enactments, as it is only reasonable to suppose that our legislature designed to adopt the practice, so far as it is adapted to our circumstances, as well as the provisions of the law itself.”¹

§ 1145. **When the writ to be granted—Penalty.**—The statute of this State, based upon the English statute,² provides that, unless it shall appear from the petition itself, or from the documents thereto annexed, that the party can neither be discharged, admitted to bail, nor otherwise relieved, the court or Judge shall forthwith award a writ of *habeas corpus*. Any Judge empowered to issue writs of *habeas corpus*, who shall corruptly refuse to issue any such writ, when legally applied for, in a case where it may lawfully issue, or who shall for the purpose of oppression unreasonably delay the issuing of such writ, shall, for every such offense, forfeit to the prisoner or party aggrieved a sum not exceeding One Thousand Dollars.’

The common law rule states emphatically that the writ cannot be denied where, “a probable ground is shown that the party is imprisoned without just cause, and therefore hath a right to be delivered.” For the writ then becomes a “writ of right, which may not be denied, but ought to be granted to every man that is committed or detained in prison, or otherwise restrained of his liberty, though it be by the command of the King, the Privy Council, or any other.”³

§ 1146. **Form of the writ.**—If the writ be allowed by the court it shall be issued by the Clerk under the seal of the court; if by a Judge it shall be under his command and shall be directed to the person in whose custody or under whose restraint the prisoner is, and may be substantially in the following form, to wit:⁴

¹ Hammond v. People, 32 Ill., 446.

² Rev. Stat., Chap. 65, ¶ 5, § 5.

³ 31 Car. II, Ch. 2; and 56 George III, Ch. 100; Hammond v. People, 32 Ill., 446.

⁴ 3 Bla. Com. 132.

⁵ Rev. Stat., Chap. 65, ¶ 6, § 6.

NO. 376.—GENERAL FORM OF WRIT OF HABEAS CORPUS.

The People of the State of Illinois:

To the Sheriff of county,
(or to "A..... B....." as the case may be.)

You are hereby commanded to have the body of E..... F....., by you imprisoned and detained, as it is said, together with the time and cause of such detention and imprisonment, by whatsoever name, the said E..... F....., shall be called or charged, before the court of county, (or "before G..... H....., Judge of, etc.,") at immediately after being served with this writ, to be dealt with according to law.

And have you then and there this writ, with a return thereon, of your doings in the premises.

..... ,
("Clerk" or "Judge" as the case
may be.)

(Seal of the court if signed by Clerk.)

(The writ must be endorsed with these words to prevent a pretense of ignorance by the person to whom directed.)

"By the Habeas Corpus Act."¹

NO. 377.—FORM OF WRIT OF HABEAS CORPUS AD TESTIFICANDUM.

The people of the State of Illinois,

To the Sheriff of County.

We command you that you have the body of E..... F....., detained in prison, under your custody, as it is said, under safe and secure conduct, by whatsoever name the said E..... F..... may be charged before the Court of county (or as may be) at a court to be held at on the day of next, to testify the truth according to his knowledge in a certain cause, now pending therein, and then and there to be tried, wherein A..... B....., as plaintiff, and C..... D....., as defendant; and that immediately after the said E..... F..... gives his testimony before said court you will return him to our said prison, etc.

And have you then and there this writ with a return thereon of your doings in the premises.

(Signed as above and sealed when signed by Clerk.)

(Endorsed as above.)

§ 1147. Subpoena for witnesses—To be issued when.—

When the party has been committed upon a criminal charge, unless the court or Judge shall deem it unnecessary, a sub-

¹ Rev. Stat., Chap. 65, ¶ 7, § 7.

poena shall also be issued to some of the witnesses, whose names have been endorsed upon the warrant of commitment, to appear before such court or Judge at the time and place when and where such *habeas corpus* is returnable, and it shall be the duty of the Sheriff, or other officer, to whom the subpoena is issued, to serve the same, if it be possible, in time to enable such witness to attend.'

§ 1148. **Service of the writ—(a) Who may make.**—The writ of *habeas corpus* may be served by the Sheriff, Coroner, or any Constable, or other person appointed for that purpose, by the court or Judge by whom it is issued or allowed; if served by a person not an officer, he shall have the same power, and be liable to the same penalty for nonperformance of his duty, as though he were a Sheriff.'

§ 1149. **(b) How service effected.**—Service of the writ of *habeas corpus* shall be made by leaving a copy of the original writ with the person to whom it is directed, or by any of his under officers, who may be at the place where the prisoner is detained; or if he cannot be found, or has not the person imprisoned or restrained in custody, the service may be made upon any person who has him in custody with the same effect as though he had been made a defendant therein.'

Expenses must be paid—Exception.—When the person confined or restrained is in the custody of a civil officer, the court or Judge granting the writ, shall certify thereon the sum to be paid for the expenses of bringing him from the place of imprisonment, not exceeding ten cents per mile, and

¹ Rev. Stat., Ch. 65, ¶ 8, § 8.

Further as to names of witnesses being endorsed upon the copy of the *mittimus*, see Rev. Stat., Ch. 38, ¶ 87, § 25.

² Rev. Stat., Chap. 65, ¶ 9, § 9.

³ Rev. Stat., Chap. 65, ¶ 10, § 10.

Prisoner cannot be removed from county, when.—To prevent any person from avoiding or delaying his trial, it shall not be lawful to re-

move any prisoner on *habeas corpus* under this act, out of the county in which he is confined, within fifteen days next preceding the term of the court at which such prisoner is to be tried, except it be to convey him into the county where the offense, with which he stands charged, is properly cognizable. Rev. Stat., Chap. 65, ¶ 28, § 28.

the officer shall not be bound to obey it, unless the same so certified is paid or tendered to him, and security is given to pay the charges of carrying him back, if he should be remanded: *Providid*, that if such court or Judge shall be satisfied that the person so confined or restrained is a poor person and unable to pay such expenses, then such court or Judge shall so certify on such writ, and in such case, no tender or payment of expenses need be made or security given, as aforesaid. The officer shall be bound to obey such writ.¹

§ 1150. The return of the writ—Form.—The officer or person upon whom such writ is served, shall state in his return plainly and unequivocally:

1. Whether he has or has not the party in his custody, or control, or under his restraint, and if he has not, whether he has had the party in his custody, control, or under his restraint, and any, and what, time prior, or subsequent to the date of the writ.

2. If he has the party in his custody or control, or under his restraint, the authority, or true cause of such imprisonment or restraint setting forth the same at large.

3. If the party is detained by virtue of any writ, warrant, or other written authority, a copy thereof shall be annexed to the return, and the original shall be produced and exhibited on the return of the writ to the court or Judge, before whom the same is returnable.

4. If the person upon whom the writ is served, has had the party in his custody or control, or under his restraint, at any time prior or subsequent to the date of the writ, or has transferred such custody or restraint to another, the return shall state particularly to whom, at what time, for what cause, and by what authority such transfer took place.

The return shall be signed by the person making the same, and except where such person is a sworn public officer and makes the return in his official capacity, it shall be verified by oath.²

¹ Rev. Stat., Chap. 65, ¶ 11, § 11.

² Rev. Stat., Chap. 65, ¶ 12, § 12.

The return may be amended at

any time by leave of the court or Judge. Rev. Stat., Chap. 65, ¶ 20, § 20.

The body must also be brought—Exception.—The officer or person making the return, shall, at the same time, bring the body of the party, if in his custody, or power, or under his restraint, according to the command of the writ, unless prevented by sickness, or infirmity of the party.¹

¹ Rev. Stat., Chap. 65, ¶ 13, § 13.

Examination in case of sickness.

—When, from the sickness or infirmity of the party, he cannot, without danger, be brought to the place appointed for the return of the writ, that fact shall be stated in the return, and if it is proved to the satisfaction of the Judge, he may proceed to the jail, or other place where the party is confined, and there make his examination, or he may adjourn the same to such other time, or make such other order in the case, as law and justice require. Rev. Stat., Chap. 65, ¶ 14, § 14.

Obedience to writ enforced by attachment—Penalty.—If the officer, or person, upon whom such writ is served, refuses or neglects to obey the same, by producing the party named in the writ, and making a full and explicit return thereto, within the time required by this act, and no sufficient excuse is shown for such refusal, or neglect, the court or Judge, before whom the writ is returnable, upon proof of service thereof, shall force obedience by attachment as for contempt, and the officer or person so refusing or neglecting shall forfeit to the party aforesaid a sum not exceeding five hundred dollars, and be incapable of holding office. Rev. Stat., Chap. 65, ¶ 15, § 15.

Other writ to take body from disobedient officer.—The court or Judge may also, at the same time, or afterwards issue a writ to the Sheriff or other officer to whom such attachment is directed, commanding him to bring forthwith before

the court or Judge, the party for whose benefit the writ was allowed, who shall thereafter remain in the custody of such officer or Sheriff, or other person, until he is discharged, bailed, or remanded, as the court or Judge shall direct. Rev. Stat., Chap. 65, ¶ 16, § 16.

Emergency proceedings — Body may be taken before habeas corpus issues—Arrest of the restraining person.—Whenever it shall appear, by the complaint, or by affidavit, that any one is illegally held in custody or restraint, and that there is good reason to believe that such person will be taken out of the jurisdiction of the court, or Judge, before whom the application for a *habeas corpus* is made, or will suffer some irreparable injury, before compliance with the writ can be enforced, such court or Judge may cause the writ to be directed to the Sheriff or other officer, commanding him to take the prisoner thus held in custody or restraint, and forthwith bring him before the court or Judge to be dealt with according to law.

The court or Judge may also, if the same is deemed necessary, insert in the writ a command for the apprehension of the person charged with illegal restraint.

The officer shall execute the writ by bringing the person therein named before the court or Judge and the like return and proceedings shall be required and had as in other writs of *habeas corpus*. Rev. Stat., Chap. 65, ¶ 17, § 17.

§ 1151. **Proceedings on return. (a) Generally.**—Upon the return of a writ of *habeas corpus*, the court, or Judge, shall, without delay, proceed to examine the cause of the imprisonment or restraint, but the examination may be adjourned from time to time as circumstances require.¹

The issues raised on the hearing of a *habeas corpus* may be one of law only, or it may be one of both law and fact. Where the facts stated in the return are not controverted, the issue is one of law alone, as is the case when the detention of the prisoner is claimed to be illegal, and he claims a legal exemption from it.² It is said that “in *habeas corpus*, where the petitioner alleges imprisonment by the respondent (defendant), under a specific claim of authority, and the exemption in law by reason of certain stated facts, and the respondent asserts the authority and admits the facts stated, denying the legal exemption set up, there arises a simple issue of law, which must be tried by the case made and no facts *de hors* the record can be legally considered.”³

The issue of fact may be raised by denial on oath. The party imprisoned or restrained may deny any of the material facts set forth in the return, and may allege any other facts that may be material in the case, which denial or allegation shall be on oath.⁴ This will raise a question of fact, which must first be determined, and then if a question of law remains it will be disposed of. What facts may properly be put in issue covers a wide field of inquiry and must depend on each particular case; but the rule expressing the general doctrine is that only such matters as have a necessary connection with the question of the validity of the detention or imprisonment will be considered, and other matters will be uniformly rejected.⁵

The court or Judge shall proceed in a summary way to examine the cause of imprisonment or restraint, hear the evidence produced by any person interested or authorized to

¹ Rev. Stat., Chap. 65, ¶ 18, § 18.

⁴ Rev. Stat., Chap. 65, ¶ 19, § 19.

² Church on *Habeas Corpus*, § 160.

⁵ Church on *Habeas Corpus*, § 170.

³ *Camfield v. Patterson*, 33 Ga., 561.

appear, both in support of such imprisonment or restraint, or against it, and thereupon shall dispose of the party as the case may require.¹

§ 1152. (b) When the prisoner held on process will be discharged.—It is the duty of Circuit Courts and Judges thereof, in vacation, upon the presentation to them of proper petition, to issue writs of *habeas corpus* and discharge from custody prisoners held by process in the cases hereinafter enumerated.²

If it appear that the prisoner is in custody by virtue of process from any court legally constituted, he can be discharged only for some of the following causes:

1. Where the court has exceeded the limit of its jurisdiction, either as to the matter, place, sum, or person.

2. Where, though the original imprisonment was lawful, yet, by some act, omission, or event, which has subsequently taken place, the party has become entitled to his discharge.

3. Where the process is defective in some substantial form required by law.

4. Where the process, though in proper form, has been issued in a case or under circumstances where law does not allow process or orders for imprisonment or arrest to issue.

5. Where, although in proper form, the process has been issued or executed by a person, either unauthorized to issue or execute the same, or where the person having the custody of the prisoner under such process is not the person empowered by law to detain him.

6. Where the process appears to have been obtained by false pretense or bribery.

7. Where there is no general law, nor any judgment, order, or decree of a court to authorize the process, if in a civil suit, nor in vacation, for a criminal proceeding.

No court or Judge, on the return of a *habeas corpus*, shall,

¹ Rev. Stat., Chap. 65, ¶ 19, § 19.
Amendment.—Any denial or allegation may be amended at any time

by leave of the court or Judge. Rev. Stat., Chap. 65, ¶ 20, § 20.

² *Matson v. Swanson*, 131 Ill., 235.

in any other matter, inquire into the legality or justice of the judgment or decree of a court legally constituted.¹

§ 1153. (c) When the prisoner will not be discharged.—No person shall be discharged under the provisions of the statute in this State, if he is in custody, either:

1. By virtue of process, by any court or Judge of the United States, in a case where such court or Judge has exclusive jurisdiction; or,

2. By virtue of a final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree, unless the time at which such party may be legally detained has expired; or,

3. For any treason, felony, or other crime committed in any other state or territory of the United States, for which such person ought, by the Constitution and laws of the United States, to be delivered up to the executive power of such state or territory.²

§ 1154. New commitment—Recognizance of witnesses—Penalty for omission.—In all cases where the imprisonment is for a criminal or supposed criminal matter, if it appears to the court or Judge that there is sufficient legal cause for the commitment of the prisoner, although such commitment may have been informally made, or without due authority, the court or Judge shall make a new commitment in proper form and direct it to the proper officer, or admit the party to bail, if the cause is bailable.

The court or Judge shall also, when necessary, take the recognizance of all material witnesses against the prisoner as in other cases. The recognizance shall be in the form provided by law, and returned as other recognizances.

If any Judge shall neglect or refuse to bind any such prisoner or witness by recognizance, or to return a recognizance when taken as aforesaid, he shall be deemed guilty of misdemeanor in office, and be proceeded against accordingly.³

¹ Rev. Stat., Chap. 65, ¶ 22, § 22.

² Rev. Stat., Chap. 65, ¶ 21, § 21.

³ Rev. Stat., Chap. 65, ¶ 23, § 23.

§ 1155. **Remanding prisoner—Remanding order.**—When any prisoner brought up on a *habeas corpus* shall be remanded to prison, it shall be the duty of the court or Judge remanding him to make out and deliver to the Sheriff, or other person, to whose custody he shall be remanded, an order in writing, stating the cause of remanding him.

If such prisoner shall obtain a second writ of *habeas corpus* it shall be the duty of such Sheriff, or other person to whom the same shall be directed, to return therewith the order aforesaid; and if it shall appear that the said prisoner was remanded for an offense adjudged not bailable, it shall be taken and received as conclusive and the prisoner shall be remanded without further proceedings.¹

§ 1156. **Second writ of habeas corpus—Limit of court's power.**—It shall not be lawful for the court or Judge, on a second writ of *habeas corpus* obtained by such prisoner, to discharge the said prisoner, if he is clearly and specifically charged in the warrant of commitment with a criminal offense; but the said court or Judge, shall, on the return of the second writ, have power only to admit such person to bail where the offense is bailable by law, or remand him to prison where the offense is not bailable, or being bailable, where such prisoner shall fail to give the bail required.²

§ 1157. **Discharged person cannot be re-imprisoned for same cause—Exceptions.**—No person who has been discharged by order of the court or Judge, on a *habeas corpus*, shall be again imprisoned, restrained, or kept in custody for the "same cause" unless he be afterwards indicted for the same offense, nor unless by legal order or process of the court, wherein he is bound by recognizance to appear.

The following shall not be deemed to be the "same cause":

1. If, after a discharge, for a defect of proof, or any material defect in the commitment in a criminal case, the

¹ Rev. Stat., Ch. 65, ¶ 24, § 24.

² Rev. Stat., Ch. 65, ¶ 25, § 25.

prisoner should be again arrested on sufficient proof, and committed by legal process for the same offense.

2. If, in a civil suit, the party has been discharge for any illegality in the judgment or process, and is afterwards imprisoned by legal process for the same cause of action.

3. Generally, whenever the discharge has been ordered on account of nonobservance of any of the forms required by law, the party may be a second time imprisoned, if the cause be legal and the forms required by law observed.¹

§ 1158. No review of habeas corpus proceedings.—The rule obtained by the English practice under the statute from which our *habeas corpus* statute is modeled, that no writ of error would lie to review *habeas corpus* proceedings, and our legislature having adopted the substance of the English statute, it is reasonable to suppose that it designed to adopt the practice under such statutes, and consequently our court has held that no writ of error will lie to review a judgment on *habeas corpus* discharging the prisoner.²

However, a judgment against a Sheriff for costs of *habeas corpus* proceedings where a prisoner is discharged may be reviewed by writ of error. A second writ of *habeas corpus* may be obtained.³

§ 1159. Penalties. (a) For re-arresting person discharged.—Any person who, knowing that another has been discharged by order of a competent Judge or tribunal, on a *habeas corpus*, shall, contrary to the provisions of the *habeas corpus* act, arrest or detain him again for the same cause which was shown on the return of such writ, shall forfeit five hundred dollars for the first offense, and one thousand dollars for every subsequent offense.⁴

§ 1160. (b) For avoiding the writ.—Any one having a person in his custody, or under his restraint, power, or con-

¹ Rev. Stat., Ch. 65, ¶ 26, § 26.

² *Hammond v. People*, 32 Ill., 446;

Wallace v. Cleary, 5 Ill. App., 334;

Nor will it lie on a refusal to

discharge a prisoner. *Ex parte*, Thompson, 93 Ill., 89.

³ *Hammond v. People*, 32 Ill., 446.

⁴ Rev. Stat., Chap. 65, ¶ 27, § 27.

trol, for whose relief a writ of *habeas corpus* is issued, who, with intent to avoid the effect of such writ, shall transfer such person to the custody or place him under the control of another, or shall conceal him, or change the place of his confinement, with intent to avoid the operation of such writ, or with intent to remove him out of the State, shall forfeit for every such offense, one thousand dollars, and may be imprisoned not less than one year, nor more than five years. In any prosecution for the penalty incurred under this section, it shall not be necessary to show that the writ of *habeas corpus* had issued at the time of the removal, transfer, or concealment therein mentioned, if it be proven that the acts therein forbidden were done with the intent to avoid the operation of such writ.¹

§ 1161. (c) How penalties recovered.—All the pecuniary forfeitures incurred under the *habeas corpus* act shall enure to the use of the party for whose benefit the writ of *habeas corpus* issued, and shall be sued for and recovered with costs by the Attorney General or State's Attorney, in the name of the State, by information; and the amount, when recovered, shall, without any deduction, be paid to the party entitled thereto.²

¹ Rev. Stat., Chap. 65, ¶ 30, § 30.

² Rev. Stat., Chap. 65, ¶ 31, § 31.

Pleading and evidence.—In any action or suit for any offense against the provisions of this act, the defendant may plead the general issue,

and give special matter in evidence.

Rev. Stat., Chap. 65, ¶ 32, § 32.

Recovery no bar to civil damages.

—The recovery of said penalties shall be no bar as to a civil suit for damages. Rev. Stat., Chap. 65, ¶ 33, § 33.

ARTICLE V.

SCIRE FACIAS.

- | | |
|---|--|
| <p>§ 1162. Origin, nature and purpose of the writ. (a) Generally.</p> <p>1163. (b) To revive a judgment.</p> <p>1164. Same—To revive an execution after seven years.</p> <p>1165. (c) To make defendants, not served with process, parties to a judgment.</p> <p>1166. (d) To collect special assessments.</p> <p>1167. (e) To try legal existence of corporation.</p> <p>1168. (f) Against bail.</p> <p>1169. (g) Against sureties on bond of appeal from Justice's Court.</p> | <p>1170. (h) Against a corporation.</p> <p>1171. (i) To foreclose a mortgage.</p> <p>1172. Same—No declaration need be filed—Form of <i>scire facias</i>.</p> <p>1173. Same—Service of the writ—Publication.</p> <p>1174. Same—Defenses to the proceeding.</p> <p>1175. Same—Judgment.</p> <p>1176. Same—Special execution—Lien.</p> <p>1177. Pleadings in <i>scire facias</i> proceedings, generally.</p> <p>1178. Judgment in <i>scire facias</i> proceedings, generally—Damages—Costs.</p> <p>1179. Execution in <i>scire facias</i> proceedings.</p> |
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§ 1162. Origin, nature and purpose of the writ. (a) **Generally.**—A *scire facias* is a writ founded on some matter of record, as a recognizance of judgment, etc., on which it lies to obtain execution, or for other purposes,¹ as to make other parties to a judgment,² to collect special assessments,³ to foreclose a mortgage.⁴ It is in general a “judicial writ,” issuing out of the court where the record is, yet because the defendant may plead thereto, it is considered in law an *action*, so that a release of all *actions* is a good bar to a *scire facias*.⁵ It is sometimes issued in a cause pending and sometimes is of itself a new action.⁶ A *scire facias* to revive a judgment is

¹ Bacon's Abr. title “*scire facias*,” 2 Swan's Pr., 1095; 2 Tidd's Pr., 1090.

² *Post*, § 1165.

³ *Post*, § 1166.

⁴ *Post*, § 1171.

⁵ Coke's Litt., 200b, 291a; Challenor v. Niles, Adm., 78 Ill., 78; Chestnut v. Chestnut, 77 Ill., 346.

⁶ 2 Swan's Pr., 1095.

in this State, generally considered to be an action.¹ But not in such sense as to prohibit a plaintiff from suing a defendant out of the county where the latter resides or may be found.² A *scire facias* disclosing the facts upon which it is founded, and requiring an answer from the defendant, was in one case said to be in the nature of a "declaration," and when the object of it is to obtain execution on a judgment or recognizance, etc., it is properly called a writ of "execution."³ The general purpose of a *scire facias* is to make known to the defendant some matter, of which he has a right to be informed, and to afford him an opportunity, if he sees fit, to show cause why a certain step should not be taken against him.⁴ The *scire facias* performs the office of both the writ and declaration in this State. It must show every allegation necessary to recovery, and a default on the part of the defendant admits the facts alleged in the writ, and judgment may thereupon be entered.⁵

The proceeding by *scire facias* to revive a judgment is a proceeding *in personam* and not *in rem*, where the judgment sought to be revived is a judgment *in personam*.⁶

While a proceeding by *scire facias* is not a suit in every sense of the word, yet it is such in a general sense, and is such to the extent that the same is to be begun by suing out of the writ and the writ is sued out by the filing of a *præcipe*.

¹ Gibbons v. Goodrich, 3 Ill. App., 590.

² Challenor v. Niles, 78 Ill., 78.

³ 2 Tidd's Pr., 1090.

⁴ 2 Tidd's Pr., 1095; 2 Saund. Rep., 74.

⁵ Rietzell v. People, 72 Ill., 416; Connor v. People, 20 Ill., 481.

⁶ Bickersdike v. Allen, 157 Ill., 95.

NO. 378.—GENERAL FORM OF PRÆCIPE FOR SCIRE FACIAS.

STATE OF ILLINOIS, }
County. } ss.

In theCourt ofCounty.
 To theTerm, A. D.

A B }
 v. } *Scire facias.*
 C D }

The Clerk will issue a *scire facias*, against C D to revive a judgment of the term, in the court, A. D., in favor of A B for dollars damages and dollars costs (or "against and upon their recognizance of bail at the term of the court, A. D., at suit of against " or as the case may be) returnable at the next term of said court.

R S , Attorney for Plaintiff.

To O P , Clerk.

Dated Chicago, , A. D.

§ 1163. (b) To revive a judgment.—The statute in this State, providing for the revival of judgments by *scire facias* is based upon the English statutes.¹ It prescribes that judgments in any court of record in this State may be revived by *scire facias* (or an action of debt may be brought thereon) within twenty years next after the date of such judgment and not after,² except that further time is given when a judgment has been rendered for the plaintiff and the same has been reversed on writ of error; or upon appeal; or if a verdict passed for the plaintiff, and upon matter alleged in arrest of judgment, the judgment was given against the plaintiff; or if the plaintiff was nonsuited, then, if the time limited for bringing the action shall have been expired during the pendency of the suit, the said plaintiff, his or her heirs, executors, or administrators, as the case shall require, may commence such action within one year after such judgment is reversed and given for the plaintiff and not after.³

¹ 13 Ed. I, Ch. 45; Gibbons v. Goodrich, 3 Ill. App., 590.

² Rev. Stat., Chap. 83, ¶ 26, § 3.

³ Rev. Stat., Chap. 83, ¶ 25, § 2; Smith v. Stevens, 133 Ill., 183.

This statute permitting an action of debt to be brought on a judgment, permits a judgment creditor to obtain an action of debt on such judgment in the same court in which the judg-

No declaration is required of the plaintiff in a *scire facias* to revive a judgment. The writ must contain the necessary averments. The averment that the "execution remains to be made" was held to be a sufficient averment that the judgment remained unpaid.¹

Scire facias to revive a judgment in behalf of the people is unnecessary, it is believed, because the law does not impute laches to the state.²

Service by publication.—In *scire facias* to revive a judgment where the plaintiff in the judgment sought to be revived, or his attorney, shall file in the office of the Clerk of the court out of which the writ issues, showing that the defendant in the *scire facias* resides or has gone out of the state, or is concealed within the state, so that process cannot be served upon him, and stating the place of residence of such defendant, if known, or that on due inquiry, his place of residence cannot be ascertained; then in such case, notice to the defendant may be given by publication and mailed in the same manner as provided by statute for notice in like cases in chancery.³

This provision applies only to residents of the State and not to nonresidents.⁴

ment was rendered and while he is entitled to an execution of such judgment. *Greathouse v. Smith*, 4 Ill. (3 Scam.), 541.

¹ *Albin v. People*, 46 Ill., 372.

Changing name of plaintiff by amendment.—Where an administrator sues out a *scire facias* to revive a judgment in favor of his intestate he should first procure the title of the cause to be amended by substi-

tuting his name as plaintiff. Suing out a *scire facias* in the name of the deceased is irregular. *Challenor v. Niles*, Adm., 78 Ill., 78.

² *Albin v. People*, 46 Ill., 372.

³ Rev. Stat., Chap. 110, ¶ 27, § 26; see as to "Publication of Notice" in chancery cases; Rev. Stat., Chap. 22, ¶ 12, § 12.

⁴ *Bickersdike v. Allen*, 157 Ill., 95.

NO. 379.—FORM OF WRIT OF SCIRE FACIAS TO REVIVE JUDGMENT.

STATE OF ILLINOIS, }
 County. } ss.

The people of the State of Illinois.
 To the Sheriffs of said County, Greeting:—

Whereas, at the term of the Circuit Court of the said county held in and for the county of, and State of Illinois, to wit on the day of, A. D., before our said court then judicially sitting at the court house in in said county, A..... B....., by a judgment of the same court,*¹ recovered against C..... D.....,

¹ The words here used between the * make the writ applicable to revive a judgment in *assumpsit*.

In debt, include the following words between * in the above form "recovered against the said C..... D..... a certain debt of dollars."

In covenant include the following words between the * in the above form "recovered against C.... D.... for his damages which he had sustained by reason of the breach of a certain covenant made between the the said A..... B..... and C..... D....."

In case include the following words between the * in the above form: "For his damages which he had sustained by reason of a certain grievance then wholly committed by the said C..... D....."

In replevin include the following words between the * in the above form: "For his damages which he had sustained by the reason of the wrongful detaining of the cattle, goods and chattels of the said C..... D....."

In trespass include the following words between the * in the above form: "For his damages which he had sustained by reason of certain trespasses then lately committed by the said C..... D....."

In ejectment include the following words between the * in the above form: "Recovered against C..... D....., his term yet to come of and in one messuage, etc. (describe the premises as in the declaration or verdict), in your county which E..... F..... on the day of, A. D., had demised to the said A..... B..... to have and to hold the same to the said A..... B....., and his assigns, from the day of, last past, for and during and unto the full end and term of years from thence next ensuing fully to be completed and ended; by virtue of which demise, the said A..... B..... entered into the tenements aforesaid with the appurtenances, and was therefore possessed, until the said C..... D..... afterwards, to wit, on the day of, in the aforesaid, with force and arms, etc., entered into the tenements aforesaid with the appurtenances, which the said E..... F..... had demised to the said A..... B..... in the manner, and for the term aforesaid, which is not yet expired, and ejected the said A..... B..... from said (farm). Also dollars for the damages which the said A..... B..... had sus-

..... dollars for his damages which he had sustained by reason of the not performing certain promises and undertakings then lately made by the said C..... D....., to the said A..... B.....; * and also, dollars for his costs and charges by him about his suit in that behalf expended, wherefore the said C..... D....., is convicted, as appears to us of record. And now on behalf of the said A..... B....., in our said court we have been informed, and although judgment be thereupon given, which he avers still remains in full force and effect, in no wise set aside, reversed, paid off or satisfied, yet execution of the said damages and costs aforesaid still remains to be made to him; whereof the said A..... B..... hath besought us to provide him a proper remedy, in this behalf; and being willing that the things which are just in this behalf should be done,

WE DO THEREFORE COMMAND YOU that you make known to the said C..... D.....† that he be before our said Circuit Court of county on the first day of the next term thereof, to be holden at the court house in in said county, on the day of next, to show if he has or knows of anything to say for himself, why the said A..... B..... ought not to have execution against C..... D..... of the damages and costs aforesaid, according to the force, form and effect of the said recovery, if it shall seem expedient for him so to do; and further to do and receive what our said court shall then and there consider of him in this behalf.

And have you then and there this writ, with an indorsement hereon in what manner you shall have executed the same.

Seal of
the Court.

Witness O..... P....., Clerk of our said Court, and the Seal thereof at aforesaid, this day of A. D.

O..... P....., Clerk.

§ 1164. Same—To revive an execution after seven years.

—It is necessary to proceed by *scire facias* seven years after judgment becomes a lien, to revive it to the extent that an execution may be issued thereon; but real estate levied upon within said seven years may be sold upon *venditio rei exponsa*, at any time within one year after the expiration of said seven years.¹

tained by reason of the trespass and ejection aforesaid."

In ejection if the judgment was against the ejector, or if the *scire facias* be against him, etc., the Sheriff should be commanded to make known to the said C..... D....., as shown to the † "and also to

and, the tenants of the tenements, aforesaid that they be, etc., to show, if they have or know, or if either of them has or knows of anything to say for themselves or himself why," etc.

¹ Rev. Stat., Chap. 77, § 6, § 6; see ante, § 1003.

The reason assigned why a plaintiff is put to his *scire facias* after a specified time is because "when he lies by so long after judgment it shall be presumed that he hath released the execution; and therefore the defendant shall not be disturbed without being called upon, and having an opportunity in court of pleading the release, or showing cause, if he can, why the execution should not go."¹

§ 1165. (c) To make defendants not served with process parties to a judgment.—It is provided by statute in this State that where a summons or *capias* is served, on one or more, but not all of the defendants, the plaintiff may proceed to trial and judgment against the defendant or defendants, on whom the process is served, and the plaintiff may, at any time afterwards, have a summons, in the nature of a *scire facias*, against the defendant, not served with the first process, to cause him to appear in said court, and show cause why he should not be made a party to such judgment; and upon such defendant being duly served with such process, the court shall hear and determine the matter in the same manner as if such defendant had been originally summoned or brought into court, and such defendant shall also be allowed the benefit of any payment or satisfaction which may have been made on the judgment before recovered, and the judgment of the court against such defendant shall be that the plaintiff recover against said defendant, together with the defendant in the former judgment, the amount of this debt or damages, as the case may be.²

A return *non est inventus* to a summons is not necessary before the issuance of a writ of *scire facias* to make persons parties to a judgment. Such a return is not a requirement of the statute.³

This *scire facias* is considered as a summons and nothing more.⁴ It may issue *instantly* upon the obtaining of the judgment against the other defendant or defendants.⁵ And

¹ 2 Tidd's Pr., 1103; 2 Inst., 470.

² Rev. Stat., Chap. 110, ¶ 10, § 9.

³ Berry v. Krone, 46 Ill. App., 82.

⁴ Courson v. Hickson, 78 Ill., 339.

⁵ Johnson v. Buell, 26 Ill., 66.

no permission of court is necessary in order that it may be sued out.'

NO. 380.—FORM OF WRIT OF SCIRE FACIAS TO MAKE PARTY TO A JUDGMENT.

STATE OF ILLINOIS, }
..... County. } ss.

The People of the State of Illinois,
To the Sheriff of said county, Greeting:—

Whereas, at the term of the Circuit Court of county held in and for the county of, State of Illinois, to wit, on the day of, A. D., before the said court then judicially sitting at the court-house in in said county, A. B. plaintiff, by the judgment and consideration of our said court, recovered a judgment in a certain plea of (*state according to the cause of action set forth in the declaration*) then pending in said court against C. D. who was impleaded with E. F. for the sum of dollars damages and the costs of suit, which judgment still remains in full force, and unsatisfied as to the said C. D.; and whereas at the time of the rendition of the judgment the defendant E. F. has not been found, as appears upon the process issued against the said defendant therein, so that judgment could not be entered against him, together with the said C. D. for the said damages and costs.

WE DO THEREFORE HEREBY COMMAND YOU, that you summon the said E. F., if he shall be found in your county, personally to be and appear before the said Circuit Court in county on the first day of the next term thereof to be holden at the court-house in in said county on the day of next, to show cause, if any he have, why he shall not be made a party to said judgment.²

And have you then and there this writ, with your return thereon in what manner you shall have executed the same.

Seal of
the Court.

Witness O. P., Clerk of our said Circuit Court and the seal thereof, at in said County this day of A. D.

O. P., Clerk.

¹ Tiffany v. Breese, 4 Ill., 499;
Ryder v. Glover, 3 Scam. (Ill.), 547.

Proof of case de novo—When necessary.—When heirs are sought to be brought into court by *scire facias* to show cause why they should not be made parties to a judgment it is necessary to prove the case *de novo* against them. Cox v. Reed, 27 Ill., 434.

² If more than one defendant is being brought in by *scire facias*, the writ should here contain the words "if they or each of them can show why he should not be made a party to the said judgment; and further to do and receive what our said court shall then and there adjudge in the premises."

*An attachment may be sued out in aid of the scire facias issued to make new parties to a judgment against any one or all persons now in such scire facias, to any county of this State, upon the terms provided in the attachment act; and the parties in such writs of attachment may be brought in by notice as in other cases of attachment when personal service cannot be had.*¹

¹ Rev. Stat., Chap. 11, ¶ 32, § 32; Rider v. Glover, 3 Scam. (Ill.), 547; ante, Vol. I, § 352.

A new party's defense must be a good defense against the former judgment, and not against the note or account on which it was founded. A plea of non assumpsit, non est factum, or nil debit is irrelevant. Harrison v. Hart, 21 Ill. App., 348.

Scire facias to make persons parties to a Justice's judgment.—The scope of this work has been to treat only of the practice in courts of record, but it is thought best to include here the proceedings by *scire facias* to make persons parties to a judgment obtain in a Justice's Court. It is provided by statute that if any summons or *capias* is served on any one or more, but not all of the defendants, the plaintiff shall be at liberty to proceed to trial and judgment in the same manner as if all the defendants were in court, and judgment may be entered and execution issued against the defendant served with process. And the Justice of the Peace shall, on the application of the plaintiff, issue another summons, in the nature of a *scire facias*, against the defendant or defendants not served with the original process, as aforesaid, to cause him or them to appear before said Justice of the Peace, at some stated time, not less than five nor more than fifteen days from the date of such *scire facias*, to show

cause why he or they should not be made parties to said judgment. And the Justice of the Peace shall, on return, showing service of such *scire facias*, at least three days previous to the time fixed for hearing the same, proceeding to hear and determine the matter in the same manner as if such defendant or defendants had been originally served with process, and may grant continuance as in other cases. Rev. Stat., Chap. 79, ¶ 45, § 10.

Form of writ.—The *scire facias* issuing from a Justice's court shall be substantially in the following form:

State of Illinois, } ss.
County of..... }

The People of the State of Illinois,
To any Constable of said County,
Greeting:

Whereas, A..... B..... did, on the..... day of....., A. D., recover a judgment before the undersigned, one of the Justices of the Peace of, in, and for the county aforesaid, against C..... D..... impleaded with E..... F..... for the sum of....., as well as the costs of suit. You are therefore, hereby commanded to summon the said E..... F....., to be and appear before the undersigned at his office in....., in said county on the..... day of....., A. D., at..... o'clock..... M., to show cause, if any he have, why he shall not be made a party to said

§ 1166. (d) **To collect special assessments.**—The statute in giving to cities and villages the power to make special assessments for improvements and to collect the same by suit, provides also that the court in which such proceedings were had may, upon complaint of the city or village, issue a *scire facias* against the person or persons liable for such payment, to show cause why execution should not issue against him or them, for the amount of such assessment; and if, upon the return of such *scire facias*, good cause is not shown why execution shall not issue, the court may award execution against such person or persons in the usual form of execution upon judgments at law.¹

§ 1167. (e) **To try legal existence of corporation.**—Proceedings by *scire facias* is competent to try the legal existence of a pretended corporation;² but the usual proceeding to try the legal existence of a corporation is by *quo warranto*,³ or some other direct procedure. It cannot be done by *mandamus*.⁴

judgment, and make due return hereof, as the law directs.

Given under my hand, this.....
day of....., A. D.....

....., J. P.

Rev. Stat., Chap. 79, ¶ 46, § 11.

Trial on scire facias before Justice of the Peace.—On the hearing of such *scire facias* the plaintiff shall be held to prove his cause of action against such added defendant or defendants, as if no judgment had been entered, and such defendant or defendants shall be allowed the benefit of any payment which may have been made on the judgment before recovered; and the judgment of the court, if against the defendant or defendants, shall be that the plaintiff recover of such defendant or defendants, together with the defendant in the former

judgment, the amount of his debt or damages, as the case may be; and on such judgment, execution may issue against all of the defendants, as in other cases. The judgment shall not be for a greater amount than the original judgment, and interest thereon, from the time of rendering the same. Rev. Stat., Chap. 79, ¶ 47, § 12.

¹ Rev. Stat., Chap. 24, ¶ 166, § 52.

² *People v. School Trustees*; 111 Ill., 171.

³ *Renwick v. Hall*, 84 Ill., 162; *Mendotta v. Thompson*, 20 Ill., 197; *Williams v. Bank of Illinois*, 1 Gilm. (Ill.), 667.

⁴ As to proceedings in the nature of a *quo warranto* to test the legal existence of a pretended corporation, see *ante*, § 1125.

§ 1168. (f) **Against bail.**—It is especially provided by statute in this State that proceedings by *scire facias* against bail in civil cases shall not be allowed in any court of record,¹ except possibly in cases of appeal from Justice's Courts in certain cases as will be made to appear in the next succeeding section.² The scope of this work has hereinbefore been limited to civil cases in courts of record, but in order to make this article complete it is deemed best to include the proceeding by *scire facias* against bail in criminal cases, inasmuch as the proceeding itself is not a criminal proceeding.

The statute provides that when any person who is accused of any criminal offense, shall give bail for his appearance and such person does not appear in accordance with the terms of the recognizance, the court shall declare such recognizance forfeited, and the Clerk of the court shall thereupon issue a *scire facias* against such person and his sureties for the payment of the recognizance, which *scire facias* shall be served by the Sheriff of the county where the court is held, upon such person and his sureties, by reading the same to the defendants named in such *scire facias*, at least five days before the first day of the term to which the same is returnable; and in case the person aforesaid cannot be found by the Sheriff, he shall make return of that fact to the court. The court shall, thereupon, enter judgment by default against the defendants for the amount of the recognizance, unless defendants shall appear and defend such cause; and if the defendant shall appear and interpose a defense, then the cause shall be tried in the same manner as other causes of like nature, after any such recognizance shall be declared forfeited, as aforesaid. Before judgment, the court may, in its discretion, set aside such forfeiture, upon the accused being brought or coming into court, and showing to the court, by affidavit, that he was unable to appear in court according to the terms of the recognizance, by reason of sickness or some other cause, which

¹ Rev. Stat., Chap. 16, ¶ 25, § 25.

² *Scire facias against bail* in civil cases in a Justice's Court is especially provided for by statute

and the form of the writ is given therein. Rev. Stat., Chap. 79, ¶ 31, § 6.

shall satisfy the court that the accused had not been guilty of any laches or negligence; *Provided*, no such forfeiture of a recognizance shall be set aside until the accused shall pay the costs of such recognizance.¹

NO. 381.—FORM OF WRIT OF SCIRE FACIAS AGAINST BAIL.²

STATE OF ILLINOIS, }
County. } ss.

The People of the State of Illinois,
 To the Sheriff of said County, Greeting:—

Whereas, C..... D....., E..... F....., and G..... H....., heretofore to wit, on, in their own proper persons came into our said court, (or before, naming the officer who took the bail) and then and there jointly and severally acknowledged themselves to be indebted to us, in the sum of dollars to be levied upon their respective goods, chattels, lands and tenements, as the law directs; yet upon the condition that if the said C..... D..... who (here include the condition named in the bond) as by the record of the said recognizance still remaining in our said court more fully appears; and although afterwards to wit in the term of our said court in, such proceedings were thereupon had in our said court, in that behalf that the said C..... D..... was three times solemnly called in open court, but came not and therein made default and the said E..... F..... and G..... H..... were each then and there likewise three times solemnly called and required to bring into court the body of C..... D....., and yet they, the said E..... F..... and G..... H..... therein also made default and failed to bring into court the body of the said C..... D..... and thereupon it was then and there considered and adjudged by order of said court the said recognizance should be taken for and declared forfeited and the writ of *scire facias* should issue in that behalf against the said C..... D....., E..... F..... and G..... H..... as by the record and proceedings thereof remaining in our said court more fully appears.

WE DO THEREFORE HEREBY COMMAND YOU that you summon the said C..... D....., E..... F....., and G..... H....., that they be before our said court at the court-house in in said county on the day of, to show if they have or know, or if either of them has or knows, of anything to say for themselves or himself, why execution should not be awarded against them upon said recognizance so declared forfeited as aforesaid for the sum of money therein mentioned.

And have you then and there this writ with an indorsement thereon in what manner you shall have executed the same.

Witness O..... P....., Clerk of our said court, and the Seal thereof, at aforesaid, this day of, A. D.

O..... P....., Clerk.

Seal of
 the Court.

¹ Rev. Stat., Chap. 38, ¶ 310, § 17. *facias* on a forfeited recognizance

² As a model for a writ of *scire* to appear before a Justice of the

To comply with the statute it is necessary that a judgment of forfeiture should be entered before the *scire facias* is sued out. Such judgment or forfeiture is not a judgment for a sum of money, but, nevertheless, it is a judgment and a prerequisite to the suing out of a *scire facias* to call the sureties to show why judgment should not be awarded against them for a sum of money equal to the amount of the recognizance and the same to be followed by execution.¹

The *scire facias*, filling the office both of a process and a declaration, it is necessary to show by proper averments that the recognizance was taken by virtue of an order of court,² upon an indictment of the principal by the grand jury at the term of the court named in the recognizance,³ and that the recognizance and the forfeiture thereof has become a matter of record.⁴ A recognizance taken by a Judge at chambers does not become a record upon which a *scire facias* may issue until it is properly certified and filed.⁵ Furthermore, the averments, as to the conditions of the recognizance must not vary from the terms of the recognizance itself.⁶ The rules regarding variance in the averments of declaration will apply.⁷

In defense, the sureties on the recognizance may show that their principal has surrendered himself,⁸ or any matter or condition that will release them from their obligation. They cannot, however, plead duress of their principal, in discharge of his liability;⁹ nor that their principal was a soldier. Soldiers are not exempt from punishment by the state courts for a violation of its criminal laws.¹⁰

The sureties may, on motion, before final judgment on *scire*

Peace, see form given in Gengrich v. People, 34 Ill., 448. For further forms in *scire facias*, see Van Blaricum v. People, 22 Ill., 86; Vancil v. People, 16 Ill., 120.

¹ Mix v. People, 29 Ill., 196; Conner v. People, 20 Ill. 381; People v. Watkins, 19 Ill., 117; Brown v. People, 24 Ill. App., 72.

² Reese v. People, 11 Ill., 346.

³ People v. O'Brien, 41 Ill., 303.

⁴ Landis v. People, 39 Ill., 79; Campbell v. People, 22 Ill., 234; Shadley v. People, 17 Ill., 252.

⁵ Raysor v. People, 27 Ill., 190.

⁶ Reese v. People, 11 Ill. App., 346.

⁷ Ante, Vol. I, § 487.

⁸ Walton v. People, 28 Ill. App., 645.

⁹ Huggins v. People, 39 Ill., 241.

¹⁰ Huggins v. People, 39 Ill., 241.

facias show that they were unable without their fault and by the act of God to surrender their principal and be exonerated and discharged by the court, with or without costs, as the court may deem equitable.¹

No final judgment can be entered against both principal and bail, where the principal has not been served, unless his appearance has been entered, or unless other statutory provisions have been complied with, which will make him liable on default.²

§ 1169. (g) **Against sureties on bond of appeal from Justice's Court.**—The provisions of the statute in this regard, as here given, are according to the act relating to Justices, as it existed prior to the revision of the same in 1895. This particular section of the statute is omitted from the revision of 1895 and inasmuch as there is doubt at the present time whether the same was intentionally omitted and for that reason repealed, or whether the same was intended to continue because of not being specifically repealed, the same is herein given to be available or not according to some future decision of a competent court in this regard.

The statute provides that where an appeal has been taken from the judgment of a Justice of the Peace and the appeal is dismissed for want of prosecution, or the court is satisfied that the appeal was prosecuted for the purposes of delay, the court to which the appeal is taken is empowered by statute to render judgment against the appellant, at the election of the appellee for the amount of the judgment from which the appeal is taken, together with damages, not exceeding ten per cent on the amount of the judgment. And thereupon the appellee shall be entitled to a *scire facias* against the sureties on the appeal bond in such case, and such writ of *scire facias* shall be made returnable at the next succeeding term of said court, and if served ten days before the commencement of such term, and unless sufficient cause be shown by such sureties, the court shall render judgment against such

¹ Rev. Stat., Chap. 38, ¶ 312, § 19.

² *Lytle v. People*, 47 Ill., 422.

sureties for the amount of the judgment rendered against their principal.¹

NO. 382.—FORM OF WRIT OF SCIRE FACIAS AGAINST SURETIES
ON A BOND OF APPEAL FROM JUSTICE'S COURT.

STATE OF ILLINOIS, }
..... County. } ss.

The People of the State of Illinois.

To the Sheriff of said County, Greeting:—

Whereas, at the term of the Court of county, held in and for the county of, State of Illinois, to wit: On the day of, A. D., before the said court, then judicially sitting at the court house in, in said county, A..... B....., plaintiff by the judgment and consideration of our said court, recovered a judgment for dollars against one C..... D..... in an action brought to this court by appeal by said defendant from the judgment of I..... J....., Justice of the Peace in and for said county; which said judgment still remains in full force and unsatisfied, and unpaid, in whole or in part. And whereas at the time of taking the said appeal, and before the rendition of said judgment in this court, the said defendant, C..... D....., did, on, to wit, the day of, A. D., file in said court in this cause, a bond in the penal sum of dollars, conditioned among other things to pay whatever judgment might be rendered against the said defendant, C..... D....., by the court, upon the trial of said appeal and all costs that have been made, before said Justice, and all costs occasioned by said appeal, executed by C..... D....., as principal and E..... F....., as surety.

WE DO THEREFORE HEREBY COMMAND YOU that you summon the said C..... D....., if he shall be found in your county, personally to appear before said court of county on the first day of the next term thereof, to be holden at the court house in in said county on the day of, A. D., to show if he has or knows anything to say for himself, why judgment should not be rendered against him for the amount of the aforesaid judgment, and costs so heretofore rendered against the defendant C..... D....., and further to do and receive what our said court shall then and there consider of him in this behalf.

And have you then and there this writ with your return thereon, in what manner you shall have executed the same.

Seal of
the Court.

Witness O..... P....., Clerk of our said court,
and the seal thereof, at at said county this
..... day of, A. D.

O..... P....., Clerk.

¹ Rev. Stat., Chap. 79, ¶ 181, § 71.

§ 1170. (h) **Against a garnishee.**—The statute in relation to garnishment provides that if the garnishee shall fail to appear and make discovery, as required, the court or Justice of the Peace, may enter a conditional judgment against the garnishee for the amount of the plaintiff's demand (the judgment against the original defendant), and thereupon a *scire facias* shall issue against such garnishee, returnable, if the proceedings be in a court of record, at the next term of court, or if before a Justice of the Peace, within the same time as other summons from Justices of the Peace commanding such garnishee to show cause why such judgment should not be made final.¹

If the garnishee shall become a nonresident, or shall have gone out of this State, or is concealed within this State so that the *scire facias* cannot be served upon him, upon the plaintiff or his agent filing affidavit, as in cases of non-resident defendants in attachment, such garnishee may be notified in the same manner as such nonresident defendants, and upon such notice being given he may be proceeded against in the same manner as if he had been personally served with such *scire facias*.²

If the garnishee, being served with the process or notified as above directed, shall fail to appear and make discovery in the manner required by law, the court or Justice of the Peace, shall confirm such judgment to the amount of the judgment against the original defendant and award execution for the same and costs. If such garnishee shall appear and answer, the same proceedings may be had as in other cases.³

¹ Rev. Stat., Chap. 62, ¶ 8, § 8.

² Rev. Stat., Chap. 62, ¶ 8, § 8;

³ Rev. Stat., Chap. 62, ¶ 9, § 9; *Ante*, Vol. I, § 338.

Williams v. Vanmeter, 19 Ill., 293; *Cariker v. Anderson*, 27 Ill., 358.

NO. 388.—FORM OF WRIT OF SCIRE FACIAS AGAINST A GARNISHEE.

STATE OF ILLINOIS, }
County. } ss.

The People of the State of Illinois.
 To the Sheriff of said County, Greeting:—

Whereas, at the term of Court of county in the year, A. D., judgment was rendered in and by said court against C..... D....., defendant, in favor of A..... B..... plaintiff, for the sum of dollars, and E..... F..... having been duly summoned as garnishee of the said defendant and the same having been solemnly called and failed to appear, and discover on oath or affirmation what lands, tenements, goods, chattels, moneys, credits and effects of the said defendant, were in his custody, charge or possession, or under his control, or what moneys or property were by him owing to said defendant, as required by law, a conditional judgment for the above named amount was by said court rendered against said garnishee, and this writ ordered to be issued.

NOW THEREFORE WE COMMAND YOU that you summon the said E..... F....., as aforesaid, personally to be and appear before the said Court of county, on the next term thereof, to be holden at the court house in at said county on the day of next, then and there to show, if he has or knows anything to say for himself, why judgment should not be entered against him upon due execution and return of this writ.

And have you then and there this writ with endorsement thereon, in what manner you shall have executed the same.

{ Seal of
the Court. }

Witness O..... P....., Clerk of our said court,
 and the seal thereof at at said county, this ...
 day of A. D.

O..... P....., Clerk.

§ 1171 (i) To foreclose a mortgage.—The proceedings to foreclose a mortgage by *scire facias* are not according to the common law, but special and statutory. The writ performs the office of both a summons and a declaration.¹ The averments of a sufficient cause of action must be made in the writ as prescribed and no declaration need be filed.²

The statute provides that if default be made in the payment of any sum of money secured by mortgage on lands and tenements, duly executed and recorded, and if the payment be by installments and the last shall have come due, it shall be law-

¹ Ante, § 1162.

² Rev. Stat., Chap. 110, ¶ 27, § 26.

ful for the mortgagee, his assigns, on his or their executors or administrators, to sue out a writ of *scire facias* from the Clerk's office of the Circuit Court of the county in which the said mortgaged premises may be situate, or any part thereof, directed to the Sheriff or other proper officer, of any county or counties where the defendants, or any of them, may reside or be found, requiring him to make known to the mortgagor, or, if he be dead, to his heirs, executors, or administrators, to show cause, if any they have, why judgment should not be rendered for such sum of money as may be due by virtue of said mortgage; and upon the appearance of the party named as defendant in said writ of *scire facias*, the court may proceed to judgment as in other cases, but if said *scire facias* be returned *nihil*, or that the defendant is not found, an alias *scire facias* may be issued.¹ The persons to be made parties in a proceeding by *scire facias* to foreclose a mortgage is governed by the rules controlling actions at law.² The proceeding may be begun in the name of the mortgagee himself and if the mortgage has been assigned a proceeding may be brought in the name of the mortgagee for the use of the assignee.³ The statute provides that the proceedings may be against the mortgagor, or, if he be dead, against his heirs, or executors. If the proceeding be begun against the executor or administrator, the heirs of the deceased mortgagor are not necessary parties.⁴

NO. 384.—FORM OF A WRIT OF SCIRE FACIAS TO FORECLOSE A MORTGAGE.⁵

STATE OF ILLINOIS, }
County. } ss.

The People of the State of Illinois,
 To the Sheriff ofCounty, Greeting:—

Whereas, A B by R S his attorney, has filed in the Clerk's office of ourCourt, in and for the said county,

¹ Rev. Stat., Chap. 95, ¶ 17, § 17.

⁴ Rockwell v. Jones, 21 Ill., 279.

² Ante, Vol. I, §§ 12, 26, 33 and 41.

⁵ Compare Woodbury v. Manlove,

³ Winchell v. Edwards, 57 Ill., 41;

14 Ill., 212; Mitcheltree v. Stewart,

Camp v. Small, 44 Ill., 37; Bourland

2 Scam. (Ill.), 17.

v. Kipp, 55 Ill., 376.

a certain deed of mortgage, which said deed of mortgage is duly executed and recorded in the recorder's office in and for the said county and State, according to the statute in such case made and provided, which said deed of mortgage is in the words and figures following, to wit (*the mortgage may be here set out in hæc verba* ¹ *or the recitals of the mortgage, acknowledgment, etc., may be set forth in substantial averments.*)

And whereas, by virtue of the said deed of mortgage and the conditions therein contained, and according to the tenor and effect of the promissory notes and obligations in said condition recited, it appears that C..... D..... is indebted upon the said deed of mortgage to the said A..... B..... in the sum of.....dollars, together with interest thereon at the rate of.....per cent., according to the tenor and effect of said notes and accounts and according to the provision of the statute in such case made and provided; and that the said C..... D..... has wholly failed to pay the said sum, or any part thereof, according to the tenor and effect of said deed of mortgage and the notes and obligations therein recited, although often requested so to do.

And whereas, A..... B....., by R..... S....., his attorney, has filed in said Clerk's office a præcipe directing a writ of *scire facias* to be issued upon said deed of mortgage against the said C..... D....., directed to the Sheriff of.....county aforesaid, returnable to the next term of our said court.

WE DO THEREFORE HEREBY COMMAND YOU to summon the said C..... D....., if he shall be found in your county, personally to be and appear before the said.....court of.....county on the first day of the next term thereof, to be holden at the courthouse in....., in said county on the.....day of.....next, then and there to show, if he has or knows of anything to say for himself, why judgment should not be rendered against him in favor of the said A..... B....., upon the deed of mortgage aforesaid for the said sum of.....dollars, together with the interest, as aforesaid, which appears to be due and owing to him by virtue of the said deed of mortgage and the conditions therein contained and according to the tenor and effect of the notes and obligations therein mentioned and expressed.

And have you then and there this writ, with your return hereof, in what manner you shall have executed the same.

{ Seal of
the Court. }

Witness O..... P....., Clerk of our said court,
and the seal thereof at in said county,
this day of, A. D.

O..... P....., Clerk.

¹ It is well to include an averment out it. *Micheltree v. Stewart*, 2 of an acknowledgment and record, *Scam. (Ill.)*, 17. although the writ will be good with-

§ 1172. **Same—No declaration need be filed—Form of scire facias.**—The writ of *scire facias* in proceedings to foreclose a mortgage, like in other proceedings, performs the office of both a summons and a declaration.¹ Therefore, no declaration need be filed in the cause;² but the averments constituting the cause of action must be set forth in the *scire facias* itself.³ It is sufficient to set out a copy of the mortgage with a certificate of acknowledgment and of record annexed after averring that the mortgage was acknowledged or recorded, or averring that default had been made in the payment of the money mentioned therein, where it appears from the mortgage that the money was to have been paid before the issuing of the writ.⁴

§ 1173. **Same—Service of the writ—Publication.**—Upon the *scire facias* being sued out it is to be delivered to the proper officer for service and the presumption of the law is that it is delivered to the officer when issued.⁵

A writ of *scire facias* should be served personally upon the defendant.⁶ But where, for some reason, personal service cannot be made, the statute has provided substitution of service by publication as follows:

If the defendant is a nonresident, or hath gone out of the state, or on due inquiry cannot be found, or is concealed within the state, or evades the service of process, the plaintiff or his attorney may file affidavit in the same form as in like cases in chancery and notice to the defendant may be given by publication and mail in the same manner as provided by statute for notice in like cases in chancery.⁷

¹ *McFadden v. Fortier*, 20 Ill., 509; ante, § 1162.

² Rev. Stat., Ch. 110, ¶ 27, § 26.

³ *Osgood v. Stevens*, 25 Ill., 89.

⁴ *Mitchell v. Stewart*, 2 Scam. (Ill.), 17.

⁵ *Chickering v. Failes*, 26 Ill., 507.

⁶ *McCourtie v. Davis*, 7 Ill., 298.

⁷ Where a husband and wife endorse upon the writ their written acknowledgment and pray the

court to enter their appearance accordingly, service is of undoubted sufficiency. *Russell v. Brown*, 41 Ill., 183.

¹ Rev. Stat., Chap. 95, ¶ 18, § 18; Rev. Stat., Chap. 110, ¶ 27, § 26.

The service of a *scire facias* may be made by a special deputy who has not taken an official oath, but the statute requires that a return of a writ made by a special deputy

A return of the writ of *scire facias* to foreclose a mortgage must show upon whom it was served or it will not support a default judgment.¹

§ 1174. Same—Defenses to the proceeding.²—A proceeding to foreclose a mortgage by *scire facias* is strictly a proceeding at law governed by the rules and practice of the common law, and not by equity rules.³ A party is not compelled to foreclose his mortgage in equity.⁴ But all the requirements of the statute must be complied with, or the court will not get jurisdiction. For example a court depends for its jurisdiction upon the mortgage having been given to secure the payment of money and not merely to secure the delivery of property, or the performance of some other act;⁵ upon the entire amount of the mortgage being due;⁶ and upon the mortgage being duly executed and recorded.⁷ If it is not duly acknowledged it cannot be foreclosed by *scire facias*.⁸ Pleas of *non est factum* and *nul tiel record* will put in issue only the

shall be verified by his affidavit. This is the only oath which the special deputy is required to take. *Coursen v. Hixon*, 78 Ill., 339.

A *scire facias* not served until after the return day is void. *Hitchcock v. Haight*, 2 Gilm. (Ill.), 603.

¹ *Belingall v. Gear*, 4 Ill. (3 Scam.), 575. Further as to what constitutes a sufficient return, see *Rockwell v. Jones*, 21 Ill., 279.

² The defendant may plead or set-off in defense, and be allowed to set-off any demand in his favor, in the same manner, and the same rule shall apply thereto, as if the suit were in any other form of action. *Rev. Stat.*, Chap. 95, ¶ 20, § 20.

³ *Chickering v. Failes*, 26 Ill., 507; *Tucker v. Conwell*, 67 Ill., 552.

⁴ *Cottingham v. Springer*, 88 Ill., 90.

⁵ *McCumber v. Gilman*, 13 Ill., 542.

The fact that the mortgagor was primarily liable for only a part of

the debt secured by the mortgage, and as to the residue, his liability was merely secondary and could only accrue in the event of nonpayment by other parties and notice will not prevent the mortgage from being foreclosed by *scire facias*. *Russell v. Brown*, 41 Ill., 183.

⁶ *Carroll v. Ballance*, 26 Ill., 9; *Osgood v. Stevens*, 25 Ill., 89.

The fact that the last installment is due and unpaid should be averred in the petition. *Osgood v. Stevens*, 25 Ill., 89.

If only an installment is due some other remedy must be employed. *Carroll v. Ballance*, 26 Ill., 9.

⁷ *Alvis v. Morrison*, 63 Ill., 181.

⁸ *Kenosha, etc., R. R. Co. v. Sperry*, 3 Biss. (U. S.), 309.

If the mortgage has been assigned it is not necessary that the assignment should have been acknowledged. *Honore v. Wilshire*, 109 Ill., 103.

execution and registry of the mortgage.¹ No defense can be interposed except those showing that the mortgage never was a valid lien or that it has been discharged or released.² The proceeding is not an "action" in such sense as to permit a plea of usury to be interposed under the statute relating to usury.³

§ 1175. Same—Judgment.—If the defendant appear and plead, or set up any defense, or make default, after having been served with *scire facias*, or notified as aforesaid, the court may proceed to give judgment with costs for such sum as may be due by said mortgage, or appear to be due by the pleadings, or after the defense, if any be made.⁴

The proceedings by *scire facias* to foreclose a mortgage are purely proceedings *in rem*. Therefore a personal judgment cannot be entered against the mortgagor, nor will the judgment entered create a lien upon any other property than that included in the mortgage. The judgment on *scire facias* must be a judgment *in rem*.⁵

The purchaser cannot maintain a possessory action until the foreclosure is complete and the time of redemption has expired; because until that time the relation of mortgagor and mortgagee has not terminated.⁶ However, a foreclosure by *scire facias* cuts off all right of redemption except that given by the statute.⁷

A judgment of foreclosure on *scire facias* and sale of the premises cannot be collaterally attacked by a stranger, nor can it be defeated by errors and irregularities in the proceedings which do not affect the jurisdiction of the court.⁸

§ 1176. Same—Special execution—Lien.—The mortgaged premises may be sold to satisfy any judgment the Sheriff in

¹ Woodbury v. Manlove, 14 Ill., 213; Fitzgerald v. Forrestal, 48 Ill., 228.

² Carpenter v. Moers, 26 Ill., 162; White v. Watkins, 23 Ill., 480.

³ Carpenter v. Moers, 26 Ill., 162.

⁴ Rev. Stat., Chap. 95, ¶ 19, § 19.

⁵ Woodbury v. Manlove, 14 Ill.,

213; McFadden v. Fortier, 20 Ill., 509; White v. Watkins, 23 Ill., 480; Osgood v. Stevens, 25 Ill., 89; State Bank v. Wilson, 9 Ill., 57.

⁶ Rockwell v. Servant, 63 Ill., 424.

⁷ Matteson v. Thomas, 41 Ill., 110.

⁸ McCormick v. Boer, 122 Ill., 573; Swiggart v. Harber, 5 Ill., 364.

such action may recover, and the court may award a special writ of *fiery facias* for that purpose, to the county or counties in which said mortgaged premises may be situate, and on which the like proceedings may be had as in other cases of execution levied upon real estate; *provided, however*, that the judgment aforesaid shall create no lien on any other lands or tenements than the mortgaged premises, nor shall any other real or personal property of the mortgagor be liable to satisfy the same; but nothing herein contained shall be so construed as to affect any collateral security given by the mortgagor for the payment of the same sum of money, or any part thereof, secured by the mortgaged deed.

§ 1177. Pleadings in *scire facias* proceedings generally.

—No declaration is generally required in this state in proceeding by *scire facias* for the reason that the writ answers the purpose not only of a summons, but of a declaration as well.¹

While a proceeding by *scire facias* is not considered to be an “action” in all its phases, yet it is generally considered to be in so much an action, that, where the defenses are not specially prescribed by the statute of the state, the defendant may be governed by the practice under the common law and old English statutes, which have become a part of the common law in this State.²

In proceedings by *scire facias* on a recognizance a plea of *nul tiel record* is a good and sufficient plea; but the plea of *nul tiel recognizance* is insufficient.³ Likewise a plea that the prisoner died after the forfeiture and before judgment on *scire facias* issued thereon may be pleaded by the sureties.⁴ So, too, a plea that the prisoner was dead at the time he should have been produced is a good defense;⁵ but to be a good plea

¹ Rev. Stat., Ch. 95, ¶ 21, § 21; *ante*, § 1175.

² *Reitzel v. People*, 72 Ill., 416; *Connor v. People*, 20 Ill., 481; see *ante*, § 1163, “To Revive a Judgment,” and *ante*, § 1171, “To Foreclose a Mortgage.”

³ 2 Tidd's Pr., 1128-1131.

⁴ *Mooney v. People*, 81 Ill., 134.

⁵ *Mather v. People*, 12 Ill., 9.

⁶ *Mix v. People*, 26 Ill., 481.

it must state the time of the death of the prisoner.¹ And the burden is upon the defendant under such a plea to establish the death of the principal.²

A surety or sureties cannot plead duress of the principal.³

NO. 385.—FORM OF PLEA OF NUL TIEL RECORD IN SCIRE FACIAS.⁴

IN THE COURT OF COUNTY.

A.....	B.....,	} <i>Scire facias.</i>
vs.		
C.....	D.....	

And the said C..... D....., by V..... W....., his attorney, (or "in his own proper person" if he appears in person), comes and defends, etc.,⁵ and says that the said A..... B..... ought not to have his execution against the said C..... D..... or the (damages), costs and charges aforesaid because he says* that there is no such record of recovery against him, the said C..... D....., at the suit of A..... B....., in manner and form as the said A..... B..... has complained against him, and this he is ready to verify, wherefore he prays judgment if the said A..... B..... ought to have his execution aforesaid, etc.

V..... W....., his attorney.⁶

NO. 386.—FORM OF PLEA OF PAYMENT IN SCIRE FACIAS.

(Proceed as in preceding Form to *.)

That the said C..... D....., after the recovery aforesaid, and before the issuing of the said writ, to wit, on, paid to the said A..... B....., the sum of dollars in full satisfaction and discharge of the said judgment and this he is ready to verify, wherefore, etc.

(Conclude as above.)

¹ People v. Watkins, 19 Ill., 117.

² People v. Meacham, 74 Ill., 292;
See further as to defenses to *scire facias* against bail, *ante*, § 1168.

³ Huggins v. People, 39 Ill., 241.

⁴ As to the general rules of law

governing pleas and the forms thereof, see *ante*, Vol. I, §§ 651-720.

⁵ As to "Full Defense," here omitted, see *ante*, Vol. I, § 669.

⁶ Further as to pleas in general, see *ante*, Vol. I, § 651.

NO. 387.—FORM OF PLEA OF DEATH IN SCIRE FACIAS.

(Proceed as in No. 385, to *)

That the said E. F. in the said judgment mentioned before the issuing of the said writ of *scire facias* (or before the entry of judgment, or "at the time he should have been produced died" or "was dead") which said death occurred, to wit, on at and this he is ready to verify, wherefore, etc.

(Conclude as in ante, No. 385.)

§ 1178. Judgment in *scire facias* proceedings generally—**Damages—Costs.**—No damages were recoverable in *scire facias* at law for delay of execution and the parties were secondly not entitled to costs until the statute 8 and 9 William III, Ch. 11, § 3, upon which our own statute is modelled.¹ The statute of this State provides that "in all suits upon any writ of *scire facias*, the plaintiff obtaining judgment, or an award of execution, after plea pleaded, or demurrer joined therein, shall recover his costs of suit. If the plaintiff shall be nonsuited, nonpros'd, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs."² It must be remembered, however, that no costs can be recovered against executors or administrators prosecuting in the right of their testator or intestate.³

The form of the judgment in *scire facias* on an appeal bond should not be for a sum of money, but that the plaintiff have execution for the amount of the judgment and costs in the case appealed as recited in the writ of *scire facias*.⁴ The judgment record in *scire facias* proceedings, where there is no bill of exceptions, consists of the writ, the plea, the verdict of the jury where the case is tried by jury, or the finding of the

¹ The English statute provided "that in all suits upon any writ or writs of *scire facias* the plaintiff obtaining an award of execution after plea pleaded, or demurrer joined therein, shall recover his costs of suit; and if the plaintiff shall become nonsuited, or suffer a discontinuance; or a verdict shall pass against him, the defendant shall recover his costs and

have execution for the same by *capias ad satisfaciendum, fieri facias, or elegit*" with a provision that the statute shall not extend to executors or administrators. 2 Tidd's Pr., 1132.

² Rev. Stat., Chap. 33, ¶ 14, § 14.

³ Rev. Stat., Chap. 33, ¶ 7, § 7.

⁴ Straus v. Oltusky, 62 Ill. App., 660.

court where the case is tried by the court without the intervention of a jury.¹

§ 1179. **Execution in scire facias proceedings.**—The execution in *scire facias* is governed by the award of it, which award and execution is generally indicated by the special statute under which the proceeding is to be had as hereinbefore indicated. Since, by our practice, an execution by *capias ad satisfaciendum* is almost entirely abrogated, many of the complications known in the English practice in connection with execution in *scire facias* do not here arise, but it may be stated that when there is an award of execution against bail, who have been jointly and severally bound, the plaintiff may sue out an execution against either or all of them. In *scire facias* to revive a judgment, the execution will issue upon the judgment as revived, and be governed by the rules governing executions in other cases. An execution issuing upon a judgment of foreclosure is special and governed by the special provisions of the Statute as above indicated.²

¹ Straus v. Oltusky, 62 Ill. App., 460. ² Ante, § 1176.

ARTICLE VI.

ARBITRATION AND AWARD.

- | | |
|---|---|
| <p>§ 1180. Origin and nature.</p> <p>1181. Who can submit a matter to arbitration.</p> <p>1182. Submission to arbitration at common law—Matters not in suit.</p> <p>1188. Submission to arbitration under the statute—In suits pending.</p> <p>1184. Effect of submission and of award.</p> <p>1185. Who may be chosen as an arbitrator.</p> <p>1186. Duty of arbitrators—To appoint a hearing—Continuances.</p> <p>1187. Arbitrators must be put on oath—Form of oath.</p> <p>1188. Hearing—Witnesses—Subpoenas for—Compelling attendance—Oath—Contempt.</p> | <p>§ 1189. Requisites of the award—Form—Publication.</p> <p>1190. Filing award in court on non-compliance of other party.</p> <p>1191. Judgment on the award.</p> <p>1192. Enforcement of judgment if other than for the payment of money.</p> <p>1193. Setting aside award for fraud, etc.</p> <p>1194. Correcting award in regard to irregularities in form, etc.</p> <p>1195. Time to make motion to set aside, modify, etc.</p> <p>1196. Effect of setting aside award.</p> <p>1197. Review of arbitrations and awards.</p> |
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§ 1180. **Origin and nature.**—There is a proceeding of very ancient origin, known as “arbitration,” which is a mode of settling disputes by agreement of the parties to refer them to the decision of one or more different persons called arbitrators.

Blackstone says “*arbitration* is where the parties injuring and injured, submit all matters in dispute, concerning any personal chattels or personal wrong, to the judgment of two or more *arbitrators*, who are to decide the controversy. This decision is called an *award*, and thereby the question is as fully determined, and the right transferred or settled, as it could have been by agreement of the parties, or the judgment of a court of justice, and experience having shown the great use of these *peaceable and domestic tribunals*, espe-

cially in settling matters of account, and other mercantile transactions, which are difficult and almost impossible to be adjusted on a trial at law, the legislature has now established the use of them, as well in controversies where causes are depending, as in those where no action is brought.”¹ The words of the great commentator apply as aptly now and in this State as they did in England two hundred years ago, for it is said there is scarcely an exception to the rule that all actions at law, or in equity, or causes in action, may be referred to arbitration.² And that an award is the decision or judgment of the arbitrators on matters submitted to them to be decided, whereby a duty is imposed to be performed by one or more of the parties who have so submitted such matters for arbitration.³ And that an award has the force of an adjudication, and effectually concludes the parties from litigating the same matters anew.⁴ Where, however, arbitrators consider and pass upon matters not embraced in the submission, their award can have no binding force, because their jurisdiction is limited to the matters included within the submission. All things which are done by arbitrators outside of and beyond the authority of the submission are void.⁵ The “consideration” upon which a submission to arbitrate rests is the mutual promise of the parties. Having mutually agreed to the settlement of the matters of difference between them in such manner, an award made in pursuance thereof will be based upon a sufficient consideration and will not be set aside.⁶

That an award may be binding it must comprehend all the matters submitted, which are named in the submission.⁷ It will be presumed, however, on a general submission until the contrary is shown, that the award is sufficiently comprehensive and that nothing was referred or submitted to arbitration

¹ As to reference to the statute, 9 and 10 William III, Chap. 15 (A. D. 1698), see 3 Bla. Com., 16.

² *Gerrish v. Ayres*, 3 Scam. (Ill.), 245.

³ *Tompkins v. Gerry*, 52 Ill. App., 592.

⁴ *Rogers v. Holden*, 13 Ill., 293; see *post*, § 1184.

⁵ *Sherfy v. Graham*, 72 Ill., 158.

⁶ *Burnside v. Potts*, 23 Ill., 411. Further as to setting aside an award, see *post*, § 1193.

⁷ *Tucker v. Page*, 69 Ill., 179.

than what is named therein.¹ And the award must be made in the precise manner prescribed by the submission. For example where two persons agreed to submit the matter in dispute to four persons, two to be selected by one of the parties, there is not an arbitration so as to be binding upon the other party.²

§ 1181. Who can submit a matter to arbitration.—The parties to submit a matter to arbitration will be the person who could submit to any other binding agreement or confession of judgment.³ An agent appointed for that purpose, or one having such general authority, may submit a matter to arbitration.⁴ A general agent, however, cannot submit matters of his principal to arbitration without special authority in that behalf. An ordinary general agency does not confer such authority.⁵ A partner may make a submission of partnership matters to arbitration and may make a parol submission in respect to matters which do not require that the submission should be under seal.⁶ A president and secretary of a corporation may submit matters to arbitration.⁷ But executors and administrators have no power to submit a claim against an estate to arbitration, so as to bind the estate or alter the character of the claim.⁸

§ 1182. Submission to arbitration at common law.—Matters not in suit.—At common law, submissions to arbitration could be made either orally or in writing, and the award, though not a judgment in the strict sense of the word, was binding and conclusive upon the parties as to all matters con-

¹ Tucker v. Page, 69 Ill., 179.

² Williams v. Schmidt, 54 Ill., 205.

³ Rev. Stat., Ch. 10, ¶ 16, § 16.

⁴ Gristock v. Royal Ins. Co., 84 Ill., 161; Detroit v. Jackson, 1 Doug. (Mich.), 106.

⁵ Trout v. Emmons, 29 Ill., 433.

⁶ Hallack v. March, 25 Ill., 48; Compare Bolton v. Cowgill, 71 Ill., 585.

Evidence of ratification by part-

ner.—The presence of a partner who did not join in the submission to arbitration and the giving of evidence before the arbitrators, without objection at any time, is evidence that he submitted to the submission and the firm is bound thereby. Hallack v. March, 25 Ill., 48.

⁷ Fitch v. Constantine, etc., Co., 44 Mich., 74.

⁸ Reitzell v. Miller, 25 Ill., 67.

tained in the submission. A common law submission to arbitration is of course in regard to matters on which no suit has been begun and this may be done in this State if the arbitrators act fairly, and the agreement to arbitrate is duly established.¹ But for greater certainty in regard to the matter submitted the statute provides that the submission shall be in writing. The words of the statute are these: "All persons having a requisite legal capacity may, by an instrument in writing, to be signed and sealed by them, submit to one or more arbitrators in controversy existing between them not in suit; and may, on such submission, agree that a judgment of any court of record, competent to have jurisdiction of the subject-matter to be named in such instrument, shall be rendered upon the award made pursuant to such submission."² If a submission is made under this statute it is absolutely necessary that the same be in writing and under seal.³ And where a bond (whether under the statute or at common law) is conditioned that the parties will abide by and perform an award to be made by the persons chosen, if it be made in writing, under the hands and seals of the arbitrators, by a day stated, a declaration on such bond must aver that the award was made under the seals of the arbitrators, or it will be defective. And if the award be not made by the day named the parties will not be liable.⁴

Upon a submission under the foregoing section of the statute the arbitrators shall take the same oath, and may compel the attendance of witnesses, and shall proceed in the same manner, as if the submission had been made in a cause pending.⁵

By the common law in submission to arbitration it was usual that the parties should each appoint an arbitrator

¹ Koon v. Hollingsworth, 97 Ill., 52; Phelps v. Dolan, 75 Ill., 90; Ingraham v. Whitmore, 75 Ill., 24; Hallock v. Marks, 25 Ill., 48; Smith v. Douglass, 16 Ill., 34.

² Rev. Stat., Chap. 10, ¶ 16, § 16.

³ Hamilton v. Hamilton, 27 Ill., 158.

⁴ Mann v. Richardson, 66 Ill., 492.

⁵ Rev. Stat., Chap. 10, ¶ 17, § 17. Further, as to proceedings in causes pending, see sections immediately succeeding.

and provided that in case they should not agree upon an award that an umpire should, in that event be chosen by them to settle the difference without their concurrence. When such is the terms of the submission the authority of the umpire to settle the controversy will be undoubted. If the arbitrators affix their names to the award it will be considered a verification of a truth of the recitals in the award.¹

NO. 388.—FORM OF AGREEMENT TO ARBITRATE MATTER NOT IN SUIT.

KNOW ALL MEN BY THESE PRESENTS, that, whereas, a controversy is now existing between us, the undersigned, in relation to (*here insert a statement of the nature of the controversy*).

We, the undersigned, do hereby submit to E..... F..... G..... H....., and I..... J..... (*naming one or more arbitrators*), as arbitrators, the said matter of controversy existing between us, and we do hereby further agree (*if such be the agreement*), that a judgment of the Circuit Court of the County of, Illinois, may be rendered upon and award made pursuant to this submission, in pursuance of the statute in such case made and provided (*if there be no agreement that a judgment may be entered, then the following words may be used*: "and we do further hereby bind ourselves, our heirs and personal representatives, in all things to faithfully perform, fulfill, abide by and keep the award and determination of the said arbitrators, in each and every respect whatsoever").²

A..... B..... [SEAL.]

C..... D..... [SEAL.]

Dated.....

§ 1183. Submission to arbitration under the statute—
In suits pending.—It is provided by the statute that whenever the parties to any suit pending in any court of record shall be desirous and willing to submit the matter involved in such suit to the decision of arbitrators, an order shall be entered directing such submission to three impartial and competent persons, to be named in such order—such arbitrators to

¹ McDonald v. Arnout, 14 Ill., 58.

Power to appoint a receiver.—Where, in proceedings by appeal seeking the appointment of a receiver, partnership accounts were referred to arbitrators, who in their award, appointed a receiver, such appointment was not objectionable

after the court, by decree, confirmed the appointment. Gudgell v. Pettigrew, 26 Ill., 305.

² This condition, when broken, necessitates a common law action on the bond to procure its enforcement.

be agreed upon and named by the parties; but if the parties are unable to agree, each shall name one and the court a third.'

The court has no jurisdiction to submit a matter to arbitration, except in the manner indicated by the statutes. It cannot submit a disputed matter to less than three arbitrators, nor can the arbitrators proceed in any manner than that indicated by the statute.' If they do, the court will not acquire jurisdiction upon the award.'

The form of agreement to submit a matter not in suit,' may be modified to suit a case of a pending suit. It is not necessary that the court in which the cause is being tried should be named in the agreement.'

Record of the reference under the statute to arbitrators when any cause pending in any court of record shall be referred according to the provisions of statute an entry of such reference shall be made on the record, and day shall be given to the parties, from time to time, until the arbitrators report, or they may be thereof discharged, on filing such report.'

§ 1184. **Effect of submission and of award.**—While, as before said, an agreement to arbitrate is based upon a valid consideration and when an award is made thereunder, the same will be binding upon the parties, and though made as at common law, may be enforced by suit if it fairly disposes of the matters in dispute and leave nothing open to controversy, yet a mere agreement to refer to arbitration does not deprive a court of law of jurisdiction to proceed in regard to the matters of difference agreed upon to be submitted to arbitration.' The common law *agreement to arbitrate* is revocable at pleasure of either party, and at any time before the award is made, notwithstanding the agreement to arbitrate is valid. But neither party has the power to revoke a submission when

¹ Rev. Stat., Chap. 10, ¶ 1, § 1.

² Chickering-Chase Brothers Co. v. De Voll, 55 Ill. App., 442.

Moody v. Nelson, 60 Ill., 229.

³ Ante, § 1182, form No. 388.

⁴ Seaton v. Kendall, 61 Ill. App., 289.

⁵ Rev. Stat., Chap. 10, ¶ 15, § 15.

⁶ Frink v. Ryan, 3 Scam. (Ill.), 322.

made in compliance with the statute, without the consent of the other party.¹ The bringing of a suit upon the matters of difference is by implication and revocation of a prior agreement to arbitrate matters involved in the suit.² Likewise the agreement to make a second arbitration which one of the parties refuses to make, does by implication, abrogate the award made and an action will lie upon the matters originally submitted upon the breach of the new agreement to arbitrate.³

If the same act is to be performed before the making of an award and such act is not performed, the award will not be binding upon the matters to the agreement.⁴ Or if parties refuse to abide by the award to make a new agreement, this will be a waiver of any rights the parties might have had under the award.⁵ Furthermore, an abandonment of an award remits the party to their original rights.⁶

The conclusion which is arrived at by arbitrators is the judgment of a court of the party's own choosing and in most respects it is similar to other judgments. It is conclusive upon the parties both as to the law and the facts.⁷ The finding of the arbitrators, like that of a court, is regarded as embracing all the matters submitted to them and unless impeached in some manner known to the law, is conclusive of the rights of the parties.⁸ All suits springing out of the subject matter of the award will be thereafter barred.⁹ How-

¹ Paulsen v. Manske, 126 Ill., 72; Frink v. Ryan, 3 Scam. (4 Ill.), 322; Chippewa Lumber Co. v. Insurance Co., 80 Mich., 116; Narney v. Insurance Co., 63 Mich., 633; Callanan v. Port Huron, etc., Ry. Co., 61 Mich., 15.

When agreement not recoverable.
—An agreement contained in an insurance policy, to fix values or amounts by arbitration can be enforced as a condition precedent to the right to recover. The agreement can only be rescinded when the insurance company prevents such appraisal. The company will be considered as preventing it, when

the arbitrator chosen by such company acts in such manner as to make it to appear he is acting as the agent of such company. Niagara Fire Ins. Co. v. Bishop, 154 Ill., 9.

² Paulsen v. Manske, 126 Ill., 72.

³ Burnside v. Potts, 23 Ill., 411.

⁴ Burt v. McFadden, 58 Ill., 479.

⁵ Newlan v. Lombard University, 62 Ill., 195.

⁶ Eastman v. Armstrong, 26 Ill., 216.

⁷ Pulliam v. Pensoneau, 33 Ill., 375.

⁸ Hadaway v. Kelly, 78 Ill., 286.

⁹ Gerrish v. Ayres, 3 Scam. (Ill.), 245.

ever, an award may be avoided by showing fraud or misconduct on the part of the arbitrators.¹

In construing an award a court is always warranted in considering it in the light of surrounding circumstances.² The arbitrators may be themselves examined as witnesses as to the time when, and the circumstances under which an award was made, and what transpired at the hearing, and as to what evidence was given on a particular subject, and what matters were or were not examined by them.³

§ 1185. Who may be chosen as an arbitrator.—Neither natural nor legal disability will hinder a person from being an arbitrator, for every such person is at liberty to choose whom he likes best for his judge, and he cannot thereafter object because of the manifest deficiencies of the person whom he has chosen.⁴ A person cannot, however, act as an arbitrator while he is in a state of intoxication. An award so made should be set aside for his misbehavior and incompetency.⁵

Timely objection must be made to an arbitrator on account of incompetency, for if the party do not object as soon as he receives knowledge of such incompetency, but permits the hearing to proceed he will be deemed to have waived his objections.⁶

An arbitrator should have no interest in the matter to be decided, and where, unknown to the parties making the selection, the party chosen has interests which could influence him in favor of either of the contesting parties, he will be incompetent; but where such interests are known and not objected to they will not affect the action of the arbitrator.⁷

¹ See *post*, § 1193, "Setting Aside or Correcting Award;" also, § 1197. "Review."

² *Kanouse v. Kanouse*, 36 Ill., 439.

³ *Spurck v. Crook*, 19 Ill., 415.

⁴ *Evans v. Ives*, 15 Phila. (Pa.), 635; *Dickinson v. Railroad*, 7 W. Va., 390.

⁵ *Smith v. Smith*, 28 Ill., 56.

⁶ *Brown v. Leavitt*, 26 Me., 261; *Noyes v. Gould*, 57 N. H., 20; *Robb*

v. Brachman, 39 Mich., 423; *Perry v. Moore*, 2 E. D. Smith (N. Y.), 32. Further as to setting aside an award, see *post*, § 1198.

⁷ *Aetna Ins. Co. v. Stevens*, 48 Ill., 30; *Davis v. Forshee*, 34 Ill., 107; *People v. Hennesey*, 39 Ia., 192; *Perry v. Moore*, 2 E. D. Smith (N. Y.), 32; *Hicks v. McDonnell*, 99 Mass., 459; *Leominster v. Fitchburg R. R. Co.*, 7 Allen (Mass.), 38;

The expression by an arbitrator, after appointment, of an adverse opinion will disqualify him for the arbitration and the award may be by him set aside.¹

§ 1186. Duty of arbitrators—To appoint a hearing—Continuances.—When a submission is made to arbitration under the statute, the arbitrators appointed in pursuance of such statute, or a majority of them, shall proceed with diligence to hear and determine the matter in controversy. They shall appoint a time and place for hearing, and adjourn the same from time to time, as may be necessary; and on the application of either party, and for good cause, they may postpone such hearing from time to time, not extending beyond the next term of court in which the suit is pending, if the subject-matter be in suit.²

§ 1187. Arbitrators must be put on oath—Form of oath.—At the common law it is not necessary to put the arbitrators upon oath, unless it is specially required by the submission.³ But upon arbitration under the statute it is provided that before proceeding to hear any testimony in the cause, the arbitrators shall be sworn to faithfully and fairly hear, examine and determine the cause according to the principles of equity and justice, and make a just and true award according to the best of (their) understanding;'' which oath may be administered by any officer authorized to administer oaths.⁴ However, the parties may waive the statutory requirements and proceed to a hearing before unsworn arbitrators and if they do this without objection, they will be deemed to have waived the requirements of an oath. The oath is not a jurisdictional pre-

Rush v. Fisher, 70 Mich., 469; Chicago, etc., Ry. Co. v. Hughes, 28 Mich., 186; Cady v. Walker, 62 Mich., 157; Bash v. Christian, 77 Ind., 290.

¹ Beatty v. Hilliard, 55 N. H., 429; Tabor v. Jenny, 1 Sprague (U. S.), 315.

² Rev. Stat., Chap. 10, ¶ 2, § 2.

³ Kankakee & S. R. R. Co. v. Alfred, 3 Ill. App., 511; Daggy v. Cronnelly, 20 Ind., 474; Howard v. Sexton, 4 N. Y., 157.

⁴ Rev. Stat., Chap. 10, ¶ 3, § 3.

requisite and it is not necessary that it should appear upon the face of the award that the arbitrators were sworn.¹

§ 1188. Hearing—Witnesses — Subpoenas for—Compelling attendance—Oath—Contempt.—When a submission is made to arbitration by an agreement of parties and the body of arbitrators is organized in accordance therewith, it becomes the duty of such arbitrators to give a sufficient notice to each party of the time and place of hearing of matters submitted to arbitration. This must be done in order that the parties may have an opportunity to present his case by the testimony of witnesses and to be heard in arguments thereon. An award made upon an arbitration heard in the absence of one of the parties who has not been notified of such hearing will be set aside on motion of such party.²

The several Clerks of the Circuit Courts, and the Justices of the Peace, in their several counties, may issue subpoenas for the attendance of witnesses before arbitrators: if any witness, after being duly summoned, shall fail to attend, the arbitrators may issue an attachment to compel his attendance, and the said witness shall moreover be liable to the party for refusing to attend, the same as in trials at law.

Any one of the arbitrators may administer oaths and affirmation to witnesses; they may punish contempts committed in their presence during the hearing of a cause, the same as a court of record, and may admit depositions to be read in evidence, the same as in trials at law.³

The arbitrators may be compelled by an order of the court in which any cause submitted to them shall be pending to proceed to a hearing thereof, and to make report without unnecessary delay.⁴

The arbitrators must act together for they cannot take testimony separately, unless it is by the express consent of the

¹ Kankakee & S. R. R. Co. v. Schmidt, 54 Ill., 205; Taylor v. Vessel Owners' Towing Co., 25 Ill. App., 511.

² Pearson v. Sanderson, 128 Ill., 88; Vessel Owner's Towing Co. v. Taylor, 126 Ill., 250; Williams v.

App., 503.

³ Rev. Stat., Chap. 10, ¶ 4, § 4.

⁴ Rev. Stat., Chap. 10, ¶ 14, § 14.

parties to the submission.¹ The arbitrators, by the submission, become the judges, by the choice of the parties, both of the law and the fact.²

The award must be made within a reasonable time and whether it is so made, within the intention of the parties, is a question for the jury.³ Where the submission to arbitration requires an award on a certain day, if it appears that the time was extended by the consent of both parties, an award after the day named will be sustained.⁴

§ 1189. Requisites of the award—Form—Publication.—

At common law it was not a requirement that the award should be in writing.⁵ But the statute requires that the award of the arbitrators, or a majority of them, shall be drawn up in writing, and signed by such arbitrators, or a majority of them, and that a true copy of such award shall, without delay, be delivered to each of the parties thereto.⁶

An award to be binding must be *certain* and this certainty is certainty to the common intent. The uncertainty must appear on the face of the award or by averment. An award is sufficiently certain where the statements are made so definite as to be binding when stated in a contract. Every

¹ Taylor v. Vessel Owners' Towing Co., 25 Ill. App., 503.

A submission to two arbitrators, appointed by one of the parties, when by agreement the matter was to be heard by four arbitrators, to be appointed by each party, will not be binding upon the adversary. Williams v. Schmidt, 54 Ill., 205.

² Sherfy v. Graham, 72 Ill., 158.

³ Haywood v. Harmon, 17 Ill., 477.

⁴ Buntain v. Curtis, 27 Ill., 374.

Compensation of arbitrators.—Each arbitrator shall be allowed, for every day's attendance to the business of his appointment, two dollars, to be paid in the first instance by the party in whose favor the award shall be made, or to be recovered of the other party with the costs of the suit, if the award or

final decision shall entitle the prevailing party to recover costs. Rev. Stat., Chap. 10, ¶ 13, § 13.

Compensation of witnesses.—Witnesses shall receive the same fees, for attendance at arbitrations, as shall be allowed them in the Circuit Courts. Rev. Stat., Chap. 10, ¶ 13, § 13.

Compensation of officer, etc.—Sheriffs, Constables, Clerks and Justices of the Peace shall be entitled to the same fees for services performed, in relation to any arbitration, as shall be allowed by law, for the like services in their respective courts. Rev. Stat., Chap. 10, ¶ 13, § 13.

⁵ Denman v. Bayliss, 22 Ill., 300.

⁶ Rev. Stat., Chap. 10, ¶ 5, § 5.

reasonable intentment must be indulged in support of the award.¹ If an award direct one of two things to be performed in the alternative, and one of them is uncertain or impossible, it is incumbent on the party to perform the other of them.²

Under a statutory submission to arbitration the award must make it to appear that every provision of the statute was complied with, or that such compliance, if not jurisdictional, has been waived; otherwise the court will acquire no jurisdiction to act upon the award.³

The award should be as broad as the submission, and must conform thereto; that is to say, all the matters submitted should have been determined by the arbitrators and comprehended in the award.⁴ It is a general rule that if several *specific things* were submitted to the arbitrator for determination and any of them were omitted in the award the award will be void. It is nevertheless a well settled rule that where all matters of difference are submitted *generally* and an award is made to a part only, such award shall stand, because the court will infer that no more was made known to the arbitrators. And again if in the presence of arbitrators, or at any time between the submission and hearing, the parties should agree to withdraw a part of the matters specified in the submission, from the consideration of the arbitrators, and an award be made omitting the matters so withdrawn, the award will be valid.⁵

¹ Alfred v. Kankakee & S. W. Ry. Co., 92 Ill., 609; Tucker v. Page, 69 Ill., 179; Ross v. Hammond, 16 Ill., 99; Root v. Renwick, 15 Ill., 461; Whittemore v. Mason, 14 Ill., 392; McDonald v. Arnout, 14 Ill., 58.

An award is not uncertain, nor less final, because certain amounts are to be paid in proportion to the interests of the parties where such interests are defined by the bill out of which the award springs and the answer admits them. Gudgell v. Pettigrew, 26 Ill., 305.

As to what is not an award where accounts are submitted, see Tompkins v. Gerry, 52 Ill. App., 592.

² McDonald v. Arnout, 14 Ill., 58.

³ Forman Lumber Co. v. Ragsdale, 12 Ill. App., 441.

⁴ Aetna Ins. Co. v. Stevens, 48 Ill., 31; Buntain v. Curtis, 27 Ill., 374; Whetstone v. Thomas, 25 Ill., 361.

⁵ Whetstone v. Thomas, 25 Ill., 361; Ballance v. Underhill, 3 Scam. (Ill.), 453; Busse v. Agnew, 10 Ill. App., 527.

NO. 389. —FORM OF AWARD.

TO ALL WHOM THESE PRESENTS SHALL COME OR MAY CONCERN:

Be it known and published, that we, E..... F....., G..... H..... and I..... J....., arbitrators, to whom the matters in controversy existing between A..... B..... and C..... D..... was submitted, do declare and publish¹ that we, after being sworn, as required by the statute, faithfully and fairly to hear, examine and determine, according to the principles of equity and justice, the matters of controversy submitted to us, and to make a just and true award thereon, according to the best of our understanding, and having appointed a place and time for the hearing of said cause, and having given the said parties, respectively, notice of the place and time of such hearing, and having been attended by the parties, or their respective attorneys, and having heard the allegations of the parties and their testimony and the testimony of their witnesses upon oath, as required by the statute, and having fully considered the matters in controversy, in said cause, and being fully advised in relation thereto, do publish, this our award, in writing, that is to say:

That, etc., (*here insert the matters determined and awarded.*)

In witness whereof we have hereunto subscribed our names in the presence of each other, this day of, A. D.

----- }
 ----- } Arbitrators.
 ----- }

§ 1190. Filing award in court on noncompliance of other party.—If either of the parties to an award made under the statute shall neglect to comply with such award, the other party may, at any time within one year from the time of such

¹ *What is a publication.*—Anything done which enables the parties to receive knowledge of the contents of an award may be called a publication thereof; (*Thompson v. Mitchell*, 35 Me., 281); such as reading the award to the parties; (*Perkins v. Wing*, 10 Johns. (N. Y.), 143); delivering duplicate copies to the parties, (*Plummer v. Morrill*, 48 Me., 184); or by reading and filing it in court. *Denn v. Perkins*, 1 Hals. (N. J.), 415. It is generally considered to be "published" as soon as it is completed. *Russell on Arbitrators*, 255. So, where the submission required

that it be published within ten days, it was held sufficient that it was written, signed and witnessed within that time (*McClure v. Schroyer*, 13 Mo., 104); and unless the submission requires it, there is no need that the award should be "published" or that a notice if it should be given to the parties; nor at common law, even that it should be in writing. *Denman v. Bayliss*, 22 Ill., 300. However, if the submission require it, the award must be published before it is effective. *Ib*; *Parsons v. Aldrich*, 6 N. H., 264.

failure, file such award, together with the submission or arbitration bond, in the court named in the submission.¹

§ 1191. **Judgment on the award.**—When an award is made in compliance with the statute and either of the parties shall fail to comply therewith and the award is filed in court as indicated in the preceding section, the party filing such award, may at the next term after such filing, by giving four days' notice of his intention to the opposite party, and if no legal exceptions are taken to such award or other proceedings,² have final judgment thereon, as on the verdict of a jury, for the sum specified in said award to be due, together with the costs of arbitration and of the court; an execution may issue thereon as in other cases.³

Judgment will not, however, be entered upon an award in this manner unless the award is made in pursuance of the statute, or unless the submission provides for such judgment to be entered. The common law award, however conclusive, is not a verdict upon which judgment can be entered. It is only a cause of action, and to enforce it suit must be brought upon the award and not upon the submission, unless a bond was given for the performance of the award, in which case the action may be upon the bond, but not upon both bond and award.⁴

Where no effort is made to conform with the statute, but only to make a common law arbitration, judgment will be

¹ Rev. Stat., Chap. 10, ¶ 6, § 6.

² As to motion to set aside and modify an award, see *post*, § 1193.

³ Rev. Stat., Chap. 10, ¶ 7, § 7.

As to interest, see *Tucker v. Smith*, 69 Ill., 179; *Seely v. Pelton*, Admx., 63 Ill., 101.

Judgment of discontinuance.—Where, by agreement, the parties submitted a pending cause to arbitration and the arbitrators made the award that the proceeding should be dismissed, it is proper for the court, at the next term, to enter a

discontinuance of the suit. *Cunningham v. Craig*, 53 Ill., 252.

⁴ *Cook v. Schroeder*, 55 Ill., 530; *Weinz v. Dopfer*, 17 Ill., 111; *Smith v. Douglass*, 16 Ill., 34; *Low v. Nolte*, 15 Ill., 368; *Nolte v. Low*, 18 Ill., 437; *Jackson v. Hoffman*, 31 La. Ann., 97; *McArthur v. Oliver*, 53 Mich., 299; *Alpena Lumber Co. v. Fletcher*, 48 Mich., 555; *Gibson v. Burrows*, 4 Mich., 713; *Gallagher v. Kern*, 31 Mich., 138.

As to declaration and pleas in an action upon an award, see *Seely v. Pelton*, 63 Ill., 101.

rendered as provided for in the submission, or if no provision be made for the entry of judgment the award itself is as conclusive as a judgment and ends the litigation on the original cause effectually. When money is awarded, a demand is not necessary, unless it be required by the award itself. If other than the payment of money be awarded an action for specific performance will lie at once after the award is published.¹

§ 1192. Enforcement of judgment if other than for the payment of money.—When the award requires the performance of any act other than the payment of money, the court rendering such judgment shall enforce the same by rule, and the party refusing or neglecting to comply with such rule, may be proceeded against by attachment or otherwise, as for contempt.² For example a conveyance in obedience to the terms of the award may be enforced in this manner.³

However, a common law award cannot be enforced by rule of court. The court only gets jurisdiction so to enforce the award when the award is made in compliance with the provisions of the statute. A common law award must be enforced by an action or set up by way of defense.⁴

§ 1193. Setting aside award for fraud, etc.—If any legal defects appear in the award or other proceedings, or if it shall be made to appear, on oath or affirmation, that said award was obtained by fraud, corruption, or other undue means, or that such arbitrators misbehaved, the court in which the cause is pending, may set aside such award.⁵

The court cannot interfere with the award or the proceedings by which the award was made, except for the causes enumerated in the statute, *i. e.*, fraud, corruption, or other undue means, or misbehavior of the arbitrators.⁶ A mere

¹ Wilkes v. Cotter, 28 Ark., 519;
Kingsley v. Bill, 9 Mass., 198;
Plummer v. Morrill, 48 Me., 184.

² Rev. Stat., Chap. 10, ¶ 8, § 8.

³ Kankakee & S. R. R. Co. v. Alfred, 3 Ill. App., 511.

⁴ Smith v. Douglass, 16 Ill., 34;
Low v. Nolte, 15 Ill., 368.

⁵ Rev. Stat., Chap. 10, ¶ 9, § 9.

⁶ Spurck v. Crook, 19 Ill., 415;
Ross v. Hammond, 16 Ill., 99;
Chandler v. Gay, 1 Ill. (Breese), 88.

As to what is or is not misbehavior, see Moshier v. Shear, 102 Ill., 169; Leitch v. Campbell, 27 Ill., 138; Gudgell v. Pettigrew, 26 Ill.,

error of judgment on the part of the arbitrators as to the law or the fact will not vitiate an award.¹ The correction of a mistake in an award, as in other instances, must be referred to a court of equity.² And the only mistake which a court of equity will relieve is a mistake of all the arbitrators and not a part of them only.³ A mistake, however, in drawing up the award, will be reformed, that is to say, if the award, as it appears in writing, was not in fact the award made by the arbitrators, the former will be made to conform to the latter.⁴

The burden of proof is upon the person who alleged the fraud, corruption, or other undue means, or the misbehavior of the arbitrators. Such facts will not be presumed and must be proved as averred.⁵

§ 1194. Correcting award in regard to irregularities in form, etc.—If there be any evident miscalculation or misdescription, or if the arbitrators shall appear to have awarded upon some matter not submitted to them, not affecting the merits of the decision upon the matters submitted, or where the award shall be imperfect in some matters of form, not affecting the merits of the controversy, and where such errors and defects, if in a verdict, could have been lawfully amended, or disregarded by the court, any party aggrieved may move the court to modify or correct such award.⁶ This provision does not give the court equitable power to reform awards in

305; *Taylor v. Vessel Owners', etc.*, Co., 25 Ill. App., 508; *Smith v. Smith*, 28 Ill., 56; *White v. Robinson*, 60 Ill., 499.

As to fraud, see *Root v. Renwick*, 15 Ill., 461; *Claycomb v. Butler*, 36 Ill., 100.

¹ *Sherfy v. Graham*, 72 Ill., 158; *Ross v. Hammond*, 16 Ill., 99; *Smith v. Douglass*, 16 Ill., 34; *Root v. Renwick*, 15 Ill., 461; *Pottle v. McWorter*, 13 Ill., 454.

² *Howell v. Howell*, 26 Ill., 460.

³ *Pulliam v. Pensoneau*, 33 Ill., 375.

⁴ *Sherfy v. Graham*, 72 Ill., 158; see *post*, § 1194.

⁵ *Tucker v. Page*, 69 Ill., 179; *Haywood v. Harmon*, 17 Ill., 477; *Root v. Renwick*, 15 Ill., 461; *Vanlandingham v. Lowery*, 2 Scam. (Ill.), 240.

Further as to proof, see *Tucker v. Page*, 69 Ill., 179; *Kankakee & S. R. R. Co. v. Alfred*, 3 Ill. App., 511.

⁶ *Rev. Stat.*, Chap. 10, ¶ 10, § 10. Further as to "Amendments," see *ante*, Vol. I, § 740.

regard to mistakes, but merely applies to the form of the award.¹

§ 1195. Time to make motion to set aside, modify, etc.—Application to set aside, modify, or amend such award, as provided in the two preceding sections, must be made before the entry of final judgment on such award: *provided*, nothing herein contained shall be so construed as to deprive courts of chancery of their jurisdiction as in other cases.² Where a party stands by and suffers judgment to be entered on the award to which technical objections could be made, a court will not thereafter interfere to change the judgment.³

Nevertheless, the validity of an award may be attacked even after judgment has been entered in conformity with such award.⁴

A motion is usually supported by affidavits, but it is discretionary with the court to require oral testimony and cross-examination.⁵

§ 1196. Effect of setting aside award.—It is evident that the setting aside of an award in a pending suit will leave the matters in the same condition as though no submission had ever been made and the court may proceed accordingly. After an award has been set aside, the matters pending cannot be again referred, unless there is a stipulation by the parties to that effect.⁶

§ 1197. Review of arbitrations and awards.—Writs of error and appeals may be taken from any decision of the court by the party deeming himself aggrieved, as in other cases; and if the Supreme Court shall remand the case, such

¹ Howell v. Howell, 26 Ill., 460; Compare *ante*, § 1193.

² Rev. Stat., Chap. 10, ¶ 11, § 11.

³ Duncan v. Fletcher, 1 Ill. (Breese), 323; Seaton v. Kendall, 61 Ill. App., 289.

⁴ Cunningham v. Craig, 53 Ill., 252.

⁵ Marquette, etc., Ry. Co. v. Probate Judge, 53 Mich., 218; French v. Butler, 89 Mich., 79. Further as to "Burden of Proof," see *ante*, § 1193.

⁶ Smith v. Smith, 28 Ill., 56.

further proceedings shall be had as the nature of the case may require.¹

It must, however, be remembered that the arbitrators, by the submission, become the judges, by the choice of the parties, both of the law and the fact and that there is no appeal or review from or of any decision *made by them* within the scope of their powers, except for fraud, corruption, and partiality, or misconduct.²

A submission and award made in compliance with the statute becomes a part of the judgment record in the same manner that a summons or declaration becomes a part of the record and need not be preserved by bill of exceptions.³

¹ Rev. Stat., Chap. 10, ¶ 12, § 12; Further as to "Review of proceedings by appeal and writ of error," see *ante*, §§ 1030 and 1036.

An appeal does not lie from a judgment of a Justice of the Peace upon the award of arbitrators. *Van Winkle v. Beck*, 2 Scam. (Ill.), 488. The statute regarding

appeals and writs of error refers to courts of record, because the statutory awards in suits pending can be made in courts of record only. Compare *ante*, § 1183; Rev. Stat., Chap. 10, ¶ 1, § 1.

² *Sherfy v. Graham*, 72 Ill., 158; as above shown. *Ante*, § 1193.

³ *Buntain v. Curtis*, 27 Ill., 374.

ARTICLE VII.

REFEREES AND REFERENCES.

- | | |
|--|--|
| § 1198. Definition and nature. | § 1201. Referee's report. |
| 1199. Appointment of referee—
His power—Exceptions—
Further evidence, etc. | 1202. Exceptions to report—Refer-
ring cause back with in-
structions. |
| 1200. Trial by referee—Compel-
ling attendance—Oaths. | 1203. Judgment—costs. |
| | 1204. The record. |

§ 1198. **Definition and nature.**—A “referee” is an officer who is appointed in pursuance of a State statute to hear and determine all or a portion of the issues that arise on the final hearing of a cause.¹ And a “reference” is an act, order or paper by which a matter is committed to one or more persons for investigation and report.²

When a case is referred by a rule of court, the referee derives his authority from the court and not from the consent of the parties. The case remains in court subject to its power, and a judgment must be entered by the court.³

Submitting the issues to a referee has been said to be a substitution for a trial by jury.⁴ But in this State the referees report not only their findings of fact, but the conclusions of law.⁵ But the findings of a referee as to facts is treated as a verdict of the jury.⁶ The reference is for the purpose of informing the court of the referee's conclusion as to the law or facts, and the court is at liberty to accept or disregard the report.⁷

The referring of issues to a referee is a practice much employed in New York and other states where matters may be referred upon motion of one of the parties supported by the

¹ Central Trust Co. v. Wabash Ry. Co., 32 Fed., 685.

² And. Law. Dict.

³ Seavey v. Beckler, 132 Mass., 204.

⁴ Seavey v. Beckler, 132 Mass., 204.

⁵ Rev. Stat., Chap. 117, ¶ 1, § 1.

⁶ Scott v. Maxwell, 18 Ill. App., 72.

⁷ Marshall v. Meech, 51 N. Y., 140.

requisite affidavits, and while that may not be done in this State, yet it is an efficient procedure to hasten the trial of issues where the parties are desirous of so doing, in large cities where the courts are overcrowded with business, or the cause is not soon to be reached on the calendar.

§ 1199. Appointment of referee—His power—Exceptions—Further evidence, etc.—The statute provides that in all common law causes in courts of record, after issue joined or default entered, it shall be competent for the court, upon the agreement of the parties, or their counsel, to appoint one or more referees, not exceeding three, who shall have authority to take testimony in such cause, and report the same in writing, together with their conclusions of law and fact, to the court, and the court shall have power to render judgment upon the finding of such report: *Provided*, either party may except to such report, and have his exception heard and determined by the court; and the court may, if necessary to take further evidence, refer the cause back to the referees, with instructions. Notice of the time of hearing such exceptions and the taking of such further evidence shall be given, under such rules as the court may prescribe.¹

The appointment of a referee to try a controversy at law is similar to the reference of a matter in chancery to a master and the proceeding should be similar.² The statute must be substantially pursued in all respects. The appointment must be made by the order of court and the report must contain the evidence as well as the referee's conclusion thereon. The parties are entitled to be heard on exceptions to the referee's report.³ Objections to the referee's report must be urged in the trial court.⁴

¹ Rev. Stat., Chap. 117, ¶ 1, § 1.

² *Pardridge v. Ryan*, 35 Ill. App., 230.

³ *Morey v. Warrior Mower Co.*, 90 Ill., 307.

⁴ *St. Louis, etc., v. Himrod*, 88 Ill., 410.

What is not a reference.—A stip-

ulation to refer a cause to a third person as a referee and that a court may enter judgment upon the finding, is not a valid reference, nor is it a statutory arbitration, but it is a good common law arbitration. The consent of the parties gives the court jurisdiction to enter judgment

NO. 390.—FORM OF STIPULATION TO REFER THE ISSUES.

(Title of court and cause.)

It is hereby stipulated and agreed by and between the parties to this action that the same be referred to (*name one or three persons as referees*) to hear and examine the issues, heretofore joined in this cause and that an order may be entered accordingly.

Dated

.....
Attorney for Pltf......
Attorney for Deft.¹

NO. 391.—FORM OF ORDER OF REFERENCE ON THE STIPULATION.

(Title of cause.)

AT THE TERM, (etc.)

On reading and filing the annexed stipulation, and on motion of R.... S...., Esquire, attorney for plaintiff, it is ordered that this action and all the issues therein be, and the same hereby is, referred to (*here name the referees selected*) as referees to hear and examine.

§ 1200. Trial by referee — Compelling attendance — Oaths. — Witnesses may be required to attend and testify before such referees in the same manner as is, or may be, provided by law in cases before masters in chancery; and such referees shall have power to administer oaths to witnesses.²

The proceedings before the referee are substantially the same as before the court, and should be conducted like a trial in court.³ The parties must be present by themselves or their attorneys and produce their witnesses to be examined before

upon the finding or award. *Morey v. Warrior Mower Co.*, 90 Ill., 307. Further, as to "Arbitration and award," see *ante*, § 1180.

¹ The effect of consenting to refer the issues estops the party from asserting that the cause was not a referable one. *Yates v. Russell*, 17 Johns. (N. Y.), 461; *Bloore v. Potter*, 9 Wend. (N. Y.), 480. And although the court omit to enter

an order of reference upon such consent, the error will be cured by the statute of amendments. As to what errors will be cured by verdict, see "Amendments," *ante*, Vol. I, § 740.

² Rev. Stat., Chap. 117, ¶ 2, § 2.

³ *Gibson v. Burrows*, 41 Mich., 718; *Runnels v. Moffatt*, 73 Mich., 188.

the referee as in chancery cases submitted to a master in chancery.¹

A referee need not be sworn. He is not a judge and does not act judicially in the strict sense of the term. The judicial power is exercised by the court in giving judgment. He is a special officer of the court; but at the same time he has some discretion and his acts will not be reviewed unless they amount to an abuse of such discretion.² He is the judge of the credibility of witnesses, and the weight of evidence, and at the same time he performs the functions of a jury and his findings and conclusions of fact are entitled to the same consideration the verdict of the jury receives.³

Continuances may be made by the referee as convenience may require, so long as he does not overstep the duties required by the laws and practice.⁴

All the testimony taken before referees must be reduced to writing and subscribed by the witness.⁵

§ 1201. Referee's report.—A "report" of the referee must be annexed to, or accompany, the testimony which has been taken before the referee, and reduced to writing, and subscribed by the witnesses, and all the exhibits and papers introduced in evidence.⁶

It is contemplated that the referee will make a finding of fact and of law that may be subject to revision for errors.⁷ And he may find the facts and law separately.⁸ The finding of

¹ *Pardridge v. Ryan*, 35 Ill. App., 230.

Motion to strike out.—Where a motion is made to strike out or exclude the testimony of certain witnesses and exhibits, the reason therefor should be stated. If the ground for the motion is not stated, either in the motion, or the exception filed to the referee's report, (see *post*, § 1202,) or in the brief and argument of the plaintiff in error, the court of review will not, on writ of error, consider the same. *Butler v. Cornell*, 148 Ill., 276.

² *Underwood v. McDuffy*, 15 Mich., 361; *People v. Wayne Circuit Judge*, 18 Mich., 453; *Runnels v. Moffatt*, 73 Mich., 188.

³ *Butler v. Cornell*, 148 Ill., 276.

⁴ See *Continuances*, *ante*, § 789; *Campeau v. Brown*, 48 Mich., 145.

⁵ *Rev. Stat.*, Chap. 117, ¶ 4, § 4.

⁶ *Rev. Stat.*, Chap. 117, ¶ 4, § 4; *Morey v. Warrior Mower Co.*, 90 Ill., 307.

⁷ *Gibson v. Burrows*, 41 Mich., 713.

⁸ *Rev. Stat.*, Chap. 117, ¶ 1, § 1; *Smith v. Warner*, 14 Mich., 152.

fact must be more than a narration of evidence. It must determine what is proved. It must show the facts sufficient to indicate that his conclusions as to the amount due is a legitimate conclusion; but where the finding implies an *assumpsit* it will support a judgment, even though it does not find in express terms that the defendant should pay money to the plaintiff.¹ But conclusions alone will not support a judgment. The evidence in writing must be annexed to or accompany the report.² The report should contain the referee's conclusion of law;³ but a referee is not required to supplement his general finding by answers to specific questions dictated by counsel.⁴

NO. 392.—FORM OF REFEREE'S REPORT DISMISSING THE ACTION.

(*Title of court and cause.*)

To the Court of the County of:—

In pursuance of an order made in the above entitled cause, by which it was referred to me (*or as the case may be*) to hear and examine the same, I do report that I have been attended by the parties and their counsel, and that, after hearing their respective allegations and proofs, I do find, as a matter of fact, that no account ever existed between the said defendant and the said plaintiff, as alleged in the declaration in this action, and that the defendant is not indebted to the plaintiff in the sum in said declaration set forth, nor in any sum.

And upon the foregoing facts I find as a conclusion of law that the aforesaid cause of action should be dismissed.

Dated,

.....,
Referee.⁵

NO. 393.—GENERAL FORM OF REFEREE'S REPORT.

(*Title of court and cause.*)

To the Court of the County of:

In pursuance of an order made in the above entitled cause, by which it was referred to me (*or as the case may be*), to hear and examine the same, I do respectfully report that I have been attended by the parties and their counsel, and that, after hearing their respective allegations and proofs, I find the following:

¹ Nugent v. Nugent, 48 Mich., 362.

² Rev. Stat., Chap. 117, ¶ 1, § 1.

³ Rev. Stat., Chap. 117, ¶ 1, § 1.

⁴ Odd Fellows v. Morrison, 42 Mich., 521.

⁵ Cooper on Referees, page 83.

Matter of fact (*stating the findings of fact separately and concisely*).

I.

II.

As to conclusions of law I find (*stating the conclusions separately, etc*).

I.

II.

III. That the defendant is indebted to the plaintiff in the sum of..... dollars, with interest on the same, since the.....day of....., A. D., amounting to.....dollars, and that the plaintiff is entitled to judgment against the defendant with costs (or "that nothing is due to the plaintiff from the defendant, and that the defendant is entitled to judgment against the plaintiff for costs of this action").

Dated.....

.....,
Referee.

NO. 394.—FORM OF REPORT IN ACTION OF NEGLIGENCE.¹

(*Formal parts as in the preceding.*)

I. That the defendant, in the month of....., A. D....., owned and occupied a village lot, in the village of....., by a public street in said village, used by foot passengers; at the time excavated several holes for fence posts along the line of and contiguous to said street, one of which extended into the traveled part of said street and to the depth of.....feet.

II. The said defendant, after digging such holes, omitted to cover or guard the same, and omitted to use any means to warn persons passing along said street of the location of said excavations.

III. That on the.....day of....., the plaintiff, while passing along the said walk of said street in the night time, and ignorant of such excavation, accidentally stepped into the same and his knee was thereby greatly injured and the knee-pan thereof fractured.

IV. That the plaintiff suffered damages by reason of expense for medical aid, loss of time, incapacity for labor, to the amount of.....dollars, for the said act of the defendant.

V. That the plaintiff did not contribute by any fault or negligence to his injury.

As a conclusion of law I find that the acts and conduct of the defendant were negligent and careless, and produced the injury to the plaintiff, aforesaid, that the plaintiff is entitled to recover from said defendant said sum of.....dollars.

All of which is respectfully submitted,

Dated.....

.....,
Referee.

¹ This form is from *Wright v. Sanders*, 3 Keyes (N. Y.), 323; Cooper on Referees, page 118.

The report in writing may be filed in term time or vacation, and, unless excepted to, will stand as the finding of the court in term time; that is to say, that if the report when filed is not excepted, to the party in whose favor it is made may have judgment entered upon it as of course.¹

§ 1202. **Exceptions to report—Referring cause back with instructions.**—Either party may except to the referee's report and have his exceptions heard and determined by the court. If necessary to take further evidence, the court may refer the cause back to the referees with instructions.² Any objection to the referee's report, or proceedings, before the referee shall be urged, by exceptions in the trial court of record in which the cause is pending, for if not so taken it will be deemed to have been waived and will not be heard for the first time in a court of review.³

The same presumptions will be entertained in favor of the findings of a referee as are entertained in considering the verdict of a jury.⁴

NO. 395.—FORM OF EXCEPTIONS TO CONCLUSIONS OF LAW.

(Title of court and cause.)

To R..... S....., Attorney for plaintiff:

1. Take notice that the defendant excepts to the first of the conclusions of law found herein by, referee, wherein said referee has found and decided that, prior to the commencement of this action, C..... D..... duly assigned and set over to the plaintiff all his right to the claims of said defendant, and that the said plaintiff has since been and now is, the lawful owner and holder thereof.

2. That he also excepts to the second of said conclusions of law, wherein said referee has found and decided that there is now due from said defendant to said plaintiff, the sum of dollars, with interest on dollars from the day of, making in all the sum of dollars.

3. That he also excepts to said conclusions of law generally, in that said referee has found and decided that the plaintiff is entitled to judgment against said defendant for the sum of dollars.

Dated,

.....
Defendant's Att'y.

¹ Amboy v. Lansing, etc., Ry. Co.,
13 Mich., 439.

² Rev. Stat., Chap. 117, ¶ 1, § 1.

³ Butler v. Cornell, 148 Ill., 276.

⁴ Butler v. Cornell, 148 Ill., 276

A case cannot be referred back unless there have been exceptions taken, or unless there are inadvertent errors or omissions apparent from the report itself. It seems that where a cause is referred back, the whole case is again before the referee and that separate portions of the case cannot be referred back.¹ Nevertheless our statute provides that the court, upon referring a case back to the referee may instruct the referee.²

Where a referee's report is set aside the cause is in the same condition as if no trial had ever been had, and no judgment can be entered until a new trial is had.³ The report will not, however, be set aside where there has been a finding of fact by the referee and he considers the evidence sufficient. His conclusions of fact will not be reviewed, unless he has discredited the witnesses.⁴ The court will not weigh the evidence in review.⁵ The report will not be disturbed unless in violation of some rule of law.⁶

§ 1203. Judgment—Costs.—Judgment shall be rendered upon the final hearing of the cause, and against the unsuccessful party, costs shall be taxed for such fees, for the services of the referees, as shall, in the judgment of the court, be reasonable and proper, not to exceed five dollars per day: *provided*, that whenever the parties to such suit, or their counsel, shall, in writing, to be filed in the court, agree upon a larger sum per day, then the court shall be authorized to tax as part of the costs in such case the *per diem* so agreed upon.⁷

§ 1204. The record.—The record of a cause in which a reference has been made shall include all the testimony taken before the referees reduced to writing and subscribed by witnesses, together with all exhibits and papers introduced in evidence and the report of the referees.⁸

¹ Smith v. Warner, 14 Mich., 152; Bryant v. Hendee, 40 Mich., 543; Runnels v. Moffatt, 73 Mich., 188.

² Rev. Stat., Chap. 117, ¶ 1, § 1.

³ Rice v. Benedict, 18 Mich., 75; Carroll v. Grand Trunk Ry. Co., 19 Mich., 94.

⁴ McKeown v. Harvey, 40 Mich., 226.

⁵ Runnels v. Moffatt, 73 Mich.,

188; McHugh v. Curtis, 48 Mich., 262; Botsford v. Sweet, 49 Mich., 120; O'Connor v. Beckwith, 41 Mich., 657; St. Denis v. Saunders, 36 Mich., 369.

⁶ Nutting v. Burked, 48 Mich., 241; Campeau v. Brown, 48 Mich., 145.

⁷ Rev. Stat., Chap. 117, ¶ 3, § 3.

⁸ Rev. Stat., Chap. 117, ¶ 4, § 4.

ARTICLE VIII.

FORCIBLE ENTRY AND DETAINER.

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| <p>§ 1205. Definition and nature.</p> <p>1206. Forcible entry forbidden—
What is forcible within
the meaning of the statute.</p> <p>1207. When the action maintainable.</p> <p>1208. Who to be parties plaintiff.</p> <p>1209. Who to make parties defendant.</p> <p>1210. Demand in writing, when necessary—Return—Form.</p> <p>1211. Commencement of suit. (a) Complaint.</p> | <p>§ 1212. (b) Summons—Form—When returnable.</p> <p>1213. Same—Service of summons—Publication.</p> <p>1214. Pleadings.</p> <p>1215. Trial.</p> <p>1216. Judgments. (a) For the whole.</p> <p>1217. (b) For a part.</p> <p>1218. Writ of restitution—Form.</p> <p>1219. Appeal—Bond—Form.</p> |
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§ 1205. **Definition and nature.**—Originally “forcible entry” and “forcible detainer” were two separate and distinct, unlawful and forceful acts, for each of which a remedy was provided. The common law provided a remedy for the former and the old statute law provided a remedy for the latter, each being known by its separate name. The statute in this State provides one form of action for both acts, which action is known as “forcible entry and detainer.”¹

A forcible entry may be defined to be the wrongful *taking* of possession of lands or tenements by the exercise of strength or compulsory power, and against the will, of the person entitled to the possession and without authority of law, while the forcible detainer is properly stated to be the *occupying* of lands or tenements by strength and by arrangement to exclude the adverse claimant, and without authority

¹ There is nevertheless a distinction regarding the procedure between cases where the original entry was forcible, and where it was peaceable and the detention alone is wrongful and tortious. Where the entry was forcible, the cause of action is complete without a demand for possession, but where the entry was peaceable and without force, no right of action exists until after demand for possession. *Stillman v. Palis*, 134 Ill., 532; *Thomasson v. Wilson*, 46 Ill. App., 398. This

of law; and a forcible detainer may be made after either a forcible or peaceable entry.¹

The statutory proceeding of forcible entry and detainer is summary in its nature and in derogation of the common law. Therefore, according to the ordinary rules for the construction of statutes, its provisions will be strictly construed and the course of procedure outlined must be strictly pursued, or the court will not acquire jurisdiction to administer the relief desired.²

Furthermore, where the legislature, as in this instance, prescribes a remedy for a certain wrong and a mode of civil procedure to enforce the same, all other remedies and modes of civil procedure are excluded. Even the parties themselves cannot, by stipulation, substitute other and different remedies.³

Nevertheless a criminal proceeding may be maintained where the forcible entry has been accompanied by a breach of the peace.⁴

The action of forcible entry and detainer is a possessory action only, and the title to the real property is not involved therein. If it is sought to question the title to real property, that must be done in an action of ejectment, which is the only action by which the title to real estate can be questioned in this State.⁵

The action of forcible entry and detainer is an action given to protect the actual occupant of real estate against unlawful and forcible invasion, to remove the occasion for acts of violence in defending such possession and to punish a breach of the peace committed in the entry upon, or the detainer of, real property.⁶ It is designed to preserve the public peace and prevent parties from asserting their rights, real or supposed, by force and violence.⁷ The owner of lands cannot

will be made more fully to appear hereinafter when treating of "Demand" and when the same is necessary. See *post*, § 1210.

¹ And. Law Dict.; Abb. Law Dict.

² *Schaumtoeffel v. Belm*, 77 Ill., 587; *Willer v. French*, 27 Ill. App., 76.

³ *French v. Willer*, 126 Ill., 611.

⁴ *Commonwealth v. Shattuck*, 4 Cush. (Mass.), 101; *Rex v. Nichols*, 1 Kenyon (Eng.), 512.

⁵ *Ante*, Vol. I, § 238; *Shoudy v. School Directors*, 32 Ill., 290.

⁶ *Dotson v. State*, 6 Cald. (Tenn.), 545.

⁷ *Reeder v. Purdy*, 41 Ill., 279.

himself take the law into his own hands and employ force and use violence to obtain the possession of land to which he is rightfully entitled.¹ The only way by which an owner can get possession of real estate when the same is wrongfully withheld from him is by an action of forcible entry and detainer, and the action is only efficient for obtaining the possession of real estate. The possession of personal property must be obtained by an action of replevin.²

§ 1206. Forcible entry forbidden—What is forcible within the meaning of the statute.—The statute declares that no person shall make an entry into lands and tenements, except in cases where entry is allowed by law, and in such cases he shall not enter with force, but in a peaceable manner.³

What is a forcible entry is a question that has taken some litigation to determine; but it can now be safely said that while at common law force was necessary to constitute a forcible entry, yet under our statute no force whatever is necessary. A mere wrongful entry is sufficiently forceful, within the meaning of the statute. And the mere wrongful detention, although of one who first obtained possession rightfully, which right of possession has terminated, and demand therefor has been made, is, in contemplation of the statute, forcible.⁴ Forcible entry, as contemplated by the statute, does not necessarily mean the employment of actual, physical force, or the taking of possession of real estate by a breach of the peace.⁵ It is a forcible entry upon real estate to open a gate and remove cattle or other stock therefrom against the will of one occupying the property.⁶ It is a forcible entry for one in peaceable possession of a coal mine in his own right to induce the plaintiff's employees to surrender possession to

¹ Doty v. Burdick, 83 Ill., 473; Huftalin v. Misner, 70 Ill., 205; Farwell v. Warren, 51 Ill., 467; Page v. DuPuy, 40 Ill., 506; Baker v. Hayes, 28 Ill., 387.

² Smith v. People, 99 Ill., 445; Kassing v. Keohane, 4 Ill. App., 460; *ante*, Vol. I, § 155.

³ Rev. Stat., Chap. 57, ¶ 1, § 1.

⁴ Thomasson v. Wilson, 146 Ill., 384; Doty v. Burdick, 83 Ill., 473; Westcott v. Arbuckle, 12 Ill. App., 577; Knight v. Knight, 3 Ill. App., 206.

⁵ Phelps v. Randolph, 147 Ill., 335; Croff v. Ballinger, 18 Ill., 200; Atkinson v. Lester, 1 Scam. (Ill.), 407.

⁶ Phelps v. Randolph, 147 Ill., 335.

him.¹ It is forcible entry to remove, against the will of the owner,² a fence resting upon land. And it is a forcible entry and detainer for a son, who has been allowed the partial use of a barn, free of rent, to take exclusive possession as against his father.³

Where the entry is effected by the employment of actual physical force, the cause of action for forcible entry arises immediately; but where, as in the case of landlord and tenant, the entry is lawful, the detainer does not become "forcible" within the meaning of the statute until the tenant's right of possession ceases under the lease. But it is only a *cause of action* which arises when the landlord becomes entitled to the possession of real estate. He cannot, even then, enter against the will of the occupant, if the same must be resisted by force. His remedy must be sought through the peaceful agencies which a civilized community provides for all its remedies.⁴

§ 1207. **When the action maintainable.**—The statute provides that the person entitled to the possession of lands or tenements may be restored thereto in the manner hereinafter provided.

I. When a forcible entry is made thereon.⁵

¹ Hoffman v. Reichert, 147 Ill., 274.

² Coverdale v. Curry, 48 Ill. App., 213; Parrott v. Hodgson, 46 Ill. App., 230.

³ Dunstedter v. Dunstedter, 77 Ill., 580.

⁴ Reeder v. Purdy, 41 Ill., 279; Coverdale v. Curry, 48 Ill. App., 213.

⁵ For a forcible entry upon an actual possession, the action will lie as well against the one as against any other person. Huftalin v. Misner, 70 Ill., 205; Wilder v. House, 48 Ill., 279; Spurck v. Forsyth, 40 Ill., 438; Pratt v. Stone, 10 Ill. App., 633.

A person in quiet possession of mortgaged premises at the time proceedings for foreclosure are commenced may maintain the action if he is ousted by writ of possession issued on a decree to which he is not a party. Brush v. Fowler, 36 Ill., 53.

Likewise one ousted by writ of possession for other and different premises may maintain the action. Hubner v. Feige, 90 Ill., 208.

The action cannot be maintained against a widow by the heirs. She is entitled to possession as tenant in common with the heirs and where she is in possession at the time of the death of her husband her possession is lawful, so long as it is not held to

II. When a peaceable entry is made and the possession unlawfully withheld.¹

III. When entry is made into vacant or unoccupied lands or tenements without right or title.²

IV. When any lessee of the lands or tenements, or any person holding under him, holds possession without right, after the determination of the lease or tenancy by its own limitation, condition, or terms, or by notice to quit or otherwise.³

the exclusion of the heirs. *Cofoid v. Bishop*, 11 Ill. App., 117.

¹ Every detainer of premises is unlawful, and within the meaning of the statute forcible, when premises are not surrendered to the person entitled thereto, after demand duly made, notwithstanding the entry thereon may have been peaceably and lawfully made. *Thomasson v. Wilson*, 146 Ill., 384; *Clark v. Bartlett*, 44 Ill., 349.

The action will lie against one who in giving a trust deed acknowledges himself the tenant of the trust deed and has covenanted to surrender possession to the purchaser in cases of sale under the power therein, and that an action of forcible entry and detainer may be employed to dispossess him. *Chapin v. Billings*, 91 Ill., 539.

The action cannot be maintained, however, except by one who is lawfully entitled to the possession, as will be subsequently shown. See *post*, § 1208.

² One who has entered unoccupied lands under claim of title and with the honest intention of making useful improvements, cannot be dispossessed in an action of forcible entry and detainer, even by one who also claims title. *Brooks v. Bruyn*, 18 Ill., 539. Proper action to test the title is an action of ejectment.

One taking possession of unoccupied premises and claiming to be the owner can maintain an action of forcible entry and detainer against one who forcibly ejects him. *Pratt v. Stone*, 10 Ill. App., 633.

³ It is apparent that the action of forcible entry and detainer will lie against one who has obtained possession from a tenant as well as against one who has obtained possession direct from the owner. The only prerequisite to the bringing of the action is that the original lease or tenancy should have terminated by its own limitation, condition, or terms, that it may have been terminated by notice to quit in another lawful manner. *Thomasson v. Wilson*, 146 Ill., 384; *Patchell & Turner v. Johnson*, 64 Ill., 305; *Doran v. Gillespie*, 54 Ill., 366; *Ball v. Chadwick*, 46 Ill., 28.

But the action must be brought against the person withholding the unlawful possession. For example, against the sub-tenant and not against a tenant who has re-let the premises and surrendered possession. *Leindecker v. Waldron*, 52 Ill., 283; *Clark v. Baker*, 44 Ill., 349; *Brush v. Fowler*, 36 Ill., 53. Further as to "Parties Defendant," see *post*, § 1209.

The action may be maintained as

V. When a vendee, having obtained possession under a written or verbal agreement to purchase lands or tenements, and having failed to comply with this agreement, withholds possession thereof, after demand in writing by the person entitled to such possession.'

VI. When lands or tenements have been conveyed by any grantor in possession, or sold under the judgment, or decree of any court in this State, or by virtue of any sale in any mortgage or deed of trust contained, and the grantor in possession or party to such judgment or decree, or to such mortgage or deed of trust, after the expiration of the time of redemption, when redemption is allowed by law, refuses or neglects to surrender possession thereof, after demand in writing, by the person entitled thereto, or his agent.'

well at suit of one who has purchased the fee, as it could have been at suit of the landlord himself. *Fisher v. Smith*, 48 Ill., 184. Further as to parties plaintiff, see *post*, § 1208.

'Under this clause of the statute the relation of vendor and purchaser must exist. The owner in possession must have obtained it under contract of purchase, which contract he has failed to fulfill. *Haskins v. Haskins*, 67 Ill., 446; *Wilburns v. Haines*, 53 Ill., 207; *Dixon v. Haley*, 16 Ill., 145—and must have neglected or refused to comply therewith after demand in writing by the person entitled to the possession. *Haskins v. Haskins*, 67 Ill., 446.

A conveyance by way of security and a bond back for reconveyance is not a "purchase" of lands within the meaning of the statute and the action will not lie to obtain possession thereunder. *West v. Frederick*, 62 Ill., 191.

Furthermore, after the nonperformance of a contract to purchase, the vendor in possession is estopped in an action of forcible entry and detainer from denying his vendee's

right of possession. *Leshner v. Sherwin*, 86 Ill., 420.

Right to gather crops.—In case of forfeiture under contract to purchase, the purchaser shall be entitled to cultivate and gather the crops, if any, planted by him and grown or growing on the premises, at the time of the commencement of the suit, and shall have the right to enter for the purpose of removing such crops, first paying or tendering to the party entitled to the possession a reasonable compensation for such use of the land before removing the crops. Rev. Stat., Chap. 57, ¶ 4, § 4.

² Rev. Stat., Ch. 57, ¶ 2, § 2.

The writ of possession issued under a decree and the action of forcible entry and detainer seem to be concurrent remedies which may both be pursued until satisfaction is had by one or the other. *Kissinger v. Whittaker*, 82 Ill., 22.

The action will lie against all who are bound by the decree, even though they be not named therein. *Rice v. Brown*, 77 Ill., 549. The word "Party" includes any one holding the premises under the

§ 1208. **Who to be parties plaintiff.**—As before said,¹ the action of forcible entry and detainer is a possessory action in which the only question to be determined is the right of possession. Therefore the action must be begun by one having the right of possession, by him only, and, since the entire right of possession is to be determined, it must be begun by the person or persons having the right to the exclusive possession of the entire premises. Furthermore, the right of possession must exist in the plaintiff at the time the cause of action accrued against the defendant, or the suit cannot be maintained.² Actual possession (*pedis possessio*) is not an absolute prerequisite to the bringing of the action of forcible entry and detainer, for, like in an action of ejectment,³ the lawful right of possession takes with it, by force of law, such constructive possession as will enable the plaintiff to maintain an action for the actual possession thereof.⁴

maker of the mortgage or trust deed. Preston v. Zahl, 4 Ill. App., 423; Katz v. Buck, 111 Ill., 40.

But the action cannot be maintained against one who is not a "party to such judgment or decree." Kingsbury v. Perkins, 15 Ill. App., 240.

The purchaser at the foreclosure sale may, after the expiration of the time of redemption, and after demand of possession in writing, maintain the action of forcible entry and detainer to obtain possession of the premises purchased. Lehman v. Whittington, 8 Ill. App., 374.

One entitled to possession under a sale upon execution may obtain possession by an action of forcible entry and detainer under this clause of the statute. Barrett v. Trainor, 50 Ill. App., 420; after demand made of the occupant for possession. Dickason v. Dawson, 85 Ill., 53. Further as to "demand," see *post*, § 1210; and further as to "Parties Defendant," see *post*, § 1209.

¹ *Ante*, § 1205.

² Leshar v. Sherwin, 86 Ill., 420; Pensoneau v. Bertke, 82 Ill., 161; Cox v. Cunningham, 77 Ill., 545; Allen v. Tobias, 77 Ill., 169; Mann v. Brady, 67 Ill., 95; Hassett v. Johnson, 48 Ill., 68; Swetitsch v. Waskow, 37 Ill. App., 153; Mueller v. Newell, 29 Ill. App., 192; Stevenson v. Morrissey, 23 Ill. App., 258; Godard v. Lieberman, 18 Ill. App., 366.

³ *Ante*, Vol. I, § 238.

⁴ Pearson v. Herr, 53 Ill., 154; Jamison v. Graham, 57 Ill., 94; Spruck v. Forsyth, 40 Ill., 438.

It is a sufficiently exclusive possession to maintain the action in his name where the son and heir has occupied premises, the mother and widow living with him as a member of his family, without having made claim of dower. Thompson v. Sornberger, 78 Ill., 353.

One in possession of a farm, where there is a wood lot belonging thereto, but not attached, nor even fenced, may maintain the action for an invasion of the wood lot. Pear-

The action cannot be maintained by one who is not entitled to the possession. Therefore where the owner has leased the premises to another and a third person is in actual, unlawful possession thereof, the action of forcible entry and detainer must be brought by the lessee entitled to possession. In other words the incoming tenant must maintain the action for possession against the outgoing tenant of the same landlord.¹

The right to maintain an action of forcible entry and detainer vests at once in the one whose possession is invaded, which right must be exercised in his lifetime in his own name.²

The action of forcible entry and detainer abates upon the death of either party during its pendency.³

§ 1209. **Who to make parties defendant.**—The general rule is that the person or persons in actual possession at the time of the commencement of the action are the proper parties to be made defendants in an action of forcible entry and detainer. The action does not alone accrue against the actual disseizor, but accrues against every one holding under him. It may be needful, however, where the possession was first forcibly taken, and thereafterwards acquired by another who is in peaceable possession, that a demand be first made against him, which demand would not be necessary in an action against the forcible taker.⁴ Where a lease has been assigned, or the

son v. Herr, 53 Ill., 144. And a tenant in possession under a lease of the improved portion of demised premises claiming possession of the whole has a sufficient possession of the unenclosed portion to support the action against one who subsequently and forcibly enters thereon. *Hardisty v. Glenn*, 32 Ill., 62.

A person in possession of lands abutting upon streams may maintain forcible entry and detainer against one who invades his possession of the lands acquired by accretion. *Griffin v. Kirk*, 47 Ill. App., 258.

A joint tenant or tenant in common may maintain an action of forcible entry and detainer against a co-tenant who unlawfully refuses to permit him to enjoy his rights therein. *Mason v. Finch*, 1 Scam. (Ill.), 495.

¹ *Ball v. Chadwick*, 46 Ill., 27;

Norris v. Pierce, 47 Ill. App., 463.

² *Dudley v. Lee*, 39 Ill., 339.

³ *Havins v. Bickford*, 9 Humph. (Tenn.), 673.

⁴ *Thomasson v. Wilson*, 146 Ill., 384; *Clark v. Barker*, 44 Ill., 349; *Jackson v. Warren*, 32 Ill., 331.

premises have been sub-let and the assignee or sub-tenant is in possession, he is the proper party defendant in an action of forcible entry and detainer brought by the landlord to procure such possession.¹

A tenant, or one holding possession under him, has no right to the possession of the demised premises, after the expiration of the tenancy or demise. Nevertheless, the landlord or other person entitled to the possession cannot forcibly expel such occupant without rendering himself liable in trespass. The person holding over is entitled to notice to quit and an action of forcible entry and detainer cannot be entered against him until such notice is given.²

Where several persons jointly occupy the premises sought, they should all be made parties defendant; for, after judgment, the writ of possession cannot issue against one who is not a party to the suit or privy thereto. If the premises are occupied by joint tenants, or tenants in common, they must all be made parties to the suit; but if one tenant in common excludes his co-tenant, he alone can be made a party defendant at the suit of his co-tenant.³

Where persons occupy the premises severally they cannot be joined in one action, but an action must be brought against each for the part he occupies,⁴ except where the tenancy was originally joint.⁵

Whenever there shall have been one lease for the whole of certain premises, and the actual possession thereof, at the commencement of the suit, shall be divided in severalty among persons with, or other than the lessee, in one or more

¹ Hubner v. Feige, 90 Ill., 207; Clark v. Barker, 44 Ill., 339; Miller v. White, 80 Ill., 580; Hardisty v. Glenn, 32 Ill., 62; Patchell & Turner v. Johnson, 64 Ill., 305; Leindecker v. Waldron, 52 Ill., 288; Reed v. Hawley, 45 Ill., 40.

² Westcott v. Arbuckle, 12 Ill. App., 577; Mason v. Finch, 1 Scam. (Ill.), 495. Further as to "Demand" see *post*, § 1210.

In case of attornment to the

wrong person the landlord entitled to the possession may maintain the action against the sub-tenant in possession. The occupant has no better rights than the lessee himself would have. Cox v. Cunningham, 77 Ill., 545.

³ Jamison v. Graham, 57 Ill., 94; Mason v. Finch, 1 Scam. (Ill.), 495.

⁴ Reynolds v. Thomas, 17 Ill., 207.

⁵ Gould v. Henderson, 9 Ill. App.,

171.

portions or parcels, separately and severally or occupied, all or so many of such persons, with the lessee, as the plaintiff may elect, may be joined as defendants in one suit.¹

However, a sub-tenant who has not been made a party to the suit cannot be dispossessed under a judgment against the tenant only, unless the sub-tenant has taken possession during the pendency of the action.² One in peaceable possession, even though his landlord's possession be not only wrongful, but acquired by force, when he himself is not privy thereto or has no knowledge of it, cannot be turned out without due process of law.³

§ 1210. Demand in writing, when necessary—Return—Form.—The action of “forcible entry and detainer” in this State embraces in effect two actions; the old common law action of forcible entry and the old statutory action of forcible detainer. The fundamental principles of each of these actions is still apparent in our rules of practice relating to the demand to be given or not to be given before the commencement of a suit for “forcible entry and detainer.” Where the action is founded upon a forcible entry the cause of action is complete when the forcible entry is made, and there is no need that a demand for possession should be made before the commencement of the suit by the person having the possession (or the constructive possession of unoccupied lands) *at the time the forcible entry occurred*. But where the original entry was not forcible, but peaceable, and the detention only is wrongful and unlawful, such detention will not become “forcible” in contemplation of law until a demand in writing has been made upon the person so wrongfully in possession by the person entitled to the possession *at the time of the demand*.⁴

There must be a forcible detainer before the action can be maintained. If the entry has been forcible, the detainer is the result of force and therefore forcible. If the entry was

¹ Rev. Stat., Chap. 57, ¶ 15, § 15.

² Leindecker v. Waldron, 52 Ill., 283.

³ Clark v. Barker, 44 Ill., 349.

⁴ Stillman v. Palis, 134 Ill., 532; Thomasson v. Wilson, 48 Ill. App., 398.

effected without force the detainer must be rendered forcible by demand and refusal to surrender peaceably.¹

When the gist of the action is the forcible detainer, no matter which of the clauses of the statute gives the right of action, a demand in writing for the possession of the premises is an absolute prerequisite to the commencement of the suit. This demand must be made after the occupant's right of possession has terminated. The demand may be made by the plaintiff himself or by his agent, attorney, attorney in fact, or some one duly authorized by him or his attorney in fact to make it. The authority of the person to make the demand should be disclosed to the occupant and this may be done by the demand itself.² The demand is not required to be made any definite length of time before the commencement of the suit. In fact, the form prescribed by the statute demands "immediate" possession, which, not being given, will warrant the commencement of the action at once.³ The statute prescribes that the demand in writing may be made by delivering a copy thereof to the tenant, or by leaving such a copy with some person above the age of twelve years, residing on, or being in charge of, the premises; or in case no one is in the actual possession of the premises, then by posting the same on the premises. When any such demand is made by an officer authorized to serve process, his return shall be *prima facie* evidence of the facts therein stated, and if such demand is made by any person not an officer, the return may be sworn to by the person serving the same, and shall then be *prima facie* evidence of the facts therein stated.⁴

The demand for possession may be in the following form :

¹ Steiner v. Priddy, 28 Ill., 179; Robinson v. Crummer, 5 Gilm. (Ill.), 218.

² Dickason v. Dawson, 85 Ill., 53; Nixon v. Noble, 70 Ill., 32; Doran v. Gillespie, 54 Ill., 366; Eldridge v. Holway, 18 Ill., 445; Brackensieck v. Vahle, 48 Ill. App., 312; O'Malia

v. Glynn, 42 Ill. App., 51; Hoffman v. Reichert, 31 Ill. App., 558; Wheelan v. Fish, 2 Ill. App., 447; Hinterberger v. Weindler, 2 Ill. App., 407.

³ Huftalin v. Misner, 70 Ill., 205.

⁴ Rev. Stat., Chap. 57, ¶ 3, § 3.

NO. 396.—FORM OF DEMAND IN WRITING FOR POSSESSION OF PREMISES.

To.....:—

I hereby demand immediate possession of the following described premises: *(the premises must here be described with sufficient certainty, that they may be identified and located by a surveyor or officer executing a writ of restitution).*¹

This demand in writing must not be confounded with “a notice to quit” as mentioned elsewhere in the statute. This notice must be given after the right of possession has terminated by expiration of the tenancy or otherwise, and a “notice to quit” is only one means of terminating the tenancy, and is therefore not within the purpose of this article.²

§ 1211. Commencement of suit. (a) Complaint. — The statute provides that on complaint in writing, by the party or parties entitled to the possession of such premises, being filed in any court of record, or with any Justice of the Peace, in the county where such premises are situate, stating that such party is entitled to the possession of such premises (*describing the same with reasonable certainty*) and that the defendant (*naming him*) unlawfully withholds the possession thereof from him, or them, the Clerk of the court of such Justice of the Peace shall issue a summons, etc.³

¹ Stillman v. Palis, 134 Ill., 532; Cairo, & St. L. R. R. Co. v. Wiggins Ferry Co., 82 Ill., 230; Maloney v. Shattuck, 15 Ill. App., 44.

The demand shall be signed by the person claiming such possession, his agent or attorney, and the signature should disclose the authority, as “Agt.,” “Atty.,” etc.; Rev. Stat., Chap. 57, ¶ 3, § 3.

Evidence of written demand.—Where either demands in writing were made upon three different persons, the contents of each being identical with the others, except the name of the person, a fourth draft being identical with each of the others was admissible in evidence to

support an action against each. The name of the person to whom it is addressed is no part of the notice. Gardner v. Eberhart, 82 Ill., 316.

² It has been said that to support an action of forcible entry and detainer for the nonpayment of rent four things must concur:

1. There must be a default in the payment of rent.

2. There must be a demand for the same.

3. There must be a statutory notice to quit.

4. There must be a failure to pay the rent before the expiration of the time named in the notice to quit. Cone v. Woodward, 65 Ill., 477.

³ Rev. Stat., Chap. 57, ¶ 5, § 5.

The complaint must be made before the summons issues,¹ It must aver that the plaintiff was in possession of the premises and that his possession was invaded by the defendant. If the relation of landlord and tenant is shown to have existed, then it is sufficient to aver that the time for which the premises were let has expired and that the tenant persists in holding the premises after demand in writing has been made of him therefor.² And unless the complaint shows that the demand was made by the plaintiff or some one authorized by him it will be insufficient in this regard.³ The complaint must describe the premises with sufficient certainty that they can be readily identified and located by a surveyor.⁴ The premises should be properly described in the complaint, notwithstanding the fact that they may have been improperly described in the lease. It can be shown on the trial that the defendant actually entered the premises in question under the lease erroneously describing them and that he paid rent therefor.⁵

The complaint is a mere pleading and is not required to be sworn to, nor is it required to be signed by the plaintiff in person. It may be made by an agent or attorney.⁶

¹ French v. Willer, 126 Ill., 611.

² Cairo & St. L. R. R. Co. v. Wiggins Ferry Co., 82 Ill., 230; Spurck v. Forsyth, 40 Ill., 438; Smith v. Killeck, 5 Gilm. (Ill.), 293; Beel v. Pierce, 11 Ill., 91.

It not necessary to aver the day of entry and if a day of entry is averred that precise day need not be proved on the trial. Spurck v. Forsyth, 40 Ill., 438. A petition was held to be sufficient which showed that A, one of two defendants, had rented 15 acres, parcel of a larger tract and that he withholds the whole tract, and that B, the other defendant, unlawfully entered into the same premises under A, and that both unlawfully withhold them from the plaintiff after demand. Beel v. Pierce, 11 Ill., 91. Further as to including several parties where

the original lessee has sub-let the premises, see *ante*, § 1209.

³ Doran v. Gillespie, 54 Ill., 366.

⁴ Cairo & St. L. R. R. Co. v. Wiggins, etc., Co., 82 Ill., 230; Maloney v. Shattuck, 15 Ill. App., 44; Stillman v. Palis, 134 Ill., 532; Schaumtoeffel v. Belm, 77 Ill., 567; Atkinson v. Lester, 1 Scam. (Ill.), 407.

⁵ Gerlach v. Walsh, 41 Ill. App., 83.

⁶ Patterson v. Graham, 140 Ill., 531.

Objection to insufficient complaint—How made.—If the complaint in an action of forcible entry and detainer is deemed to be defective, such objection should be urged by a motion to quash, which motion is in the nature of a plea in abatement and should aver the deficiency. The

§ 1212. (b) **Summons—Form—When returnable.**—When a summons in an action of forcible entry and detainer issues out of a court of record it may be in like form as other summons issued out of such court.¹

A summons issuing out of a court of record shall be made returnable on the first day of the next succeeding term of said court, and if served ten days before the first day of the next term, the cause shall be continued to the next term of court.²

When a summons in an action of forcible entry and detainer is issued by a Justice of the Peace, it may be substantially in the following form :

NO. 397.—FORM OF SUMMONS IN FORCIBLE ENTRY AND DETAINER, BEFORE A JUSTICE OF THE PEACE.

STATE OF ILLINOIS, }
.....County. } ss.

The People of the State of Illinois,
To the Sheriff or Constable of said county, Greeting:—

You are hereby commanded to summon, to appear before, at, on the day of, A. D., at o'clock, M., to answer the complaint of wherefore he unlawfully withholds from him the possession of certain premises in said county (*describing the premises as in the complaint*), and hereof make due return as the law directs.

Given under my hand this day of, A. D.

.....,
Justice of the Peace.³

When a summons is issued by a Justice of the Peace it shall specify a certain place, day and hour for the trial, not less

motion should be made before going to trial. It cannot be urged for the first time on appeal. *Center v. Gibney*, 71 Ill., 557; *Leary v. Pattison*, 66 Ill., 203; *Doran v. Gillespie*, 54 Ill., 366; *Brown v. Keller*, 32 Ill., 151. Except where no surprise is occasioned thereby. *Snowell v. Moss*, 70 Ill., 313.

When amendment allowed. — Amendments to be complained are allowable within the discretion of

the court. *Spurck v. Forsyth*, 40 Ill., 438. And an amendment has been permitted to be made on appeal after the submission of the cause to the court where such amendment was not calculated to surprise the defendant. *Snowell v. Moss*, 70 Ill., 313.

¹ *Ante*, § 434, Form No. 20; Rev. Stat., Chap. 57, ¶ 6, § 6.

² Rev. Stat., Chap. 57, ¶ 8, § 8.

³ Rev. Stat., Chap. 57, ¶ 7, § 7.

than five nor more than fifteen days from the date of the summons.¹

*The action of forcible entry and detainer is local and confined to the county in which the land is situate. Process may, however, issue to and be served in the county where the defendant resides, though different from that where the land is located.*²

§ 1213. Same—Service of summons—Publication.—The statute prescribes that service of summons should be made by delivering a copy thereof to the defendant, or by leaving such copy at his usual place of abode, with some person of the family of the age of twelve years, or upwards, and informing such person of the contents thereof. The manner of service, and the date thereof, shall be indorsed on the back of said summons by the officer serving the same.

When service cannot be had, as provided in this section, and it shall appear by affidavit, or the return of the officer, that the defendant is not a resident of this State, or has departed from this State, or on due inquiry, cannot be found, or is concealed within this State so that process cannot be served upon him, then, if the suit is in a court of record, service may be had by notice, as in case of attachment in courts of record, or if the suit is before a Justice of the Peace, by notice as in case of attachment before Justice of the Peace.³

§ 1214. Pleadings.—No special pleadings are required in forcible entry and detainer proceedings, even in courts of record. The complaint answers the purpose of a declaration and the defendant must plead to it; that is to say, under a plea of "not guilty" he may give in evidence any matter in defense to the action.⁴ A plea of not guilty puts in issue all the material allegations of the complaint, and all matter of excuse, justification, or avoidance is generally allowed to be proved.⁵

¹ Rev. Stat., Chap. 57, ¶ 7, § 7.

² Billings v. Chapin, 2 Ill. App., 555.

³ Rev. Stat., Chap. 57, ¶ 9, § 9.
Further as to service by publication

in attachments in courts of record.
see *ante*, Vol. I, § 338.

⁴ Rev. Stat., Chap. 57, ¶ 11, § 11.

⁵ McGlynn v. Moore, 25 Cal., 348.

A plea in abatement may be filed to take advantage of defects in the proceedings,¹ but this is usually done by motion to quash.²

§ 1215. **Trial.**—Trials in courts of record in forcible entry and detainer proceedings shall be the same as in other cases of law in such courts.

In trials before Justices of the Peace, in forcible entry and detainer proceedings, either party may have the case tried by jury, if he shall so determine before the trial is entered upon, and will first advance the fees of the jurors. The number of jurors shall be six, or any greater number, not exceeding twelve, as either party may desire.³

If the defendant does not appear (having been duly summoned as above provided), the trial may proceed *ex parte*, and may be tried by the Justice of the Peace, or Judge of the court, without the intervention of a jury.⁴

There are two questions to be determined at the trial in forcible entry and detainer proceedings before a judgment for the plaintiff can be awarded. They are:

1. The exclusive possession of the plaintiff at the time the cause of action arose, and
2. The invasion of such possession of the defendant.⁵

The action being a possessory action the question of the title to the premises cannot be tried. The possession and right of possession only is the matter to be determined, and where the plaintiff fails to show his right of possession of the entire premises in question he cannot recover.⁶ Title deeds may be shown in evidence to prove the character or extent (boundaries) of the possession.⁷ And the defendant may show

¹ Shunick v. Thompson, 25 Ill. App., 619.

² Ante, § 1211n.

³ Rev. Stat., Chap. 57, ¶ 10, § 10.

⁴ Rev. Stat., Chap. 57, ¶ 12, § 12.

⁵ Jamison v. Graham, 57 Ill., 94.

⁶ Phelps v. Randolph, 147 Ill., 335; Stillman v. Palis, 134 Ill., 532; Doty v. Burdick, 83 Ill., 473; Thompson v. Sornberger, 59 Ill., 326; McCart-

ney v. McMullen, 38 Ill., 237; Fortier v. Ballance, 5 Gilm. (Ill.), 41; Kimmel v. Frazer, 49 Ill. App., 462; Thomasson v. Wilson, 46 Ill. App., 398; Maloney v. Shattuck, 15 Ill. App., 44.

⁷ Huftalin v. Misner, 70 Ill., 205; Smith v. Hoag, 45 Ill., 250; Brooks v. Bruyn, 18 Ill., 539; Ragor v. McKay, 44 Ill. App., 79.

the source of his claim to the right of possession.¹ Likewise it must be shown that the defendant, by himself, or by others holding under him, is in possession unlawfully and "forcibly" (within the meaning of the law) before a judgment can be recovered against him.²

¹ Nicholson v. Walker, 4 Ill. App., 404.

If the defendant entered under a mortgage he has a right to show the mortgage and his entry thereunder. Huftalin v. Misner, 70 Ill., 205.

² Leshner v. Sherwin, 86 Ill., 420; Bowman v. Mehring, 34 Ill. App., 389.

Where there has been a holding over after the termination of a tenancy, and a notice to quit, the gist of the action is the holding over and this must be proved by the plaintiff, or there can be no recovery. Murphy v. Dwyer, 11 Ill. App., 246.

As between vendor and vendee, on failure to comply with the agreement, it is proper to show, (1) that the relation of vendor and vendee exists; (2) that the vendee obtained possession of the land contract, and (3) that the vendee has failed or refused to comply with the contract before obtaining a deed of conveyance. Haskins v. Haskins, 67 Ill., 446.

The written agreement to sell, and the tender of a deed thereunder, may be shown to prove that the defendant failed to comply with his agreement. Leshner v. Sherwin, 86 Ill., 420.

And where the defendant takes possession under a contract to purchase and fails to comply therewith, he will be estopped from denying his vendor's right of possession. In such case the plaintiff need not prove any prior possession in himself. Leshner v. Sherwin, 86 Ill., 420.

A purchaser at a foreclosure sale

must show, in order to maintain the action, that he is such purchaser, and not only that he has demanded possession of the premises, but also that the defendant has refused, or neglected to surrender possession after such demand. Hersey v. Westover, 11 Ill. App., 197.

The tenant cannot dispute his landlord's title.—The tenant can not show in defense that the title of his landlord has expired or that some third person has the right of possession. The tenant must first surrender to him from whom he received it, before he will be permitted to show that his landlord has no longer a right to retain it. Fortier v. Ballance, 5 Gilm. (Ill.), 41.

It is no defense for the defendant in an action of forcible detainer for a tract of land to prove that he was in possession of only the house and garden situated on the tract. Rice v. Brown, 77 Ill., 550.

Nor is it a defense for the defendant to show that he entered without any actual force or breach of the peace, under claim of an adverse title. Pederson v. Cline, 27 Ill. App., 249.

It is matter of defense for the defendants to show that they occupied the tract in severalty where the action is brought against them jointly. Springer v. Cooper, 11 Ill. App., 267. In such case the actions should have been several. *Ante*, § 1209.

Declarations, made by the party at the time an act was done, explanatory of his motives or intentions, so as to show the dissent or opposi-

The proof and the finding at the trial in forcible entry and detainer proceedings must correspond with the allegations of the complaint. The rule regarding pleading, proof and recovery is the same in this as in other cases. Therefore, since, by our statute, there is in fact two actions included under one remedy, it follows that if the gist of the action is the forcible entry a finding that the defendant is guilty of "withholding" the possession, will not sustain a recovery and *vice versa*.¹

Form of the verdict.—The proper form of a verdict in an action of forcible entry and detainer will be for the jury to find that the defendant is "guilty in manner and form as alleged in the complaint;" but a simple finding of "guilty" has been held to be sufficient.²

All the members of the jury are required to sign the verdict.³

§ 1216. **Judgments.** (a) **For the whole.**—The sole object of an action of forcible entry and detainer being an action to regain a possession which has been invaded, the only judgment that can be rendered is that the plaintiff have restitution of the premises of which he has been unjustly deprived. There can be no judgment for rent or damages. The only judgment is as to the right of possession. If the rent or damages are to

tion of one party to the entry of another upon his premises against his will may be shown in evidence. Croff v. Ballinger, 18 Ill., 200.

Disclaimer by the plaintiff of any interest or claim in the premises, made before the entry of the defendant may be shown by the defendant and if shown will constitute a good defense to the action. Dudley v. Lee, 39 Ill., 339.

Sufficiency of possession to maintain the action.—An owner of premises had leased them for a year. At the expiration of the term he went to the farm. He took to the farm a load of goods. The tenant carried the goods up stairs, placed them in a room and stated that he surren-

dered possession. The landlord performed such acts preparatory to occupying the house and left with the intention of returning the following Monday. The landlord had a deed for the whole premises. It was held that these facts showed a sufficient possession of the premises to entitle the landlord to maintain an action of forcible entry and detainer against one who forcibly took possession before the return. Huftalin v. Misner, 70 Ill., 205.

¹ Wall v. Goodenough, 16 Ill., 415.

² Smith v. Killeck, 5 Gilm. (Ill.), 293.

³ Bloom v. Goodner, 1 Ill. (Breese), 63.

be recovered it must be done in a subsequent suit. The action is purely statutory and the judgment must be restricted thereto. The strict legal rights must be enforced. The court cannot consider the equities of the parties.¹

If it shall appear on the trial that the plaintiff is entitled to the possession of the whole of the premises claimed, he shall have judgment and execution for the possession thereof and for his costs.²

If the plaintiff is nonsuited, or fails to prove his right of possession, the defendant shall have judgment and execution for costs.³

§ 1217. (b) **For a part.**—If it shall appear that the plaintiff is entitled to the possession of only a part of the premises claimed, a judgment and execution shall be for that part only and for costs, and for the residue the defendant shall not be found guilty.⁴

While all the different occupants, of premises included within a single lease may be joined in an action of forcible

¹ Keating v. Springer, 146 Ill., 481; Brush v. Fowler, 36 Ill., 53; Robinson v. Crummer, 5 Gilm. (Ill.), 218; Shunick v. Thompson, 25 Ill. App., 619; Illinois Cent. R. R. Co. v. B. & O. & C. R. R. Co., 23 Ill. App., 531.

Nominal damages.—While damages cannot be awarded in an action of forcible entry and detainer, yet where one cent damages were awarded to the plaintiff the Supreme Court would not reverse the judgment for that error alone. Brush v. Fowler, 36 Ill., 53.

The conveyance pendente lite does not affect the plaintiff's right to recover, the question being his right to recover possession at the commencement of the suit. Daggett v. Mensch, 41 Ill. App., 403.

The action terminates right to recover rent, or for use and occupa-

tion.—Where a lease has been terminated by notice or an action of forcible detainer successfully prosecuted, an installment of rent which would have become due had the lease continued in force cannot be recovered. Johannes v. Kielgast, 27 Ill. App., 576.

² Rev. Stat., Chap. 57, ¶ 13, § 13

³ Rev. Stat., Chap. 57, ¶ 16, § 16.

Judgment by confession vacated.—A judgment in forcible entry and detainer entered by confession under the power incorporated in the lease will be vacated on motion, at least to the extent of giving the defendant an opportunity of interposing his defense, where, by affidavit in support of a motion, the defendant shows a good defense in law to the plaintiff's action. Ryan v. Kirshberg, 17 Ill. App., 132.

⁴ Rev. Stat., Chap. 57, ¶ 14, § 14.

entry and detainer, as hereinbefore shown,¹ the recovery against an individual defendant must be limited to such portion of the premises as is actually withheld by him.²

The plaintiff may, at any time, dismiss his suit as to any one or more of the defendants, and the jury or court may find any one or more of the defendants guilty, and the others not guilty, and the court shall thereupon render judgment according to such finding.³

§ 1218. Writ of restitution—Form.—If no appeal is prayed and a bond therefor filed within five days from the rendition of the judgment, as hereinafter indicated,⁴ a writ of restitution shall issue, by which the officer is commanded to restore to the plaintiff possession of the premises named in the judgment.⁵ Likewise a writ of restitution may be issued upon the dismissal of an appeal.⁶

In executing a writ of possession, the officer may enter the premises forcibly, if necessary, and having entered, it is his duty to remove all property, as well as the person of the defendant, doing as little damage and using as little force as possible in order to effect that purpose.⁷

NO. 398.—FORM OF WRIT OF RESTITUTION FROM JUSTICE'S COURT.⁸

STATE OF ILLINOIS, }
 County. } ss.

The People of the State of Illinois,
 To the Sheriff or any Constable of said county, Greeting:—

Whereas A..... B..... lately obtained before me a judgment against C..... D..... in an action of forcible entry and detainer and for restitution of the premises following, to wit: (*here describe the premises as in the complaint*) and also for dollars costs.

These are therefore, to command you, in the name and by the authority

¹ *Ante*, § 1209.

² *Humphreville v. Davis*, 27 Ill. App., 142.

³ *Rev. Stat.*, Chap. 57, ¶ 17, § 17.

⁴ *Post*, § 1219.

⁵ *Rev. Stat.*, Chap. 57, ¶ 18, § 18; *French v. Willer*, 126 Ill., 611.

⁶ *Harlan v. Scott*, 2 Scam. (Ill.), 65.

⁷ *Cunningham on Forcible Entry and detainer*, § 165.

⁸ Compare *Cunningham on Forcible Entry and Detainer*, p. 284.

of the said people to dispossess the said C..... D..... and to restore the said A..... B..... to the possession of the said premises. And you are also hereby commanded that of the goods and chattels of the said defendant, C..... D....., in your county, you may make the sum of dollars, being the amount of costs in said suit. Hereof make due and immediate service, and return this writ to me.

Given under my hand and seal at, this day of,
A. D.

....., [Seal.]
Justice of the Peace.

§ 1219. Appeal—Bonds—Form.—If any person shall feel aggrieved by the verdict of the jury, or the decision of the court, upon any trial, had under the Forcible Entry and Detainer Act, such party may have an appeal, to be taken to the same courts and in the same manner and tried in the same way as appeals are taken and tried in other cases.¹

The appeal must be prayed and the bond filed within five days from the rendition of the judgment.²

When the defendant appeals the condition of the bond shall be that he will prosecute such appeal with effect, and pay all rent then due or that may become due before the final determination of the suit, and also all damages and loss which the plaintiff may sustain by reason of the withholding of the premises in controversy, and by reason of any injury done thereto during such withholding, until the restitution of the possession thereof to the plaintiff, together with all costs that may accrue in case the judgment from which the appeal is taken is affirmed or appeal dismissed; which said bond shall be in a sufficient amount to secure such rent, damages and costs, to be ascertained and fixed by the court.³

¹ Rev. Stat., Chap. 57, ¶ 18, § 18. As to Appeals from Justice's Court, see *ante*, Vol. I, §§ 409-425. As to Appeal from Circuit Courts, see *ante*, §§ 1013-1020.

Where the forcible entry and detainer suit does not involve a franchise and freehold, or the validity of a statute, and in which the amount involved does not exceed one thousand dollars, and there

being no questions of law certified from the Appellate Court, no appeal will lie to the Supreme Court. *Preston v. Gahl*, 94 Ill., 586; *ante*, §§ 1017-1020.

² Rev. Stat., Chap. 57, ¶ 18, § 18; *Hosher v. Hesterman*, 51 Ill. App., 75.

³ Rev. Stat., Chap. 57, ¶ 19, § 19. *When appeal may be taken.*—An appeal cannot be taken until after

The court in which the appeal may be pending may require a *new bond* in a larger amount, if necessary to secure the rights of the parties, and in case of continuance, may require another bond to be given to further secure the same.¹

the trial court has fixed the amount of the bond to be given, because no bond can be given until the amount is ascertained by the court. *Fairbank v. Streeter*, 142 Ill., 226.

"To pay all rent due or to become due, etc."—A bond which omits this provision is not in substantial compliance with the statute. *McKoy v. Allen*, 36 Ill., 429; *Pitt v. Swearingen*, 76 Ill., 250. And where such words are not included in the bond or in words from which the covenant to pay rent can be implied, no recovery of rent can be had in a suit upon such bond. *Pitt v. Swearingen*, 76 Ill., 250.

Measure of damages in action on bond.—Where the plaintiff has been kept out of the possession of the premises during the pendency of an appeal in forcible entry and detainer proceedings, the correct measure of damages in an action on an appeal bond is the value of the use and occupation, or the reasonable rental value. *Shunick v. Thompson*, 25 Ill. App., 619.

Dissolution of appeal.—When a motion is made to dismiss an appeal because the appellee has failed to comply with the statute in having the "amount of the bond fixed by the court," the provision of the statute (§ 69 of the Act entitled "Justices and Constables") providing

that an appeal cannot be dismissed for mere defects in the bond, if the party appealing will, within a reasonable time, file a new bond, has no application. In order that an appeal may be sustained the right of a party to appeal must clearly appear, and it is consequently lost by a failure to comply with the statutory regulations. *Fairbank v. Streeter*, 142 Ill., 226.

Amendment of bond.—A motion to amend a bond given for the appeal of a forcible entry and detainer suit from a Justice's Court is addressed to the sound discretion of the court and the decision of the court thereon cannot be assigned for error. *Harlan v. Scott*, 2 Scam. (Ill.), 65.

¹ Rev. Stat., Chap. 57, ¶ 19, § 19.

New bond not required until appeal is pending.—The statute does not authorize the Circuit Court to require a new bond until after the commencement of the term to which the appeal is taken. *Ryder v. Meyer*, 66 Ill., 40; *Fairbank v. Streeter*, 142 Ill., 226.

New bond extinguishes old.—Where a new bond in a larger amount is given, as provided by the statute, such bond operates as a satisfaction or extinguishment of the former bond. *Peppers v. International Bank*, 10 Ill. App., 531.

NO. 399.—FORM OF APPEAL BOND GIVEN BY DEFENDANT IN
FORCIBLE ENTRY AND DETAINER.¹

KNOW ALL MEN BY THESE PRESENTS THAT WE, C..... D.....
E..... F..... and G..... H....., of the District of.....,
State of Illinois, are held and firmly bound unto A..... B..... in
the penal sum of.....dollars, lawful money of the United States, for the
payment of which well and truly to be made, we bind ourselves, our heirs,
executors and administrators, jointly and severally, firmly by these pres-
ents.

Witness our hands and seals this.....day of....., A. D.....

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, THAT WHEREAS, the
said A..... B..... did on the day of, A. D.
....., before L..... M....., Esquire, a Justice of the Peace
for the district of, (*if the judgment was recovered in a court of
record, name the court properly and aver accordingly*), recover a judgment
against the above bounden C..... D....., in an action of forcible
entry and detainer of certain premises in said district, and for restitution
thereof, and for costs of suit, from which judgment the said C.....
D..... has taken an appeal to the Court of
County (*if appeal be taken to Appellate or Supreme Court include the
name properly*), in the state aforesaid. Now if the said C..... D.....
shall prosecute his appeal with effect and pay all rent now due and that
may become due before the final determination of the said suit, and all
damages and loss which the plaintiff may sustain by reason of the with-
holding of the possession of said premises, and by reason of any injury
done thereto during such withholding, together with all costs, until the
restitution of the possession thereof to the plaintiff; in case the judgment
from which the appeal is taken is affirmed, then the above obligation to
become void, otherwise to be and remain in full force and effect.

C..... D....., [Seal.]

E..... F....., [Seal.]

G..... H....., [Seal.]

Approved by me this day of, A. D.

.....,
Justice of the Peace (or Judge of Court).

When the plaintiff appeals the condition of the bond shall
be as in other cases of appeal, when taken by the plaintiff,
except as otherwise provided by law.²

¹ Compare Cunningham on For-
cible Entry and Detainer, p. 283.

² Rev. Stat., Chap. 57, ¶ 20, § 20.
As to bonds of appeal from Justice's

Court, see *ante*, Vol. I, § 414. As to
bonds of appeal in courts of record,
see *ante*, § 1032.

ARTICLE IX.

DISTRESS FOR RENT.

- | | |
|---|---|
| <p>§ 1220. Definition, nature and history.</p> <p>1221. What property may be distrained—Extent of landlord's lien.</p> <p>1222. When landlord may be distrained for rent.</p> <p>1223. How the proceedings begun—Warrant—Inventory—Forms.</p> | <p>§ 1224. Summons—Issuance and return.</p> <p>1225. Notice of nonresidents, etc.—Form.</p> <p>1226. Proceedings—Pleadings.</p> <p>1227. Set-off.</p> <p>1228. Judgment.</p> <p>1229. Release of distrained property by giving bond.</p> <p>1230. Perishable property—Disposition of.</p> |
|---|---|

§ 1220. Definition, nature and history.—*Distress* is the taking of a personal chattel out of the possession of the wrongdoer into the custody of the party injured to procure satisfaction of a wrong committed.¹

Distress for rent is the taking by the landlord, by due course of law, of the property of his tenant, on which he has or may have a lien for rent, to procure a satisfaction of the rent due and unpaid. Distress for rent is a proceeding of great antiquity. It seems to have had its origin in the Gothic nations of Europe. It was recognized by the Magna Charta and since that time has been recognized and enlarged by numerous English and American statutes.²

A landlord's lien and his right to distrain for rent and create a lien thereby are separate and distinct rights. The former did not exist before the statute of Anne,³ while the latter did. The right to distrain for rent is a common law right which has been preserved by the statute and will therefore be construed more liberally than if the right were created by the statute. A landlord's lien upon the chattels of his tenant may be enforced by attachment as against one

¹ 3 Bla. Com. 6; And. Law Dict.

³ 8 Anne Ch. 14.

² Compare And. Law Dict.; Bouv. Law Dict.

interfering therewith,¹ or the lien may be enforced by distress for rent. When no lien exists until it is created by the service of a distress warrant the acquired rights of third persons take precedence thereto.²

The statute of Anne above referred to gave the landlord a lien upon the tenant's property, but this statute is not in force in this State, and the landlord has no lien upon the tenant's property prior to the service of a distress warrant, except as the statute expressly gives to him upon the crops grown or growing upon his land.³

The landlord's distress for rent does not bar his equitable remedy to prevent the removal of the crop by injunction;⁴ nor his legal action for rent;⁵ nor does a verdict rendered in favor of the defendant in distress proceedings estop the landlord from thereafter setting up the relation of landlord and tenant in another suit.⁶

The landlord's right to distress for rent cannot be destroyed by the tenant giving notice of his intention to remove, but an attempted abandonment of the premises, or neglect to harvest the crop, gives cause for distress for rent. The removal of the property does not terminate the right, for the landlord may follow the chattels to any place in the county and distrain them for rent due, and may thereafter distrain them for rent thereafter becoming due, provided it be due at the time of the distraint. Furthermore, a landlord does not waive his right to distrain for rent by taking a note and chattel mortgage for rent due.⁷

A distress for rent can only be maintained when rent is due, unless crops are being removed. It can only be main-

¹ A crop cannot be attached until the landlord's interest is set off to him. *Koob v. Ammann*, 6 Ill. App., 160.

² *Herron v. Gill*, 112 Ill., 247; *Rowland v. Hewitt*, 19 Ill. App., 450; *Penny v. Little*, 4 Ill. (3 Scam.), 301.

³ *Herron v. Gill*, 112 Ill., 247; *Rowland v. Hewitt*, 19 Ill. App., 450; see *post*, § 1231.

⁴ *Latham v. McGinnis*, 29 Ill. App., 152.

⁵ *Holley v. Metcalf*, 12 Ill. App., 141.

⁶ *Bentley v. O'Brien*, 111 Ill., 53.

⁷ *Prettyman v. Hartley*, 79 Ill., 265; *Atkins v. Byrnes*, 71 Ill., 326; *Hammond v. Will*, 60 Ill., 404; *Hare v. Stegall*, 60 Ill., 380. See further, as to Abandonment, *post*, § 1222.

tained for rent due upon an actual demise by and between the parties thereto and their privies. The distress must be made at the instance of the landlord himself, and the right to make it terminates upon the death of the landlord. His executor or administrator cannot distrain or sue for rent accruing or becoming due after the death of the owner; but the death of the tenant does not terminate the action. It survives against his personal representative. When rent is due in a certain amount the landlord may distrain, although the term of tenancy has not expired, and although the lease does not reserve the right of distraint.¹

Security for costs must be given by a nonresident landlord before commencing proceeding by distress for rent, in the same manner that is required of other nonresident plaintiffs.²

§ 1221. What property may be distrained—Extent of landlord's lien.—With the exception of the crops growing upon the demised premises chattels which are exempt from execution are exempt from distress for rent.³

In view of this exemption it is provided by the statute of this State that in all cases for distress for rent, the landlord, by himself, his agent, or attorney, may seize for rent, any personal property of his tenant that may be found in the county where such tenant shall reside; and in no case shall the property of any other person, though the same may be found on the premises, be liable to seizure for rent due from such tenant.⁴ It is the personal property only of the defend-

¹ Lillard v. Noble, 169 Ill., 311, s.c. 57 Ill. App., 27; Atkins v. Byrnes, 71 Ill., 326; Sherman v. Dutch, 16 Ill., 283; Penny v. Little, 4 Ill. (3 Scam.), 301; Murr v. Glover, 34 Ill. App., 373; Hatfield v. Fullerton, 24 Ill., 278; Rauh v. Ritchie, 1 Ill. App., 188.

Rent due from decedent a preferred claim.—A landlord, as an administrator, can list as a preferred claim against the estate of deceased tenant, a claim for rent accruing after

the death of the tenant. Whether the landlord is the administrator or not does not affect the case. Lillard v. Noble, 159 Ill., 311, s. c. 57 Ill. App., 27.

² Lapointe v. Stewart, 16 Ill., 291; ante, § 430.

³ Rev. Stat., Chap. 80, ¶ 30, § 30.

⁴ Rev. Stat., Chap. 80, ¶ 16, § 16.

Trespass.—A landlord who takes the property of a person not his tenant, though the same be found on his premises, will be liable as a tres-

ant which can be distrained. Building belonging to the tenant cannot be taken and held as chattels.¹ Furthermore, only so much property can be seized as is necessary to secure the payment of the amount of rent that is due. An excessive levy will be illegal as to the excess.²

A lien on the crops exists in favor of the landlord for the rent when such crops are grown or growing upon the demised premises, whether the rent is payable wholly or in part in money or specific articles of property, or products of the premises, or labor, and also for the faithful performance of the terms of the lease. Such lien shall continue for the period of six months after the expiration of the term for which the premises were demised.³

The lien does not extend to any property belonging to the tenant other than the crops grown on the land.⁴ But as to such crops it seems that it exists even after the same have passed into the hands of a *bona fide* purchaser. Such purchaser is by the statute notified of the existing lien of the landlord.⁵ And it is well settled that a sale with notice of the lien will not defeat the same.⁶

The landlord does not, however, with distraint, or other measure, become invested with such right of possession as is required to support an action of trover against one who purchases such crop from the tenant nor of such title as will enable him to sue for an injury to the crop. The owner's interest is a mere right to detain the property as security for the payment of the rent.⁷ This lien upon the crops grown upon the premises exists, although such crops may belong to a sub-lessee.⁸ It extends to the whole crop levied upon while

passer for all damages accruing to the owner. *Emmert v. Reinhardt*, 67 Ill., 481.

Whenever the wrong property is seized it is a trespass of the officer or person seizing it and of the landlord when he directs or ratifies the act. *Becker v. Dupree*, 75 Ill., 167.

¹ *Kassing v. Keohane*, 4 Ill. App., 460.

² *Harms v. Solem*, 79 Ill., 460.

³ Rev. Stat., Chap. 80 ¶ 31, § 31.

⁴ *Herron v. Gill*, 112 Ill., 247.

⁵ *Finney v. Harding*, 32 Ill. App., 98; but see *How v. Clark*, 23 Ill. App., 145.

⁶ *Prettyman v. Umland*, 77 Ill., 206; *Watt v. Scofield*, 76 Ill., 261.

⁷ *Frink v. Pratt & Co.*, 130 Ill., 327, s. c. 26 Ill. App., 222.

⁸ *Uhl v. Dighton*, 25 Ill., 152; *Emmert v. Reinhardt*, 67 Ill., 481.

in the tenant's possession and to all crops and portions thereof from each part of the premises for the whole of the rent, although the rent may be payable in different crops in different proportions, and unless the different parts of the premises are held under different leases.'

This lien on crops is not created by the levy of a distress warrant, but exists by force of statute prior to such levy and is paramount to the interests of third persons and can be lost only by waiver or failure to enforce at the proper time.¹ The landlord is not entitled to the possession of the crop until the rent is due.² And where the rent is payable by a share in the crop the title to the crop is exclusively in the tenant until the share is set off to the landlord.³ And until that time the lien is not enforceable by attachment.⁴ Furthermore, the owner's lien upon the crops grown upon the premises is not affected by the fact that he is a tenant in common with the person who raises the crop instead of being landlord at a fixed rental. The relation of landlord and tenant may not in fact exist in such case, but nevertheless the owner of the land has, by statute, a lien upon the crops grown thereon.⁵

The sale or assignment by a tenant of his chattels will de-

¹ Prettiman v. Umland, 77 Ill., 296; Gittings v. Nelson, 86 Ill., 591; Thompson v. Mead, 67 Ill., 395; Sargent v. Courier, 66 Ill., 245.

² Wetsel v. Mayers, 91 Ill., 497; Going v. Outhouse, 95 Ill., 346; Mead v. Thompson, 78 Ill., 62.

³ Watt v. Scofield, 76 Ill., 261.

⁴ Sargent v. Courier, 66 Ill., 245; Dixon v. Niccolls, 39 Ill., 372; Hanson v. Dennison, 7 Ill. App., 73.

⁵ Koob v. Ammann, 6 Ill. App., 160.

⁶ Creel v. Kirkham, 47 Ill., 344; Dixon v. Niccolls, 39 Ill., 372; Alwood v. Rutman, 21 Ill., 200; Vanderslice v. Mumma, 1 Ill. App., 434.

Whether the relation of landlord and tenant exists, or whether the owner and farmer are tenants in common, is only important as de-

termined, or when the owner of the land is entitled to the possession of his share of the crop. If they are tenants in common the farmer cannot have the exclusive possession, but if the relation of landlord and tenant exists, the tenant is entitled to the possession of the whole until a part is set off to the landlord. Chase v. McDowell, 24 Ill., 236; Sargent v. Courier, 66 Ill., 245; Dixon v. Niccolls, 39 Ill., 372; Alwood v. Rutman, 21 Ill., 200.

Whether the relation of landlord and tenant does or does not exist is a question of intention which is to be determined by the jury. Dixon v. Niccolls, 39 Ill., 372; Hanson v. Dennison, 7 Ill. App., 73; Vanderslice v. Mumma, 1 Ill. App., 434.

stroy the landlord's lien thereon, although such chattels still remain upon the premises.¹ But a general assignment by the tenant for the benefit of creditors will not destroy the landlord's lien, although such assignment was made before the levy of the distress warrant.² The landlord's lien for rent on the goods of his tenant, to take priority over an execution, must be enforced by the service of a distress warrant before the levy of the execution.³ Chattels covered by mortgage, but still in possession of the tenant, are liable for distress for rent at the instance of the landlord. Therefore, a landlord distraining such property will not be liable in trespass at suit of the mortgagee.⁴

Specific articles of property or products of the premises, or of labor may be distrained for rent to the value of such articles when the rent is payable wholly or in part in such specific articles of property or products of the premises or of labor.⁵

The landlord has the same right to enforce his lien against a sub-lessee or assignee (when the demised premises have been sublet or the lease assigned) that he has against the tenant to whom the premises were demised.⁶

§ 1222. When a landlord may distrain for rent.—When rent becomes due upon an actual demise,⁷ the landlord has a right to distrain personal property of the tenant therefor and this right continues for the period of six months after the expiration of the term for which the premises were demised, or the tenancy is terminated.⁸

Abandonment or removal of the tenant from the premises or any part thereof, will give to the landlord, or his agent, or

¹ Howdyshell v. Gary, 21 Ill. App., 288.

² O'Hara v. Jones, 46 Ill., 288.

³ Howland v. Hewitt, 19 Ill. App., 450.

⁴ Hulladay v. Bartholomae, 11 Ill., App., 206.

⁵ Rev. Stat., Chap. 80, ¶ 29, § 29; Craig v. Merine, 16 Ill. App., 214.

⁶ Rev. Stat., Chap. 80, ¶ 32, § 32.

That goods of a sub-lessee of part

of the demised premises are not liable to be distrained for rent reserved in the original lease, see Gray v. Rosson, 11 Ill., 527.

Release from liability to distress for tenant's rent given by the landlord to the sub-tenant, only applies to the rent accruing at the date thereof. Law v. Bentley, 25 Ill., 52.

⁷ Murr v. Glover, 34 Ill. App., 372.

⁸ Rev. Stat., Chap. 80, ¶ 28, § 28.

attorney, the right to seize upon any grown or other crops grown or growing upon the premises, or part thereof was abandoned, whether the rent is due or not. If such grown crops or any part thereof are not fully grown or matured, the landlord, or his agent, or attorney, shall cause the same to be properly cultivated and harvested or gathered, and may sell and dispose of the same, and apply the proceeds, so far as may be necessary, to compensate him for his labor and expenses, and to pay the rent: *provided*, the tenant may, at any time before sale of the property so seized, redeem the same by tendering the rent due and the reasonable compensation and expenses of the cultivation and harvesting, or gathering, the same, or may replevy the property seized.¹

Distrain before rent is due is by the statute permissible where the tenant shall, without the consent of his land sell and remove, or permit to be removed, or where he is about to sell and remove, or permit to be removed, from the demised premises such part or portion of the crops raised thereon, as shall endanger the lien of the landlord upon such crops for rent agreed to be paid, in the same manner as is provided by law in ordinary cases of distress where the rent is due and unpaid.²

§ 1223. How the proceedings begun—Warrant—Inventory—Forms.—The proceedings by distress for rent are begun, except the case of growing crops, and the landlord's lien is created by a service and return of the distress warrant with an inventory of the property levied on. The statute makes it the duty of the person making the distress to immediately file with the Clerk of a court of record of competent jurisdiction,

¹ Rev. Stat., Chap. 80, ¶ 33, § 33.

Tender of the amount due for rent will destroy the right of distress for rent at any time before judgment is rendered therein. But after proceedings are begun the expenses that have accrued therein must also be tendered. *Hammond v. Will*, 60 Ill., 404; *Hunter v. LeConte*, 6 Cow. (N. Y.), 728. The tender must, however, be made to the landlord and

not to the officer, unless the officer is particularly authorized to accept or refuse it, and the tenant may, in fact, claim the return of the goods at any time before they are sold, and if the landlord refuses to deliver them it will be a wrongful detainer. *Moore's Civil Justice*, § 969, "Tender."

² Rev. Stat., Chap. 80, ¶ 34, § 1.

or with some Justice of the Peace (if the amount of the claim is within his jurisdiction), a copy of the distress warrant, together with an inventory of the property levied upon.¹

The landlord's recovery is limited to the amount named in the distress warrant.² The warrant need not describe the premises, but if such description is included therein it will be treated as surplusage and will be therefore harmless.³ The warrant need not be under seal.⁴

The distress may be levied by the landlord or by any private person authorized by him for that purpose, as well as by an officer.⁵ It must, like other civil process, be served in due time. If levied on in the night time the act is a trespass at common law.⁶ A seizure of the wrong property will be trespass, rendering the officer or other person who makes the levy liable therefor, as well as the landlord when the latter directs or ratifies the act.⁷ An excessive levy is illegal as to the excess.⁸

The service of a distress warrant cannot be prevented by injunction at the instance of the tenant where the landlord is solvent. This is because the tenant has an adequate remedy at law for the breach of the landlord's contract to defend.⁹

The distress warrant and inventory may be in the following forms :

NO. 400.—FORM OF DISTRESS WARRANT.

STATE OF ILLINOIS, }
County. } ss.

To E..... F..... (or if the fact say "the Sheriff" or "any Constable") of said county:

Whereas, C..... D....., of said county, is justly indebted to A..... B..... in the sum of dollars, being ("one month's" or "one quarter's" or "one year's" or otherwise as the case may be) rent, due to me on the day of, A. D., for the premises¹⁰ now in his possession demised to him by me.¹¹

¹ Rev. Stat., Chap. 80, ¶ 17, § 17.

² Asay v. Sparr, 26 Ill., 115.

³ Alwood v. Mensfield, 33 Ill., 352.

⁴ Dennis v. Maynard, 15 Ill., 477.

⁵ Taylor on Landlord and Tenant, 243; Rev. Stat., Chap. 80, ¶ 16, § 16.

⁶ Sherman v. Dutch, 16 Ill., 283.

⁷ Becker v. Dupree, 75 Ill., 167.

⁸ Harms v. Solem, 79 Ill., 480.

⁹ Leopold v. Judson, 75 Ill., 536.

¹⁰ The premises need not be described. *Supra*.

¹¹ The warrant performs the office of a declaration. Therefore if evi-

Now, therefore, I do hereby authorize and request you to make distress according to law of said rent of the goods and chattels of the said C..... D....., which are liable to be distrained, wherefore the same may be found in said county.

In witness whereof I hereunto set my hand this day of
A. D.'

A..... B.....,
Landlord.

NO. 401.—FORM OF INVENTORY OF PROPERTY LEVIED ON.

STATE OF ILLINOIS, }
 } ss.
..... County. }

By virtue of the distress warrant of which the within is a copy I have levied upon and taken the following goods and chattels to wit, (*here state the number and names of the articles seized*) property of the said C..... D.....,

E..... F....., ("Sheriff," "Constable,"
"Agent" or "Attorney" as the case may be).

§ 1224. **Summons—Issuance and return.**—Upon the filing of the copy of a distress warrant and inventory above mentioned the Clerk or Justice of the Peace shall issue a summons against the party against whom the distress warrant shall have been issued, which summons shall be returnable as other summons are.¹

The summons may be in the following form:

NO. 402.—FORM OF SUMMONS IN CASE OF DISTRESS FOR RENT.

(*Commence as in form No. 20, ante, Vol. I, p. 412, down to and including the word "Greeting." Then add.*)

Whereas A..... B..... has lately distrained the goods and chattels of the said C..... D..... for the sum of dollars, claimed to be due to him for rent of certain premises leased;

You are therefore hereby commanded, etc., (*conclude as in ordinary summons*).

dence of other matters will be desired to be introduced, proper allegations must be included in the distress warrant. See *post*, § 1226.

¹ A warrant need not be sealed.
Supra.

² Rev. Stat., Chap. 80, ¶ 18, § 18.

§ 1225. **Notice of nonresidents, etc.—Form.**—The statute prescribes that when it shall appear, by affidavit filed in the court where the distress proceeding is pending, that the defendant is a nonresident, or has departed from this State, or on due inquiry cannot be found, or is concealed within the State, and the affiant shall state the place of residence of the said defendant, if known, and if not known, that upon diligent inquiry he has not been able to ascertain the same, notice may be given, if the suit is in a court of record, as attachment cases in such courts,¹ or if the suit is before a Justice of the Peace, as in cases of attachment before Justices.²

§ 1226. **Proceedings—Pleadings.**—The suit shall thereafter proceed in the same manner as in attachment before such court or Justice of the Peace:³ *provided*, that it shall not be necessary for the plaintiff in any case to file a declaration, but the distress warrant shall stand for a declaration and shall be amendable as other declarations:⁴ *provided*, that no such amendment shall in any way affect any liability that may have accrued in the execution of such warrant.⁵ This being true, a copy of the instrument (lease) sued on need not be filed with the warrant as is required with the declaration in ordinary suits at law.⁶ But the plaintiff may, by filing affidavit of claim,⁷ entitle himself to judgment as in case of default, unless the defendant shall file an affidavit of merits with his plea.⁸

The distress warrant filling the office of a declaration must contain allegations of all the facts upon which proof is desired to be offered. Therefore, if the plaintiff desires to show that the defendant might, by good husbandry, have made a better crop, and increased the rent, the allegation of that fact must be made in the distress warrant.⁹

¹ *Ante*, Vol. I, § 338.

² Rev. Stat., Chap. 80, ¶ 19, § 19.

³ *Ante*, Vol. I, §§ 337, *et seq.*; *Poppers v. Meager*, 33 Ill. App., 20; *Olds v. Loomis*, 10 Ill. App., 498.

⁴ *Ante*, Vol. I, § 740, *et seq.*

⁵ Rev. Stat., Chap. 80, ¶ 20, § 20.

⁶ *Fergus v. Garden City Mfg. Co.*,

71 Ill., 51; *Bartlett v. Sullivan*, 87 Ill., 219; *Alwood v. Mansfield*, 33 Ill., 452.

⁷ *Ante*, Vol. I, § 550.

⁸ *Bartlett v. Sullivan*, 87 Ill., 219; *ante*, Vol. I, § 712.

⁹ *Bainter v. Lawson*, 24 Ill. App., 634.

§ 1227. **Set-off.**—A defendant may avail himself of any set-off or other defense which would have been proper if the suit had been for rent in any form of action and with like effect.¹

The tenant may recoup for damages for breach of the landlord's contract of lease,² and may recoup the damages caused by the landlord's torts affecting the premises; but he cannot recoup or set-off damages on other accounts.³

The defendant, in interposing set-off or damages, must plead such matter specially, for, otherwise, the action is confined to rent. Furthermore, the plaintiff may reply by further set-off to the matter pleaded by the defendant, but he cannot recover judgment on his set-off.⁴

The tenant may plead and prove payment of rent,⁵ or a tender thereof.

§ 1228. **Judgment.**—*Judgment for the plaintiff.*—If the plaintiff succeeds in his suit, judgment shall be given in his favor for the amount which shall appear to be due him.⁶

Effect of judgment when defendant served.—When the defendant has been served with process or appears to the action, the judgment shall have the same force and effect as suits commenced by summons, and execution may issue thereon, not only against the property distrained, but also against the other property of the defendant. But the property distrained, if the same has not been replevied or released from seizure, shall be first sold.⁷ The judgment is final between the parties upon all questions which are determined or should have been determined; that is to say, it is final as to whether rent is or is not due, and, if so, how much.⁸ The judgment being final, an appeal will lie therefrom.⁹

Judgment by default when defendant not served—Execution.
—When publication of notice shall have been made, as pro-

¹ Rev. Stat., Chap. 80, ¶ 21, § 21.

² Lindley v. Miller, 67 Ill., 244.

³ Lynch v. Baldwin, 69 Ill., 210.

⁴ Cox v. Jordan, 86 Ill., 560.

⁵ Sketoe v. Ellos, 14 Ill., 75; ante, § 1222.

As to judgment in case of set-off, see *post*, § —.

⁶ Rev. Stat., Chap. 80, ¶ 22, § 22.

⁷ Rev. Stat., Chap. 80, ¶ 23, § 23.

⁸ Clevenger v. Dunaway, 84 Ill., 367.

⁹ Kimball v. Ritter, 25 Ill., 276.

vided by law,¹ but the defendant is not served with process and does not appear, judgment by default may be entered, and the plaintiff may recover the amount due him for rent at the time of issuing the distress warrant, and a special execution shall issue against the property distrained, but no execution shall issue against any other property of the defendant.²

When judgment in favor of the defendant—Set-off.—If the judgment is in favor of the defendant, he shall recover costs and have judgment for the return of the property distrained, unless the same has been replevied or released from such distress. And if set-off is interposed, and it appears that a balance is due from the plaintiff to the defendant, judgment shall be rendered for the defendant for the amount thereof.³

§ 1229. Release of distrained property by giving bond.—When any distress warrant has been levied, the person whose property is distrained may release the same by entering into a bond in double the amount of the rent claimed, payable to the landlord, with sufficient sureties to be approved by the person making the levy, if the bond is tendered before the filing of a copy of the warrant, as provided by law,⁴ or if after, by the Clerk of the court in which, or Justice of the Peace before whom, the suit is pending, conditioned to pay whatever judgment the landlord may recover in the suit, with costs of suit. If the bond be taken before the filing of a copy of the distress warrant, such bond shall be filed therewith, and if taken after the filing of a copy of the distress warrant, it shall be filed in the court or with the Justice where the suit is pending.⁵

§ 1230. Perishable property — Disposition of.—If any property distrained is of a perishable nature and in danger of immediate waste or decay, and the same is not replevied, or bonded, the landlord or his agent or attorney may, upon giving notice to the defendant or his attorney, if either can be

¹ *Ante*, § 1225.

² Rev. Stat., Chap. 80, ¶ 24, § 24.

³ Rev. Stat., Chap. 80, ¶ 25, § 25.

⁴ *Ante*, § 1223.

⁵ Rev. Stat., Chap. 80, ¶ 26, § 26.

found in the county, or if neither can be found, without any notice, apply to the Judge or Master in Chancery of the court in which, or the Justice of the Peace before whom the suit is pending, describing the property, and showing that the same is so in danger, and if such Judge, Master, or Justice of the Peace is satisfied that the property is of a perishable nature, and in danger of immediate waste or decay, and if the defendant or his attorney is served with notice, or does not appear, that he cannot be found in the county, he may issue an order to the person having possession of the property, directing the sale thereof upon such time and such notice, terms and conditions as the Judge, Master, or Justice of the Peace shall think for the best interests of the parties concerned. The money arising from such sale shall be deposited with the Clerk of the court in which, or Justice of the Peace before whom the suit is pending, there to abide the event of the suit.¹

¹ Rev. Stat., Chap. 80, ¶ 27, § 27.

PART XII.

RELATION OF ATTORNEY AND
CLIENT.

RELATION OF ATTORNEY AND CLIENT.

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| <p>§ 1231. Definition of terms.</p> <p>1232. The vocation of a lawyer—
Nature of his office.</p> <p>1233. Admission to practice.
(a) Necessity thereof.</p> <p>1234. (b) Who may be admitted.</p> <p>1235. (c) Manner of procuring admission.</p> <p>1236. Same. 1. Upon examination—Affidavit of applicant, and certificate of instruction, or affidavit of credible witness.</p> <p>1237. Same. 2. Upon diploma issued by a law school.</p> <p>1238. Same. 3. Upon a license granted in another state.</p> <p>1239. (d) Certificate of moral character.</p> <p>1240. (e) Requisite oath—Form.</p> <p>1241. (f) Roll of attorneys.</p> <p>1242. (g) License, by whom issued.</p> <p>1243. (h) Admission a judgment of the court.</p> <p>1244. Admission to the United States Supreme Court—Form.</p> <p>1245. Summary jurisdiction of courts over attorneys.
(a) Generally.</p> <p>1246. (b) To strike attorneys' names from the rolls.</p> <p>1247. (c) To suspend attorneys from practice for a time.</p> <p>1248. (d) Opportunity given to be heard.</p> <p>1249. (e) The practice.</p> <p>1250. Effect of removal or suspension.</p> <p>1251. Restoration.</p> <p>1252. Privileges and exemptions of attorneys.
(a) Generally.</p> | <p>§ 1253. Privilege from arrest—Liability to.</p> <p>1254. (b) Privilege from serving as a juror.</p> <p>1255. (c) Privilege regarding examination.</p> <p>1256. (d) Privilege of counsel in argument.</p> <p>1257. (e) Privileged communications.</p> <p>1258. Disability of attorneys by reason of their profession.
(a) From becoming bail or surety.</p> <p>1259. (b) From acting on both sides.</p> <p>1260. (c) From buying demands for suit.</p> <p>1261. (d) When counsel in a case may be a witness.</p> <p>1262. (e) From administering oaths in cases wherein he is counsel.</p> <p>1263. Liability to third persons.</p> <p>1264. Retainer and appearance.
(a) Right to counsel.</p> <p>1265. (b) The contract of retainer.</p> <p>1266. (c) Appearance generally.</p> <p>1267. (d) Withdrawal of appearance—Substitution of attorneys.</p> <p>1268. Authority and powers—
Management of cause—
Satisfaction.</p> <p>1269. Duties and liabilities to client. (a) Generally.</p> <p>1270. (b) In the management of the cause.</p> <p>1271. (c) In the collection of money.</p> <p>1272. (d) In the purchase of real estate.</p> <p>1273. (e) In the investigation of title.</p> <p>1274. Liability of client to attorney—Compensation.</p> <p>1275. Proving the retainer.</p> <p>1276. Attorney's lien for services.</p> |
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§ 1231. **Definition of term.**—At different periods of time in different countries, and even in different parts of our country, the members of the legal profession have been and are designated by so many different titles, sometimes applied because of the different courts in which they practice, sometimes descriptive of their different rank and dignity, and sometimes of the different branch of the profession which they pursue, that a few words regarding the meaning of the various terms will not be out of place, even in a brief article like the following.¹

A *lawyer* is one skilled in the law; one whose profession is to give advice and assistance in legal matters, and to prosecute and defend in courts the causes of those who may employ him for that purpose. The designation comprehends the several classes known as attorneys, solicitors, proctors, counselors, barristers, and advocates, who, with the various privileges, and in the different capacities, give aid in expounding, replying and enforcing the law, or in the preparation of legal documents.²

An *advocate* in the legal sense of the term, means a legal assistant, a legal adviser, or counsel. It is a term borrowed from the Roman law and under the English system there are "two species," as Blackstone says, barristers and sergeants.³ All advocates are members of the bar—are admitted to plead at the bar—and all come to the bar through the inns of the court. For the first sixteen years they are "barristers." After sixteen years' standing they may become "sergeants" and acquire additional privileges and dignity.

In England advocates cannot become attorneys without being disbarred, nor can attorneys become advocates and continue to be attorneys. The offices are kept distinct. An attorney in England is not a member of the bar.

It may be well to state in passing that the institution and office of the sergeant at law was practically brought to an end

¹ See subject more fully treated. American Encyclopedia "Lawyer."
Weeks on Attorneys at Law.

² Thomas M. Cooley, LL. D., New ³ 3 Bla. Com., 26.

by the coming into operation of the Supreme Court of Judicature Act of November 2, 1875.¹

A *counsel* or *counsellor* is an advocate associated in the management of a particular cause, or one who acts as a legal adviser in reference to a matter requiring legal knowledge and judgment.²

A *proctor* is a special term applied to legal practitioners in the admiralty and ecclesiastical courts. It appears to be a contraction of the Latin *procurator*, though a Roman procurator only addresses the court as an advocate, occasionally being properly an assistant to an advocate and as Cicero tells us, rendering his services for very trifling fees.³

A *solicitor*—a term derived from the Latin *solicitare*—by the English classification, is a person practicing in courts of equity; one whose business is to be employed in the care and management of matters and suits in chancery. It is a term of limited application at most, and since the abolition of the distinct courts of chancery in this country (except in New Jersey) it has fallen into such disuse that Story and other elementary writers do not use it, even in treating of matters in equity. The term “solicitor” in chancery is still used in this State,⁴ though “attorney at law” comprehends the same, and without great care on the part of the conservatives the term “solicitors” will disappear entirely from the every day practice.

An *attorney at law* in England is not a member of the bar, and may not address the court. He is, however, an “officer of the court and legally qualified,” and his business is to formally conduct the proceedings in civil and criminal cases, to attend the courts, Judges and public officers, to investigate the matters in controversy by personal communication with their clients, to collect and analyze evidence, to summon the

¹ 36 & 37 of Vict., Ch. 66, § 87; 38 & 39 of Vict., Ch. 77, § 14.

² Bouv. Law Dict.

³ Proust. n. Cic. De Orat. Lib. i-45; Weeks on Att’y, §§ 28, 32.

⁴ Compare Rev. Stat., Ch. 13, ¶ 7, § 7.

witnesses, to prepare for the trial or hearing, and to take the necessary proceedings after judgment.¹

The term "attorney at law" in this country has been given a broader application, until it may be said to comprehend all grades of practicing lawyers. It is used to indicate all classes of persons skilled in the law, and who are appointed to represent others in litigation and in legal matters.²

"Attorney"—a term in its broadest sense, meaning one who is placed in the stead of another, to manage his affairs,—is the term generally used in speaking of legal matters, to mean an attorney at law; and in that sense its use is so general as never to be misunderstood. When it is sought to indicate one who serves another as his agent in doing a particular thing, the term "attorney in fact" is used. An "attorney in fact," properly speaking, is an agent for the transaction of an act specified in a sealed instrument called a "letter of attorney," or "power of attorney."³

§ 1232. The vocation of a lawyer—Nature of his office.

—One of the beneficial effects of the late civil war has been to determine, authoritatively, the nature of the lawyer's vocation; whether he is a public officer, civil officer, person holding an office of trust, or private individual licensed (revocably) to follow a certain occupation. The matter came up under what is known as the "test-oath acts" which, though differing in phraseology, were, by the different State legislatures and congress, to the effect of prohibiting public officers, and persons elected or appointed to any office of trust, civil or military, from exercising the functions, or receiving the emoluments of their offices, unless they should, on oath, state that affiant had given voluntarily no aid, effort, or encouragement to any person or pretended government, then in armed hos-

¹ *Reece v. Rigby*, 4 Barn. & Ald., 202; *Russell v. Palmer*, 2 Wils. (Eng.), 325; *Hopkinson v. Smith*, 7 Moore (Eng.), 237.

² *Standard Dict.*; *Wharton on Agency*, 555; *Ingraham v. Richardson*, 3 La. Ann., 839; *Trow-*

bridge v. Wier, 6 La. Ann., 706; *Bienvenu v. Factors, etc., Ins. Co.*, 33 La. Ann., 209; *People v. May*, 2 Mich., 605; *Henry v. Gregory* 29 Mich., 69.

³ *And. Law Dict.*; *People v. May*, 3 Mich., 605.

tility or inimical to the government of the United States. In the litigation growing out of these acts it seems to have been well settled that an attorney at law is an officer holding an office; but in the words of Justice Field—"the profession of an attorney and counsellor is not like an office created by an act of Congress, which depends for its continuance, its powers, and its emoluments upon the will of the Creator, and the possession of which may be burdened with any condition not prohibited by the Constitution. Attorneys and Counsellors are not officers of the United States; they are not elected or appointed in the manner prescribed by the Constitution for the election and appointment of such officers; they are officers of the court, admitted as such, by its order, upon evidence of their possessing sufficient legal learning and fair private character * * *. The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counsellors and are entitled to appear as such and conduct cases therein. From its entry the parties become officers of the court and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct, ascertained and declared by the judgment of the court, after opportunity to be heard has been afforded. Their admission or their exclusion is not the exercise of ministerial power." It is the exercise of judicial power.'

For this reason mandamus will not lie to vacate an order removing an attorney and counsellor.'

§ 1233. Admission to practice. (a) Necessity thereof.—The office of an attorney at law is public so far as concerns

¹ *Ex parte* Garland, 4 Wall. (U. S.), 378.

² *Ex parte* Cooper, 22 N. Y., 81; *Ex parte* Second, 19 How. (U. S.), 9; *Petition of Splane*, 123 Pa. St., 527; *Weeks on Att'ys*, § 38.

³ *Ib.*

⁴ *Courtesy extended to attorneys residing in other states*.—When any counsellor or attorney at law, resid-

ing in any other state or territory, may desire to practice law in this State, such counsellor or attorney shall be allowed to practice in the several courts of law and equity in this State upon the same terms and in the same manner that counsellors and attorneys at law residing in this State now are or hereafter may be admitted to practice law in

the necessity of a license of some kind for its exercise, and the duty imposed upon the attorney of subserving the interest of public justice in the mode pointed out by his oath for admission.¹ Due admission to practice, according to the *lex fori*, is essentially to enable a person to practice, either as an attorney, solicitor, or counsellor in a particular court.² A citizen of one state is not entitled, as of right, to admission to the bar of another state.³

However, a client is not bound to ascertain whether a person, ostensibly acting as an attorney, whom he employs in that capacity, is duly qualified. Proceedings taken by practitioners whose qualifications are defective are held to be neither void, nor, perhaps irregular on that account, so far as the proceedings are concerned.⁴ The fact of an attorney be-

such state or territory. Rev. Stat., Chap. 13, ¶ 12, § 12.

Who may not practice as attorneys.—No person who holds a commission as a Justice of the Supreme Court of the State of Illinois or as a Judge of any court of record in this State, shall be permitted to practice as an attorney or counsellor at law in the court in which he is commissioned or appointed, nor shall any judge of any county or Probate Court be permitted to practice in the court for which he is commissioned or appointed, and it shall be unlawful for any County Judge Probate Judge, County or Probate Clerk or Deputy County or Probate Clerk, to make accounts current or reports for any executor, administrator, guardian, or conservator, in which said court shall have to act on judicially, nor shall any Coroner, Sheriff or Deputy Sheriff be permitted to practice as aforesaid in the county in which he is commissioned or appointed, nor shall any Clerk or Deputy Clerk of a court of record be permitted to practice as an attorney or counsellor at law in the

court in which he is such Clerk, or Deputy Clerk. Rev. Stat., Chap. 13, ¶ 10, § 10.

Further, no person shall be permitted to enter his name upon the roll to be kept by the Clerk of the Supreme Court (*post*, § 1241), until he has taken the oath required. *Post*, § 1240; Rev. Stat., Chap. 13, ¶ 10, § 10.

¹ Wharton on Agency, § 557; Waters v. Whitmore, 23 Barb. (N. Y.), 505; Weeks on Att'y at Law, § 43.

² Robb v. Smith, 4 Ill. (3 Scam.), 46; Wharton on Agency, § 557; Hobby v. Smith, 1 Cow. (N. Y.) 588; Seymour v. Ellison, 2 Cow. (N. Y.), 13; Harrington v. Edwards, 17 Wis., 586; Cobb v. Judge, 43 Mich., 289.

³ 1 Weeks on Att'y at Law, § 43.

⁴ Hilleary v. Hungate, 3 Dowl. (Eng.), 62; Glynn v. Hutchinson, 3 Dowl. (Eng.), 529; Smith v. Wilson, 1 Dowl. (Eng.), 545; Harding v. Purkess, 2 Marsh. (Eng.), 223; Arnold v. Nye, 23 Mich., 286; Wilcox v. Cosstick, 2 Mich., 165; Farmers', etc., Bank v. Troy City Bank, 1 Doug. (Mich.), 457.

ing admitted to practice is not a cause for dissolving an injunction, and the dismissal of an appeal. If the plaintiff is present to attend, he need have no counsel, but the attorney himself may be punished.¹

Furthermore, one who has in fact been practicing as an attorney will be presumed, the contrary not appearing, to have been licensed to practice.²

The statute of this State regarding the necessity of admission provides that no person shall be permitted to practice as an attorney or counsellor at law, or to commence, conduct, or defend any action, suit or plaint in which he is not a party concerned, in any court of record within this State, either by using or subscribing his own name or the name of any other person, without having previously obtained a license for that purpose from two of the Justices of the Supreme Court, which license shall constitute the person receiving the same as an attorney and counsellor at law, and shall authorize him to appear in all the courts within this State, and there to practice as an attorney and counsellor at law, according to the laws and customs thereof, for and during his good behavior in said practice, and to demand and receive fees for any services which he may render as an attorney and counsellor at law in this State.³

§ 1234. (b) **Who may be admitted.**—To be admitted to the practice of law in this State one must possess a good moral character and be of the age of twenty-one years;⁴ and since sex has never been made one of the elements of citizenship, it follows that females having the requisites and qualifications, may occupy the office of attorney and counsellor at law and enjoy the emoluments thereof.⁵

¹ Peterson v. Parrott, 4 W. Va., 42; Reeder v. Snyder, 3 W. Va., 413; Rev. Stat., Chap. 13, ¶ 1, § 1.

² *Ex parte* Tripp, 66 Ind., 531; Norburg v. Heinmann, 59 Mich., 210.

³ Rev. Stat., Chap. 13, ¶ 1, § 1.

⁴ Rev. Stat., Chap. 13, ¶ 2, § 2; Supreme Court Rule 25.

⁵ United States v. Anthony, 11 Blatchf. (U. S.), 203; People v. Town of Oldtown, 88 Ill., 205; Rev. Stat., Chap. 13, ¶ 1, § 1; U. S. Const. Amendment XIV.

§ 1235. (c) **Manner of procuring admission.**—There are three ways by which a person may procure a license of the Supreme Court of this State to practice the law herein: (1), By examination; (2), upon diploma from a law school, and (3) upon a license granted in another state.

§ 1236. **Same.** 1. **Upon examination—Affidavit of applicant, and certificate of instructor, or affidavit of credible witness.**—Every application for license to practice law in courts of this State, except those who apply for admission upon a license granted in another state, or upon a diploma issued from a law school of this State, shall present to one of the Appellate Courts, in term time, proof that he has pursued for the period of two years the same course of studies prescribed for students in any of the regularly established law schools of this State, or a course of law studies equivalent thereto, naming the books studied, and that such law studies have been pursued under the direction and supervision of one or more licensed lawyers, or firms of lawyers, and that the applicant has submitted to satisfactory examinations by such lawyer or lawyers, or firm or firms of lawyers, at convenient intervals during such period of study covering progressively the entire course studied, such proof to consist of the affidavit of the applicant and also the certificate or certificates of the lawyer or firm under whose direction and supervision such studies have been pursued; or if in consequence of death or absence of such lawyer or lawyers, his or their certificate cannot be procured, its place may be supplied by the affidavit of any credible witness having knowledge of the facts: *Provided*, however, that the time employed as a law student in any established law school shall be considered a part of the two years of which the court shall be satisfied by affidavit of the applicant and the certificate of the secretary or of one of the supervisors of such school.¹

Upon the presentation of such affidavits and certificates to any of the Appellate Courts, in term time, such court may, at such convenient time, as it shall designate, by an order or

¹ Supreme Court Rule 45.

rule of court, examine, in open court, the applicants so presenting them for admission to the bar; and shall certify, under the seal of the court, the fact of such examination and the names of those whom they shall find entitled to admission to the bar, to this court. Licenses shall be hereafter issued by the Judges of this court, in term time, on such certificates: *provided*, that each of such certificates shall be accompanied by the affidavit of the applicant or some other reputable person that he is of the age of twenty-one years, or above, and a citizen of the State, and also a certified transcript from a court of record in this State showing that he is a man of good moral character. An applicant who shall, upon examination, as aforesaid, by the Appellate Court, be rejected, shall not be permitted to re-examination until the next regular term of the Appellate Court in which he was so examined and rejected.'

§ 1237. Same. 2. Upon diploma issued by a law school.

—A diploma regularly issued by any law school regularly organized under the laws of this State, whose regular course of law studies is two years, and requiring actual attendance by the student of at least thirty-six weeks of each of such years, may be received and acted upon in the place and stead of the examination in open court required by Rule 45;¹ but every application for admission to the bar made on behalf of any person to whom any diploma, as aforesaid, has been awarded, must be made in term time, by motion of some attorney of this court, supported by the usual proofs of good moral character, and the production in court of such diploma, or a satisfactorily accounting by affidavit for its non-production, and in all cases when the diploma on which the application is based does not recite all the facts requisite to its reception, all such omitted facts must be shown by the affidavit of the applicant or some officer of the law school, or both.²

§ 1238. Same. 3. Upon a license granted in another state.—The statute declares that any person producing a

¹ Supreme Court Rule 46.

² *Ante*, § 1236, ¶ 1.

³ Supreme Court Rule 47.

license or other satisfactory voucher proving that he hath been regularly admitted an attorney at law, in any court of record within the United States, and obtaining a certificate of good moral character as required by this act,¹ may be licensed and permitted to practice as a counsellor and attorney at law, in any court of this State, without examination.²

§ 1239. (d) Certificate of moral character.—The statute declares that no person shall be entitled to receive a license as aforesaid, until he shall have obtained a certificate of his good moral character from a court of record of some county.³

The usual method pursued for procuring such a certificate from the court is for an attorney in practice in such court to, in open court, introduce the applicant and ask that the court issue a certificate of good moral character to him. Upon the strength of the introduction and the standing of the attorney who makes the request, the court generally directs the Clerk to issue a certificate of good moral character to the applicant, naming him.

The certificate of moral character accompanied by the certificates or proofs above designated,⁴ and by the requisite oath,⁵ is then forwarded to the Clerk of the Supreme Court, accompanied by the requisite fee (now five dollars) for having the applicant's name enrolled upon the record of attorneys of the Supreme Court.⁶

§ 1240. (e) Requisite oath—Form.—The statute prescribes that every person admitted to practice as an attorney and counsellor at law, shall, before his name is entered upon the roll to be kept as hereinafter provided, take and subscribe an oath substantially in the following form :

¹ *Post*, § 1239.

² *Rev. Stat.*, Chap. 13, ¶ 3, § 3.

³ *Rev. Stat.*, Chap. 13, ¶ 2, § 2.

⁴ *Ante*, §§ 1236–1238.

⁵ *Post*, § 1240.

⁶ *Post*, § 1241.

NO. 404.—FORM OF OATH UPON ADMISSION TO THE BAR.

I, R..... S..... do solemnly swear (or "affirm" as the case may be), that I will support the Constitution of the United States and the Constitution of the State of Illinois, and that I will faithfully discharge the duties of the office of attorney and counsellor at law to the best of my ability.¹

This oath shall be administered by some one duly authorized by law to administer oaths, and the person administering such oath shall certify the same on the license, which shall be a sufficient voucher to the Clerk of the Supreme Court to enter, or insert, or permit to be entered, or inserted on the roll of attorneys or counsellors at law, the name of the person of whom such certificate is made.²

§ 1241. (f) **Roll of attorneys.**—It shall be the duty of the Clerk of the Supreme Court, in each Grand Division, to make and keep a roll or record, stating at the head thereof that the persons whose names are therein written have been regularly licensed and admitted to practice as attorneys and counsellors at law within this State, and that they have duly taken the oath of office, as prescribed by law, which shall be certified and endorsed on the said license.³

The Clerk of the Supreme Court is authorized to enter or insert, or to permit to be entered or inserted, on the roll of attorneys or counsellors at law the name of the person named in the certificate of the administration of the oath required as above set forth and made in the manner set forth.⁴

§ 1242. (g) **License, by whom issued.**—It is provided by a rule of the Supreme Court that the Clerk of the Grand Division in which the order of admission is to be made, may prepare the license which are to be granted upon the applications above described ready for the signatures of the Judges of the Supreme Court who shall sign the same, after which the license will be by the Clerk forwarded to the applicant.⁵

¹ Rev. Stat., Chap. 13, ¶ 4, § 4;
² 10, § 10.

⁴ *Ante*, § 1240; Rev. Stat., Chap. 13, ¶ 10, § 10.

³ Rev. Stat., Chap. 13, ¶ 10, § 10.

⁵ Supreme Court Rule 49.

³ Rev. Stat., Chap. 13, ¶ 5, § 5.

§ 1243. (h) **Admission a judgment of the court.**—As hereinbefore stated, the order of admission is a judgment of the court that the person possesses the requisite qualifications as attorney and counsel, and that he is entitled to appear as such and conduct cases therein. The person becomes an officer of such court after the entry of such judgment, and will hold such office during good behavior. He can only be deprived of his office because of professional misconduct, which must be ascertained and declared by the judgment of the court, after opportunity to be heard has been afforded.¹ The act of admission is neither ministerial nor executive. The courts act judicially and therefore *mandamus* will not lie to review it.*

§ 1244. **Admission to the United States Supreme Court—Form.**—It is requisite to the admission of attorneys or counsellors to practice in the Supreme Court of the United States, that they shall have been such for three years past in the Supreme Courts of the states to which they respectively belong, and that their private and professional character shall appear to be fair.* They are required to take and subscribe the following oath, or affirmation, viz. :

NO. 405.—FORM OF OATH UPON ADMISSION TO UNITED STATES SUPREME COURT.

I, R..... S....., do hereby swear (or "affirm," as the case may be) that I will demean myself, as an attorney and counsellor of this court, uprightly and according to law; and that I will support the Constitution of the United States.⁴

In all courts of the United States, the parties may plead and manage their own cases personally, or by the assistance of such counsel or attorneys at law, as by the rules of such court respectively, are permitted to manage and conduct causes therein.⁵

¹ *Ex parte Garland*, 4 Hall (N. Y.), 378; *Petition of Splane*, 123 Pa. St., 527.

² *Post*, § 1251, "Restoration."

³ United States Supreme Court Rule 2.

⁴ *Desty's Fed. Proc.*, 245, 246.

⁵ 1 United States Stat. at Large, 92; Constitution of United States, Amendment VI.

§ 1245. Summary jurisdiction of courts over attorneys.

(a) **Generally.**—The liability of attorneys which may be fixed and reached by the exercise of summary jurisdiction of the court, extends to liabilities on all their undertakings with clients; to cases when they act without authority; to cases of attachment against them for various offenses and delinquencies; to striking their names from the rolls and suspending them from practice; to compelling them, in proper cases, to the disclosure of a client's abode or occupation, and to compelling them to produce the client and to disclose a certain class of communications; to delivering up documents; to the paying of money and costs; to the answering of matters of affidavit; to contempt of court and professional misconduct generally.¹ The attorney being an officer of the court, is liable to such summary jurisdiction in the tribunals in which he practices, because of the inherent power residing in such court.²

In the exercise of summary jurisdiction of the court over attorneys to compel them to perform their undertakings, the court does not interfere for the sole purpose of enforcing contracts, on which actions might be brought in a more speedy and less expensive mode, but for the purpose of securing honesty in the conduct of its officers in all such matters as they undertake to perform, or see performed, when employed as such, or because they are such officers. It does not interfere so much between party and party to settle disputed rights, as summarily to punish, by attachment, the misconduct, or disobedience in its officers. The rules of law applicable to contracts are, indeed, not particularly regarded. The courts, for instance, have enforced, summarily, an undertaking given by an attorney on which an action would be prevented by the provisions of the statute of frauds; and lapse of time affords no ground for preventing the court from interfering in enforcing such an undertaking, although it does in the ordinary course of applications against attorneys.³ The rule is founded on the

¹ Weeks on Atty's at law, § 77; (Eng.), 921; *In re Graves*, 1 Crompt. Rev. Stat., Chap. 13, ¶¶ 6 and 7. & J., 364; Anonymous, 2 Barn. &

² *Moutray v. People*, 162 Ill., 194. Adol., 766.

³ *In re Hilliard*, 2 Dowl. & L.

principle of trust and confidence necessarily reposed in attorneys in their professional character.¹

§ 1246. (b) To strike attorneys' names from the rolls.

—The power to strike an attorney's name from the rolls is a power inherent in the court itself. Having express power to grant a license to practice law it has an inherent right to see that the license is not abused or perverted to a use not contemplated in the grant.² This is necessary for the protection of the court, the proper administration of justice, the dignity and purity of the profession, for the public good and for the protection of clients.³

The statute provides that the Justices of the Supreme Court, shall have the power at their discretion to *strike the name of an attorney or counsellor at law from the roll* for misconduct in his office. The statute also provides that any Judge of a Circuit Court, or of the Superior Court of Cook County, which, for like cause, have power to *suspend any attorney or counsellor at law from practice* in the court over which he presides, during such time as he may deem proper, subject to the right to have such order set aside by the Supreme Court upon appeal.⁴ The Circuit Courts have no power to strike the name from the roll. That power rests alone with the Supreme Court.⁵ Neither have the Circuit Courts power to permanently suspend the attorney from practice for that would be equivalent to striking his name from the roll. The Circuit Court may suspend an attorney from practice until the next term of the Supreme Court in order that proceedings may be there instituted to strike his name from the roll, and, if no movement is then made by the Supreme Court, the Circuit Court being advised thereon should rescind the order of suspension.⁶

¹ *In re Aitken*, 4 Barn. & Ald., 47; *Ex parte*, Bodenham, 8 D. & E. 595.

⁴ Rev. Stat., Ch. 13, ¶ 6, § 6.

² *In re Goodrich*, 79 Ill., 148; *Ex parte* Steinman, 95 Pa. St., 220; *People v. Green*, 7 Col. 235.

⁵ *Winkelman v. People*, 50 Ill., 449.

³ *Florida v. Kirk*, 12 Fla., 278; *Ex parte* Smith, 28 Ind., 47.

⁶ *Winkelman v. People*, 50 Ill., 449.

It is for *malconduct in office* alone that the attorney's name may be stricken from the roll. Charges affecting his character as a man, or integrity as a private citizen will not be considered. For any misconduct not in his official capacity, redress must be sought by suit in the ordinary manner.¹ It seems (at least in Texas), that applying approbrious epithets to a Judge in vacation cannot be considered a "contempt involving fraudulent or dishonest conduct, or malpractice" within the meaning of the statute using those words.² But bringing a divorce suit in collusion, without authority, and acting in fraudulent collusion with one party to procure the divorce without the knowledge or consent of the other party is malpractice for which the name of the attorney may be stricken from the roll.³ The same is true in case of collusion of the husband's attorney with the wife, whereby the husband is enabled to get a divorce.⁴ Likewise the making of a fraudulent affidavit in a divorce case, whereby an order of court for money is procured, is sufficient ground for striking an attorney's name from the roll.⁵ And so are surreptitious advertisements proposing to procure divorces without publicity and without reference to the parties.⁶

¹ *People v. Murphy*, 119 Ill., 159; *People v. Goodrich*, 79 Ill., 148; *People v. Allison*, 68 Ill., 151; *People v. Palmer*, 61 Ill., 255; *People v. Ford*, 54 Ill., 520; *People v. Harvey*, 41 Ill., 277.

² *Jackson v. State*, 21 Tex., 668.

³ *Dillon v. State*, 6 Tex., 55.

⁴ *In re Gail*, 74 N. Y., 526.

⁵ *People v. Leary*, 84 Ill., 190.

⁶ *People v. Goodrich*, 79 Ill., 148.

As to fine and imprisonment in such cases, see Rev. Stat., Ch. 40, ¶ 21, § 21.

Striking name from roll for refusal to pay over money collected.—The statute provides that in all cases when an attorney of any court in this State or solicitor in chancery, shall have received, in his said office of attorney or solicitor in the course

of collection or settlement of any claim, left with him for collection or settlement, any money or other property belonging to any client, and shall, upon demand made, and tender of his reasonable fees and expenses, refuse or neglect to pay over, or deliver the same to the said client, or any person duly authorized to receive the same, it shall be lawful for any person interested, to apply to the Supreme Court of this State for a rule upon said attorney or solicitor, to show cause at a time to be fixed by the said court, why the name of the said attorney or solicitor should not be stricken from the roll, a copy of which rule shall be duly served upon said attorney or solicitor at least two days previous to the day upon which said

The complaint may be made by "any person interested" and the statute in making such statement should not receive a narrow construction, and therefore another person than a creditor has a sufficient interest to make the application to have the attorney's name stricken from the roll. This is because the members of the legal profession bear such an important relation to the public that other members of the profession and other persons are deemed to be "persons interested."

§ 1247. (c) To suspend attorneys from practice for a time.—The lighter punishment of suspension for a time is sometimes inflicted for lighter offenses, as where an attorney used indecorous language to the court in a petition for a rehearing suggesting that the court was disposed to punish him for publishing certain articles.*

The end to be attained is protection, not punishment. Therefore in all causes in which removal from office is unreasonably severe—as where a young attorney made an affidavit which was morally false, believing it to be literally true—and the end sought is reclamation, not destruction, the punishment should be reprimand, suspension, fine, or imprisonment; for the expulsion from the bar lasts for all time, blasts all prospects of prosperity to come, and mars the fruit expected from the training of a lifetime.'

§ 1248. (d) Opportunity given to be heard.—While the court may have inherent power to summarily disbar an attorney, *i. e.*, to strike his name from the roll, the courts rec-

rule shall be made returnable and if upon the return of said rule, it shall be made to appear to the said court, that such attorney or solicitor has improperly refused or neglected to pay over or deliver said money or property so demanded as aforesaid, it shall be the duty of the said court to direct that the name of the said attorney or solicitor be stricken

from the roll of attorneys in said court. Rev. Stat., Chap. 13, ¶ 7, § 7; *People v. Cole*, 84 Ill., 327; Compare *People v. Allison*, 68 Ill., 151.

¹ *People v. Palmer*, 61 Ill., 255.

² *De Armas Case*, 10 Martin (La.), 123. In this case the attorney was suspended for twelve months.

³ *In re Knott*, 71 Cal., 584.

⁴ *Weeks on Attorney at Law*, § 80.

ognize the fact that a Judge may not be exempt from acting maliciously and corruptly, for it has been said regarding the limit of the power to disbar or suspend an attorney that no order should be made therefor where the offense is not of so gross or serious a nature as to render the attorney unworthy of his office.¹

The statute and practice in this State permits an attorney to be heard in his own defense and it is said that his name should not be stricken from the roll for alleged misconduct in office except upon a clear preponderance of proof against him.²

§ 1249. (e) **The practice.**—The practice in the English and American courts generally is, upon the filing of an information or complaint, for the court to issue a rule upon the attorney, reciting the substance of the information or charges against him, requiring him to show cause why his name should not be stricken from the roll.³ Such is the general practice in this State, but any appropriate procedure may be adopted provided the charges are stated with sufficient particularity, and reasonable notice and opportunity to defend be given.⁴ The statute in this State requires the Clerk of the Supreme Court to send written notice to the defendant. Stating distinctly the grounds of the complaint or the charges exhibited against him, after which he will be allowed a reasonable time to collect and prepare testimony for his justification and will be allowed to be heard in his own defense.⁵ It is error to strike an attorney's name from the rolls on mere motion without giving him notice of the proceeding, whether the court proceed under a statute or in the exercise of its inherent powers.⁶

¹ *Ex parte*, Bradley, 7 Wall. (U. S.), 364; Dickinson v. Dustin, 21 Mich., 561; Watson v. Savings Bank, 5 Rich. (S. C.), 159.

² Rev. Stat., Chap. 13, ¶ 8, § 8; People v. Baker, 56 Ill., 299.

See as to "rule to show cause" Rev. Stat., Chap. 13, ¶ 7, § 7; *ante*, § 1246n.

³ Wharton on Agency, § 557;

Wharton on Criminal Law, § 3430; Weeks on attorney at law, § 53.

⁴ *Moutray v. People*, 162 Ill., 194; *People v. Lamborn*, 1 Scam. (Ill.), 123.

⁵ Rev. Stat., Chap. 13, ¶ 8, § 8.

⁶ *Ex parte*, Heyfron, 7 How. (Miss.), 127; Dickinson v. Dustin, 21 Mich., 561.

In analogy to the limitation of prosecutions for misdemeanor there should be a limit of time for the filing of informations against attorneys, and therefore the law does not favor proceedings of this nature after a great lapse of time from the commission of the act of which complaint is made. Furthermore, the complaint should state with particularity the acts of which the attorney is charged, in order that the accused may be enabled to make his defense. It is the charges alone which are made in the information or complaint that will be considered. The court will not consider the charges made in affidavits filed with the complaint.¹

The proceedings to disbar an attorney, while not strictly criminal, have that nature, and the charges preferred should be clearly supported by the evidence to warrant a conviction.²

The statute in this State is a penal statute, and will be strictly construed. One of the effects of a strict construction is that the power of suspension is limited to the particular court in which the Judge is presiding at the time he makes an order of suspension.³

The proceedings to disbar or suspend an attorney is not a "prosecution" in a sense that is required by the Constitution to be carried on in the name and by the authority of the people; nor need the complaint conclude "against the peace and dignity of the people of the State of Illinois."⁴

In proceedings to strike an attorney's name from the roll the accused is not entitled to a trial by jury.⁵

The order of suspension cannot be broader than the rule. Therefore where the rule requires an attorney to show cause why he should not be suspended from practice in the Circuit Court of a certain named county, the order cannot be entered suspending him from practice in a judicial circuit comprising other counties and courts.⁶ This is in compliance with the well known rule that the judgment must be supported by the pleading.

¹ People v. Allison, 68 Ill., 151.

⁴ Moutray v. People, 162 Ill., 194;

² People v. Baker, 56 Ill., 299;

Hay v. People, 59 Ill., 94.

Baluss' Case, 28 Mich., 507.

⁵ People v. Goodrich, 79 Ill., 148.

³ Moutray v. People, 162 Ill., 194.

⁶ Moutray v. People, 162 Ill., 194.

§ 1250. **Effect of removal or suspension.**—Every attorney whose name shall, at any time, be stricken from the roll by the order of the court, in the manner aforesaid, shall be considered as though his name had never been written thereon, until such time as the said Justices, in open court, shall authorize him to sign or subscribe the same.¹

§ 1251. **Restoration.**—If an attorney's name be stricken from the roll for malpractice, he may afterwards be readmitted on motion, and on a proper showing. Striking an attorney's name from the roll is not of necessity a perpetual disability; it seems that it is sometimes meant merely as a temporary punishment and regarded in the light of a temporary suspension only. While one is disbarred as an attorney he will not be permitted to represent any person in court, either as attorney, agent, or otherwise; and when he is a candidate for readmission he must satisfy the court that he ought to be restored and that no objection remains. The matter of readmission is left largely to the sound discretion of the court. It is only in a clear case of excessive jurisdiction that *mandamus* will lie to restore an attorney's name to the roll.²

In this State when an attorney is suspended from practice by a Circuit Court or by the Superior Court of Cook County an appeal will lie to the Supreme Court from the order suspending him.³

§ 1252. **Privileges and exemptions of attorneys.** (a) **Generally.**—Attorneys properly admitted and enrolled are entitled to prosecute and defend all actions and suits at law and in equity, to prepare pleadings and other proceedings connected therewith and generally to transact all business that comes within their employment. Regularly admitted

¹ Rev. Stat., Chap. 13, ¶ 8, § 8.

² *Ex parte Frost*, 1 Chitt. Rep. 558; *Commonwealth v. Breckenridge*, 1 Serg. & R. (Pa.) 18; *Cobb v. Judge*, 43 Mich., 289; *People v. Dowling*, 55 Barb. (N. Y.), 197;

State v. Kirke, 12 Fla., 278; *Ex parte Robinson*, 19 Wall. (U. S.), 505; see *Lowenthal's Case*, 61 Cal., 122.

³ Rev. Stat., Chap. 13, ¶ 6, § 6.

and practicing attorneys were formerly supposed to be always present in court, and on that account have various special privileges, some of which still remain. These privileges chiefly concern the privilege from arrest, the privilege as to suing and being sued, exemptions from various civil duties and the privilege of counsel as to words spoken. These privileges, however, are not allowed so much for the benefit of the attorney as for the protection of the client, whose rights might be jeopardized did the privilege not exist.¹

To prevent the injury that might otherwise result to the business of the client by the actions of his attorney, it was formerly the practice in England, to require that no matter where the residence of the plaintiff, the attorney must be sued in the court where he was practicing, and further that no matter where the residence of the defendant the attorney could bring suit in his own court.²

§ 1253. Privilege from Arrest—Liability to.—It is provided by the statute in this State that all attorneys and counsellors at law, as well as other officers enumerated, shall be privileged from arrest while attending court and whilst going to or returning from court; but they shall be liable to arrest and held to bail and shall be subject to the same legal process and may in all respects be proceeded against in the same courts, and in the same manner when not attending court or going to or returning from court, as other persons are, any law, usage, or custom to the contrary notwithstanding.³

The limitation of the law as above indicated illustrates the improvement of the law (the creditor being considered) since the time when a solicitor was, on being arrested, while returning from attending the master, ordered to be discharged, not only in the original action, but from all subsequent detainers.⁴

When an attorney claims a privilege from the service of

¹ Weeks on Attorneys, § 106; ³ Rev. Stat., Chap. 13, ¶ 9, § 9.
Howe v. Wooley, 1 Velt. (Eng.), 1; ⁴ *Ex parte* Ledwick, 8 Vesey
Gerard's Case, 1 W. Black. 1225. (Eng.), 598.

² Weeks on Attorneys, § 106.

legal process, while in attendance at court or going to or returning therefrom, such privilege must be claimed by way of a dilatory plea, which, like other dilatory pleas, must be interposed at the first opportunity, or it will be deemed to be waived.¹

When an attorney is arrested and desires to set up his privilege he should apply summarily to the court in which the business is pending, or to the court out of which the process issued, for an order for his immediate discharge from that arrest, and the order should be served.

§ 1254. (b) **Privilege from serving as a juror.**—Practicing attorneys are exempt from serving as jurors in this State by force of the statute.² This is an “exemption,” and not a “disqualification.” It is a privilege of the attorney, and one which may be waived.³

§ 1255. (c) **Privilege regarding examination.**—It is a familiar principle of agency that “what a man may do by himself he may do by another;” therefore, whatever rights of inspection of files or records or other matters the client possesses, he may delegate to his attorney, and furthermore, the attorney, being a licensed officer of the court, has such right to the inspection of the files in the cases in which he is interested, and of the records and other matters pertaining thereto. The right to inspect the records in the Recorder’s office and the records in the Probate Court are given by special statute in some states, but in this State the right to the inspection of all records, indices, abstracts, and other books kept in the office of the Recorder, and all instruments filed for record therein, as possessed by all persons for the purpose of inspection or examination and for the purpose of taking memoranda, or abstracts thereof, free of charge.⁴

¹ Wilson v. Nettleton, 12 Ill., 61.

² Rev. Stat., Chap. 78, ¶ 4, § 4.

³ Further as to jurors, see *ante*, § 804.

⁴ Rev. Stat., Chap. 115, ¶ 21, § 21.

An attorney’s right of inspection on behalf of his client, it seems, cannot be compelled by *mandamus*. Brown v. County Treasurer, 54 Mich., 182.

§ 1256. (d) **Privilege of counsel in argument.**—"The benefit of the Constitutional right to counsel depends very greatly on the freedom in which he is allowed to act, and to comment upon the facts appearing in the case, and on the inferences deducible therefrom. The character, conduct and motives of the parties and their witnesses, as well as of other persons more remotely connected with the proceedings, enter very largely into any judiciary inquiry, and must form the subject of comment, if they are to be sifted and weighed. To make comment of value, there must be the liberty of examination in every possible light, and of suggesting any view of the circumstances of the case, and of the motives surrounding it, which seem legitimate to the persons discussing them. It will often happen in criminal proceedings that while no reasonable doubt can exist that a crime has been committed, there may be a very great doubt whether the prosecutor or the accused is the guilty party; and to confine the counsel for the defense to such remarks concerning the prosecutor as he might justify if he had made them without special occasion, would render the right of counsel, in many cases, of no value. The law, justly and necessarily, in view of the importance of the privilege, allows a very great liberty in these cases, and surrounds them with a protection that is always a complete shield, except where the privilege of counsel has been plainly and palpably abused."¹ It is held to be, on the whole, for the public interest, and best calculated to subserve the purposes of justice to allow counsel full freedom of speech in conducting the cases and advocating and sustaining the rights of their constituents; and this freedom of custom ought not to be impaired by numerous and refined distinctions.² Therefore an attorney, in the discussion of his client's cause, is not liable for words spoken or written relative to the matter in controversy, or to subjects which arise in the course of the trial. No action will lie for such speaking or writing, however false, defamatory or malicious may be the words, pro-

¹ Cooley's Const. Lim., 443.

Y.), 410; *Dikeman v. Arnold*, 83

² *Hastings v. Lusk*, 22 Wend. (N. Mich., 218.

vided the matter was material to the issue, or inquiry before the court. But if the attorney wantonly departs from the evidence and point in issue, with intent to injure the character of the adversary or that of others, without propriety or probable ground, he is responsible.¹

When counsel in other arguments state facts to which there is no evidence, nor of which there can be any judicial notice taken, the opposite counsel should call the attention of the court thereto at the time, and when an objection is made, the court should compel counsel to confine his argument to a consideration of such matters as properly pertain to the case under the evidence.²

§ 1257. (e) **Privileged communications.**—The rule in regard to privileged communications between attorney and client seems to have had its origin in the fact that the parties themselves were not competent witnesses in the suit, and therefore the advocate could not be called upon to state what his client could not state.³

Mr. Wharton says “a lawyer, no matter in what capacity he may be employed, is not, by Anglo-American law, permitted to disclose communications made to him by his client in the course of their professional relations.”⁴ Oral communications are thus protected.⁵ And, *a fortiori*, does the privilege extend to cases stated for the purpose of obtaining the opinion of council,⁶ and to written instruments held by counsel or attorneys on behalf of their clients.⁷ The relation

¹ Newfield v. Copperman, 15 Abb. (N. Y.), Pr. n. s. 360; Marsh v. Elsworth, 36 How., 532, s. c. 50 N. Y., 309; Hastings v. Lust, 22 Wend. (N. Y.), 410; Weeks on Attorneys at Law, § 110. Further as to the scope of the argument, etc., see *ante*, § 907.

² McDonald v. People, 126 Ill., 150; Townner v. Johnson, 82 Ga., 940; Welch v. Palmer, 85 Mich., 310.

³ As to Privilege, generally, see *ante*, § 832.

⁴ Wharton on Evidence, § 576.

⁵ Williams v. Smith, 18 N. Y., 550; Britton v. Lorenz, 45 N. Y., 57; Orton v. McCord, 33 Wis., 205.

⁶ Pearce v. Pearce, 1 DeGex & S. (Eng.), 25; *Ante*, § 832.

⁷ Crosby v. Berger, 11 Paige (N. Y.), 377; Laing v. Bartley, 3 Starky's Rep. (Eng.), 342; Compare *ante*, § 832.

of attorney and client must exist, or the communication must be made with a view to the relation.¹

"The privilege is essential to public justice, for, did it not exist no man would dare to consult a professional adviser with a view to his defense and to an enforcement of his rights;" nor is the privilege in any way affected by the statutes making parties witnesses,² though it is said a party making himself a witness cannot, on the ground of the statute, refuse to answer to his confidential communications to his counsel.³

The rule established by the weight of authority is this: an attorney is privileged from giving evidence of any confidential communication made to him by his client, or concerning which he has been informed in his professional capacity as attorney for the client. The privilege is that of the client and not that of the attorney. If the client, therefore, choose to waive the privilege, the attorney cannot refuse to answer and be protected by the court in his refusal.⁴

The rule has been extended to an interpreter who was present at a conversation between a foreigner and his attorney, the interpreter being held with the same secrecy as the attorney himself, and not allowed to divulge the facts confided to him, even though the purpose of the confidence was then at an end. An attorney's clerk is within the rule when he is acting for his master.⁵ But one erroneously supposed to be an attorney (as a student) and to whom one makes a confidential communication, is not within the rule.⁶

¹ Brown v. Matthews, 79 Ga., 392; Young v. State, 65 Ga., 525; Tucker v. Finch, 66 Wis., 17; Taylor v. Boardman, 24 Mich., 287; Kelly v. Richardson, 69 Mich., 430; *ante*, § 832.

² Lord Brougham in Greenough v. Gastin, 1 Myrle & K. (Eng.), 103.

³ Montgomery v. Pickering, 116 Mass., 227; Barker v. Kuhn, 38 Ia., 395, s. c., 38 Am. Rep., 495; Root v. Wright, 84 N. Y., 72.

⁴ Woodburn v. Henshaw, 101 Mass., 193, s. c., 3 Am. Rep., 333.

⁵ People v. Baker, 56 Ill., 299; Wood v. Thornley, 58 Ill., 404; Parkhurst v. Lawton, 2 Swanst. 216; Parkins v. Harkshaw, 2 Starkey Rep. (Eng.), 239; Vaillant v. Dundermead, 2 Atkins (Eng.), 524; *ante*, § 832.

⁶ Taylor v. Foster, 2 Car. & P. (Eng.), 195; Jackson v. French, 3 Wend. (N. Y.), 337.

⁷ Barnes v. Harris, 7 Cush. (Mass.), 576; Fountain v. Young, 6 Esp. (Eng.), 113; Weeks on Attorney at Law, § 144.

An attorney may, of course, testify as to communications made to him by a person who is not and has not been his client.¹ So he may as to the handwriting of his client, since a knowledge of that may be gained without a confidential communication from his client.² But the privilege extends not only to what the attorney has had communicated to him by his client, but to every fact the attorney has learned in his character as attorney.³ Even to what he has overheard of a conversation between his client and a third person, provided the same be relating to the business in which the attorney is engaged.⁴ But not as to business in which the relation of attorney and client does not exist.⁵ As where an attorney is consulted merely as a friend and neither he nor the person communicating with him supposes the relation of attorney and client to exist between them.⁶ The privilege does not extend to matters of fact which the attorney knows by other means than confidential communications with his client, even though he might not be likely to have known them had he not been employed as an attorney,⁷ nor does it extend to and excuse an attorney from testifying in regard to an agreement for settlement made by him with the opposite party at the request of his own client.⁸

Where the attorney is a member of the firm the privilege of the communication and the compelled secrecy extends to every member of the firm.⁹

The privilege ceases, it is said, with the death of the client where the attorney is made executor and residuary legatee.¹⁰

¹ *Tucker v. Finch*, 66 Wis., 17.

² *Holthausen v. Pondir*, 28 Jones & S. (N. Y. Super. Ct.), 73.

³ *State v. Douglas*, 20 W. Va., 770; *Hernandez v. State*, 18 Tex., 134.

⁴ *Root v. Wright*, 84 N. Y., 72, s. c. 38 Am. Rep., 495.

⁵ *House v. House*, 61 Mich., 69; *ante*, § 832.

A bill in chancery which a party has sworn to, but never filed, and which was prepared by the attorney on his client's statement of the facts,

is a privileged communication in the hands of an attorney, and is not admissible in evidence against the client. *Burnham v. Roberts*, 70 Ill., 19.

⁶ *Goltra v. Wolcott*, 14 Ill., 89.

⁷ *Swaim v. Humphreys*, 42 Ill. App., 371.

⁸ *Thayer v. McEwen*, 4 Ill. App., 416.

⁹ *People v. Baker*, 56 Ill., 299.

¹⁰ *Crosby v. Berger*, 11 Paige (N. Y.), 377, s. c. 42 Am. Dec., 117, s. c. 4 Edw. (N. Y.), 252.

Some further applications of the rule and its exceptions have been pointed out in treating of the evidence offered in "proceedings at the trial."

§ 1258. **Disability of attorneys by reason of their profession—(a) From becoming bail or surety.**—From motives of public policy, and to prevent attorneys from having an undue interest in litigation, they are prevented in most States from becoming bail or sureties in cases in which they are engaged and in some States they are not permitted to be bail or sureties, even in courts in which they are attorneys.* There is no such statute provision in this state, but the practice of going bail for a client is seldom indulged in and is looked upon with disfavor.

§ 1259. **(b) From acting on both sides.**—Under no circumstances can an attorney at law recover for legal services rendered by him in the same suit to parties having opposite interests.* The relation of attorney and client implies that the attorney is to look to the client alone for his compensation, and to receive any compensation from the opposite party or his attorney, without the consent of his client, is a breach of trust reposed in him by his employer.*

Where, however, there is no conflict between the interest of the plaintiff and an intervenor in the suit, there is no inconsistency in their being represented by the same attorney.* And it has been held further, that being counsel for the defendant in one suit will not prevent an attorney from accepting a retainer from the plaintiff in that suit to prosecute an action against his client for breach of contract of marriage.*

§ 1260. **(c) From buying demands for suit.**—As a general rule, and for the purpose of restraining any unnecessary

* *Ante*, §§ 832, 833.

* *Weeks on attorneys*, 119.

* *Commonwealth v. Gibbs*, 4 Gray, (Mass.) 146; *Donald v. Wagner*, 5 Mo. App., 56. *Weeks on attorneys* § 120n.

* *Orr v. Tanner*, 12 R. I., 94n.

* *Hall v. Brackett*, 60 N. C., 215.

* *Musselman v. Baker*, 26 Neb., 737.

litigation, the law does not permit attorneys to buy demands for suit or choses in action, but the rule is not intended to be carried to such an extent as to prevent a purchase for the honest purpose of protecting some other important right of the assignee.¹ There are statutes in some states prohibiting the purchase of claims for collection, but there is no law in this State to prohibit a person from purchasing claims or titles on speculation or for the purpose of prosecuting them in the courts.²

§ 1261. (d) When counsel in a case may be a witness.—

As a general rule, there is nothing affecting the competency of an attorney as a witness in the case he is trying or directing,³ not even when his fee is contingent upon his success. His interest only affects his credibility.⁴ But good practice requires that the testifying of counsel be confined to extreme cases and to matters as to which there is no other proof.⁵

The incompetency, or rather the unpopularity of a witness, has no application to his opinion as an expert on any matters connected with his specialty. Lawyers are admissible witnesses to prove the laws of their profession, the practice of courts, and the value of professional services rendered by attorneys.⁶

¹ Weeks on Attorneys, § 121; Ramsey v. Erie Ry. Co., 3 Abb. (N. Y.), Pr. 174; Mann v. Fairchild, 3 Abb. (N. Y.), App. Dec., 152; Van Ransselaar v. Sheriff, 1 Cow. (N. Y.), 443.

² Fetrow v. Merriweather, 53 Ill., 276.

Barratry and maintenance.—As to the common law offense of champerty being abolished by the sections of the Criminal Code, defining the terms and prescribing a punishment for barratry, see Rev. Stat., Chap. 38, ¶¶ 26, 27; Newkirk v. Cone, 18 Ill., 449; what is not maintenance, see Guthrie v. Wabash Ry. Co., 40 Ill., 109.

³ Morgan v. Roberts, 38 Ill., 65; Tullock v. Cunningham, 1 Cow. (N. Y.), 256.

⁴ Stratton v. Henderson, 26 Ill., 68; Central Branch, etc., v. Andrews, 41 Kan., 370.

⁵ Ross v. De Moss, 45 Ill., 447; Madden v. Farmer, 7 La. Ann., 480.

For decisions on the Georgia statute prohibiting an attorney from testifying for his client, see Churchill v. Croker, 25 Ga., 479.

⁶ Wharton on Evidence, § 442; Weeks on Attorneys, § 126; Turnbull v. Richardson, 69 Mich., 400; Kelley v. Richardson, 69 Mich., 430; Convey v. Campbell, 52 Ind., 157.

§ 1262. (e) From administering oaths in cases wherein he is counsel.—In two of the United States, attorneys are prohibited by statute from administering oaths in causes in which they are professionally engaged.¹ In this State there is no statutory prohibition, but the courts generally discountenance the practice of attorneys in legal proceedings administering oaths and taking affidavits to be used in such proceedings; but the proceedings themselves cannot be treated as a nullity because of the fact of a counsel engaged therein having administered an oath. If the adversary does not take steps to set aside the proceedings in due time on account of that fact, the irregularity will be deemed to have been waived.²

§ 1263. Liability to third persons.—Ordinarily, attorneys at law, like other agents, are exempt from liability to third parties, for what they do in the name and behalf of their principals; but like other agents, they may render themselves liable to third persons in various ways, as by acting without authority, or independently of their clients, or in excess of their authority, practicing fraud or collusion, or acting under illegal, informal, or irregular proceedings,—and the same rules appear to apply in cases of both contract and torts. Attorneys may be liable for entering an unauthorized appearance, and for assuming obligations on their own account.³ Lord Abinger says “in cases of contract the attorney is known merely as an agent—the attorney of the principal—and is directed by the principal himself. The agent, acting for and on the part of the principal, does not bind himself, unless he offers to do so by express words; he does not make himself liable for anything, unless it is for those charges which he is himself bound to pay and for which he makes a charge.”⁴ The attorney may become liable on an illegal seizure when he assists in or sends his clerk to assist

¹ See Howell Mich. Stat., § 637; Agency, §§ 612-613; Weeks on Attorneys, § 127.
 Kansas Code, § 334, *et seq*; Foote v. Smith, 34 Kans., 27.

² Linck v. The City of Litchfield, 141 Ill., 469.

³ Coke on Litt., 52a; Wharton on

⁴ Opinion in Robins v. Broge, 3 Mees. & W. 119. Hardy v. Keeler, 56 Ill., 152.

in the service of the writ.¹ While the attorneys acts merely in his character as such, making use of the process of law to enforce his client's demands, however groundless it may be, he is not amenable to suit; but when he steps beyond that line and actively aids his client in the execution of his purpose he becomes personally liable.² An attorney may so act under his general employment to enforce a legal claim as to render himself liable for a malicious prosecution or arrest.³

§ 1264. Retainer and appearance. (a) Right to counsel.

—The right to counsel has, in England, been oftenest denied when it was most needed. Persons ignorant and unaccustomed to public assemblies, perhaps feeble in body, or in intellect, or in both, were put upon trial on charges which might consign them to the most ignominious death, with able counsel opposed, and all the machinery of the law in active operation against them, and yet they were refused the right to counsel. This for the most part occurred when the person was charged with treason or felony and the practice of denial of counsel in such cases lasted through a long period of time. Lord Holt and his associates, in 1695, condemned Sir William Parkins for high treason, without granting him privilege of counsel, when by act of Parliament, before then passed, he might have had the privilege of counsel on the next following day, Lord Holt declaring that he must administer the law as he found it and could not anticipate the operation of an act of parliament for one single day. Sir William was consequently executed.*

§ 1265. (b) The contract of retainer.—“Retainer” is the act of a client by which he engages a lawyer or counsel to manage his cause.* In some localities the term is used as synonymous with “retaining fee” meaning the first payment of compensation for services to be rendered.* The ancient practice was to appoint attorneys in court, but it now may be

¹ Hardy v. Keeler, 56 Ill., 152.

Liebers v. Hermeneutics, Ch. 4, §

² Schalk v. Kingsley, 42 N. J. L.,

15; Cooley's Const. Lim., 33.

³ Burnap v. Marsh, 13 Ill., 335.

* Bouv. Law. Dict.

* Weeks on Attorney at law citing

* As to “Compensation,” see *post*.

§ 1274.

done out of court in writing or by parol.¹ The contract of retainer may be made like any other; it may be express or implied. When services are rendered under such circumstances as reasonably imply that they were performed with the assent and on the request of the party he must be held liable.²

The contract of appointment may be either "special" or "general."³ If the agreement is that an attorney shall receive a stated amount per year for his services, the contract is good for at least a year and it seems he cannot be discharged before that time.⁴ But the employment to do a mere ministerial act, such as procuring the execution of a deed, does not constitute him an agent so as to affect his client with constructive notice of matters within the knowledge of the attorney.⁵ Accepting a retainer fee will constitute the relation of attorney and client.⁶

Before an attorney undertakes his client's business there is no confidential relations existing between them, and therefore the attorney may make a contract with reference to his services and compensation therefor in the same manner and to the same effect that other parties may contract. They deal with each other at arm's length, their contracts will be construed as other contracts are.⁷ It is not against the law and public policy in this State for an attorney to receive a contin-

¹ Chicago Public Stock Exchange v. McLaughry, 50 Ill. App., 358.

A corporation may make a parol contract of retainer, but it seems that it should be done by a majority of the board, at a legal session, though a record thereof is not essential. McCabe v. Board, 46 Ind., 330; Bank v. Fellows, 28 N. H., 302; Osborne v. Bank, 9 Wheaton (U. S.), 738.

A railroad company is liable for the services of an attorney retained by the general manager of the company, unless he had no authority to make the employment and the attorney knew it. St. Louis, etc., Ry. Co. v. Grove, 39 Kans., 371.

² Cooper & Moss v. Hamilton, 52 Ill., 119; Johnston v. Brown, 51 Ill. App., 549; Weeks on Attorneys, § 187.

³ Sanders v. Seelye, 128 Ill., 681.

⁴ Alderton v. Emmons, 4 Com. B., 479; Weeks on Attorneys, § 178.

⁵ Wyllie v. Holland, 32 Law Journal Ch'y (Eng.), 782.

⁶ DeWolf v. Strader, 26 Ill., 225.

It is unusual for an attorney to charge more than one attorney fee in the same case. Should he charge more than one he cannot recover such extra charge. Schnell v. Schlernitzauer, 82 Ill., 439.

⁷ Elmore v. Johnson, 143 Ill., 513.

gent fee for the services rendered his client.' But the courts will look scrutinizingly into the contract between attorney and client to see that they are just and equitable.' An attorney may contract with his client to receive a share of the money or property recovered but the client has a right to rescind such a contract if he elects to do so within a reasonable time, irrespective of the fairness or unfairness of the contract.' A contract is not champertous unless it contains the essential element that the attorney will prosecute the suit at his own expense.'

A client cannot rescind a special contract with his attorney at discretion; but he has a right to do so if the attorney fails to use reasonable diligence of the performance on his part of the undertaking. This right results from the very nature of the contract.' When an attorney accepts employment in a case and there is no special contract as to duration of the employment, the law implies an obligation on his part to attend to it until it is determined. He may demand payment of fees earned, and if not paid, may give reasonable notice and withdraw from the case, but he cannot abandon the case without just cause; nor will a refusal to pay some other demand justify him in leaving the case.'

The attorney's duty does not cease with the recovery of judgment on a claim put in his hands for collection. He should collect the money after the judgment is recovered, unless it is otherwise agreed upon between him and his client, and, where land has been sold to satisfy a judgment, his duty continues until the expiration of the time for redemption. It is the duty of the attorney to receive the money which may be paid to the Sheriff in redemption from such sale.'

¹ Newkirk v. Cone, 18 Ill., 449.

² Rolfe v. Rich, 46 Ill. App., 406.

³ Elmore v. Johnson, 143 Ill., 513; Newkirk v. Cone, 18 Ill., 449.

⁴ Bla.Com. 134; 2 Chitty on Cont., 996-997; Story Eq. Jur., § 1048; Phillips v. South Par. Commissioners, 119 Ill., 626; Gilbert v. Holmes, 64 Ill., 548; Neal County v. Franklin, 43 Ill. App., 237; Thurston v. Percival, 1 Pick. (Mass.), 415; La-

throp v. Amherst Bank, 9 Metc. (Mass.), 489; Redman v. Sanders, 2 Dana (Ky.), 70; Allen v. Hawks, 13 Pick. (Mass.), 79.

⁵ Walsh v. Shumway, 65 Ill., 471. What will justify such rescission, see *Id.*

⁶ Cairo & St. L. R. R. Co. v. Koerner, 3 Ill. App., 248.

⁷ Zeigler v. Hughes, 55 Ill., 288; Smyth v. Harvie, 31 Ill., 62.

Death ends the contract of retainer, and, without a new retainer the attorney has no authority to appear in the suit for the executor or administrator of his former client.¹

§ 1266. (c) **Appearance generally.**—In the ancient practice of the law, attorneys to appear for parties in suits were appointed orally in open court.² They were afterwards allowed to be appointed out of court by “warrant of attorney” which was filed in court thereafter any time before judgment. The lack of this warrant of attorney was aided by the statute of amendments and could not be assigned for error. The strictness regarding the “warrant of attorney” to appear for a party as gradually relaxed until now, although an attorney cannot, without special authority, admit jurisdictional process upon his client, yet it has been presumed on collateral proceedings, and on appeal or error, that a regular attorney at law, who appeared for a defendant, though not served, had authority to do so.³ Therefore, in order to enable a party to be relieved, who has been represented by an unauthorized attorney, he must negative the presumption of authority, and there is no rule, statute or authority permitting an adversary to require an attorney to affirmatively establish his power to act for the person in whose behalf he has entered an appearance in due form. An attorney in good standing is presumed to have had authority to enter an appearance until the contrary is shown.⁴

¹ Turnan v. Temke, 84 Ill., 286; Gleason v. Dodd, 4 Metc. (Mass.), 333; Doty v. Dexter, 61 Mich., 348; Harness v. State, 57 Ind., 1.

Money in the hands of a Sheriff made upon execution in favor of a plaintiff, must, upon death of the plaintiff, be retained by the Sheriff until demanded by the personal representatives of the deceased. Furthermore, if the court should enter an order that the Sheriff pay such money to the deceased party or his attorney, an injunction may issue on the application of the Sheriff. Risley v. Fellows, 5 Gilm. (Ill.), 531.

² Chicago Public Exchange v. McClaughry, 50 Ill. App., 358.

³ Prince v. Griffin, 16 Ia., 522; Masterson v. LeClaire, 4 Minn., 163; Fowler v. Morrill, 8 Tex., 153; Thomas v. Steele, 22 Wis., 207; Shroudenbeck v. Company, 22 Wis., 207; Sheldon v. Tiffen, 6 How. (U. S.), 163; Lagwood v. Patterson, 1 Blackf. (Ind.), 327, s. c. 89 Am. Dec., 520; Hare & Wall, notes to Mills v. Duryee, 2 Am. Lead. Cas.

⁴ Weeks on Attorneys at Law, § 193; Newberg v. Heineman, 59 Mich., 210.

Where an attorney has, without authority from the client, appeared and begun suit, the defendant is not bound to answer, else he might be twice compelled to litigate the same action. A judgment in his favor would be no bar to a subsequent action brought by the direction of the plaintiff.¹ But the possession of a promissory note raises the presumption of a right to sue upon it.² An action begun without authority will be dismissed on motion. An attorney must be actually employed for the plaintiff before he can represent the plaintiff in court.

An appearance may be general or special, but this refers to the character of the appearance and the effect upon the trial of the cause, and not to the relationship of attorney and client, hence it has received attention in the former part of this work and needs no notice here.³

§ 1267. (d) Withdrawal of appearance—Substitution of attorneys.—A change of attorneys in a pending suit in this State must be made by order of court. It cannot be made by voluntary arrangement.⁴ An attorney desiring to withdraw from a case, or a party desiring a substitution of attorneys, may move the court for leave to withdraw or substitute, as the case may be, upon notice given to the client or attorneys interested. When an attorney of record applies for permission to have his appearance stricken out, the presumption is that he does so by the authority of his client, and the client is not thereby entitled to a continuance of his case.⁵

§ 1268. Authority and powers—Management of cause—Satisfaction.—In general the law of principal and agent applies to attorney and client. The client is bound by the ordinary rules of agency, by the acts of his attorney, within the scope of the latter's authority,⁶ and cannot be interfered with

¹ Frye v. Calhoun Co., 14 Ill., 132.

² Donald v. Wilson, 79 Mich. 181.

³ Ante, §§ 628-31.

⁴ Cohen v. Smith, 33 Ill. App., 344.

⁵ Henck v. Todhunter, 4 Har. & J. (Md.), 275, s. c., 16 Am. Dec., 300.

⁶ Wharton on Agency, § 580.

until it is revoked.¹ Like in other cases of agency the power of the attorney to bind the client must sometimes be particularly expressed. An attorney cannot transfer the title of a promissory note in his hands for collection;² nor can he sell or assign a claim to a stranger without express authority;³ nor can he contract independently in relation to any of his client's demands.⁴

The relation of attorney and client is personal in its nature and the confidence reposed in the counsel cannot be delegated to another without the consent of the client. The client is entitled to receive the identical legal services he contracts for.⁵ But under certain circumstances, such as great distance, etc., an attorney is authorized by his retainer to employ reasonable assistance at the expense of his client.⁶

The effect of a retainer to prosecute or defend a suit is to confer upon the attorney all the powers exercised by the forms and usages of the court in which the suit is pending. A client is presumed to authorize and sanction such action as the attorney, in his superior knowledge of the law, may decide to be legal, proper and necessary, in the prosecution of the demand, and whatever adverse proceedings the attorney may take are to be considered, as far as they affect the defendant in the suit, as approved in advance by the client, and therefore *his* acts, even though they prove to be unwarranted by law.⁷ He may receive payment;⁸ may bring suit after

¹ *Cohen v. Smith*, 33 Ill. App., 344.

Power of attorney not of record.

—Where an attorney other than the attorney of record is called upon to do some specific service and performs only such service, his implied authority to bind his client is limited to the proper conduct of the particular work entrusted to him, and the rule regarding special agents applies. A party dealing with him outside of the particular service does so at the peril of being able to show that the attorney possesses express authority to do the

act in question. *Cameron v. Stratton*, 14 Ill. App., 270.

² *Goodfellow v. Landis*, 36 Mo., 168; *Terhune v. Colton*, 10 N. J. Eq., 21.

³ *Pennington v. Patchin*, 5 Vt., 346.

⁴ *Annelly v. Ded Saussure*, 12 S. C., 488.

⁵ *Cornelius v. Wash*, 1 Ill. (Breese), 98.

⁶ *Singer, Nimick & Co. v. Steele*, 125 Ill., 426.

⁷ *Cameron v. Stratton*, 14 Ill. App., 270; *People v. Supervisor*, 100 Ill., 332; *Foster v. Wylie*, 27 Mich., 244.

⁸ *Greenl. Ev.*, 141; *Custer v.*

being nonsuited in the first for want of formal proof;¹ may sue out a writ of error on the judgment;² may discontinue the suit;³ may restore an action after a *nol pros*;⁴ may claim an appeal and bind his client by recognizance in his name for the prosecution of it;⁵ and may submit the suit to arbitration,⁶ but it said only under a rule of court.⁷

Stipulations made in open court by an attorney in respect to a pending case, are, when free from fraud, authorized and binding upon the client and cannot be repudiated by the successor in employment of the attorney who made the agreement.⁸ And although the agreement between attorneys be made orally, and out of court, they may, if acted upon by them, be enforced by the court.⁹ A party will not, however, be bound by a contract made by her attorney out of court relating to property not made a part of the decree in the suit, without proof of authority in the attorney to bind the client or acquiescence of the act by him after knowledge of the fact. There is no presumption of authority over matters outside the suit and the burden of proving it rests upon the party alleging the authority.¹⁰

Nevertheless, where an attorney makes an agreement which is so unreasonable as to imply bad faith it will be notice thereof to the opposite party and will not bind the client.¹¹

Agnew, 63 Ill., 194; compare Nolan v. Jackson, 16 Ill., 272; Ruckman v. Alwood, 44 Ill., 183.

¹Scott v. Elmendorf, 12 Johns. (N. Y.), 315.

²Grovenor v. Danforth, 16 Mass., 74.

³Haillard v. Smart, 6 Cow. (N. Y.), 385; McLeran v. McNamara, 55 Cal., 508.

⁴Renold v. Alberti, 1 Binn. (Pa.), 649.

⁵Adams v. Robinson, 1 Pick. (Mass.), 462.

⁶Somers v. Balabrega, 1 Dall. (U. S.), 164; Buckland v. Conway, 16 Mass., 396.

⁷Markley v. Amis, 8 Rich. (S. C.), 468.

Parties may prosecute or defend their own suits without attorneys.—

There is nothing in the law relating to attorney and client authorizing the former to appear for the latter, which will prevent the plaintiff or defendant from managing their own cause in court. Rev. Stat., Chap. 13, ¶ 11, § 11.

⁸Lockwood v. Black Hawk, etc., Co., 34 Ia., 235.

⁹Chicago, etc., Ry. Co. v. Hintz, 132 Ill., 265.

¹⁰Brooks v. Kearns, 86 Ill., 547.

¹¹Ball v. Leonard, 24 Ill., 146; Wharton on Agency, § 585.

When an attorney settles a judgment without authority, the client may either repudiate the act and

In the general management of suits, the attorney has a very extensive authority, which springs mainly from his general retainer. He has the free and full control of the case, in its ordinary incidents, and as to those incidents is under no obligation to consult his client.¹

But in important cases he should take his client's instructions and he must render an account to the client when it is so desired. The client, being bound by the attorney's acts, where there is no collusion with the opposite party, can have redress, in case of injury, from the attorney alone.²

The attorney is liable to his client for the negligence of the person employed by such attorney.³

A clear case of malpractice will be heavily punished by the court; but the case must be clear and free from doubt, not only as to the act charged, but as to the motive.⁴

Admissions of an attorney are only evidence against the client when they are made with a view to obviate the necessity of proving, at the trial, the facts admitted.⁵ The nature

enforce the judgment, or may ratify the act and sue the attorney for money had to his use. *Chapman v. Burt*, 77 Ill., 337.

¹ Wharton on Agency, § 585.

Authority to dispose of perishable property.—Where goods levied upon in prosecution of a suit are of a perishable nature or likely to be pilfered, the attorney has authority to direct or consent that they shall be sold by the officer, and the proceeds kept for distribution. The client will be bound by such act of the attorney. *Nelson v. Cook*, 19 Ill., 440.

Authority to receive service of notice in appealed cases.—It has been held that the attorney who conducted the case in a Justice's court may, after an appeal is taken, be served with notice by the appellant, and the appellee be bound thereby. *Vallens v. Hopkins*, 51 Ill. App., 337.

² *Wilson v. Spring*, 64 Ill., 14; *Greenlee v. McDowell*, 4 Ired. (N. C.), Eq., 481; *Foster v. Wiley*, 27 Mich., 244.

Client's recourse against attorney.

—The attorney is held to a reasonable degree of care and skill, and if injury results to the client by lack of the same, the attorney must respond in damages to the extent of the injury sustained. *Stevens v. Walker & Dexter*, 55 Ill., 151.

³ *Walker v. Stevens*, 79 Ill., 193.

⁴ *People v. Harvey*, 41 Ill., 277.

Equity.—While an attorney is liable to his client for the injury sustained, it will not relieve against the acts done by the client, unless fraud is shown between him and the opposite party, or unless the attorney is not responsible. *Wilson v. Spring*, 64 Ill., 14.

⁵ *Young v. Wright*, 1 Campb. 140.

of the attorney's employment gives him the power to make admissions for and waive the rights of his client which will be as binding as if made by the client himself, so long as there is no fraudulent collusion with the other party.¹ Furthermore written admissions, made for the purpose of a former trial, may be used on the new trial.² And it seems that an admission by an attorney at a trial, though made orally, will bind his client on a subsequent trial of the same case, if it appears that they were intended to be general.³ On the contrary it is said the admission that things existed on a certain day, are no evidence of the state of facts on a subsequent date.⁴

Judgment—Compromise.—The judgment obtained in a case may be satisfied by the attorney under the authority of his general retainer, and by the payment to him of the entire amount stated in such judgment, and since he has a lien upon such judgment for his services rendered in obtaining it, he is the proper person to sign such satisfaction or "satisfaction piece." Notwithstanding an attorney holds a lien upon the judgment for his fees he cannot enter satisfaction of the entire judgment without payment of the full sum, and if he makes satisfaction for less than the face of the judgment without authority it will be good only for the amount received. In order that an attorney may have power to receive less than the full amount of the demand or judgment, or to receive anything for the satisfaction of the judgment except money, he must be specially authorized so to do.⁵

A compromise made by an attorney and acted upon will be binding, unless objected to at the earliest opportunity. Where a compromise is made with a city attorney of a demand in

¹ Wilson v. Spring, 64 Ill., 14.

He may admit on the hearing of a cause the amount which is due from his client. Wilson v. Spring, 64 Ill., 14.

² Eaton v. Larkins, 5 Car. & P., 285.

³ Central Branch U. P. R. R. Co. v. Shoup, 28 Kans. 394; Scott v. Chambers, 62 Mich., 532.

⁴ MacLeod v. Wakely, 2 Car. & P., 311.

⁵ Wetherbee v. Fitch, 117 Ill., 171; Vickery v. McClellan, 61 Ill., 311; Miller v. Lane, 13 Ill. App., 648; Jackson v. Barrett, 8 Johns. (N. Y.), 361; Kellogg v. Nilbett, 10 Johns. (N. Y.), 220; Beers v. Henderson, 45 N. Y., 665; Lewis v. Woodruff, 15 How. (N. Y.), Pr. 539; Carter v. Talcott, 10 Vt., 471; Penniman v. Patchin, 5 Vt., 346.

favor of the city and judgment entered thereon, objection must be made thereto at the term in which such judgment was entered.¹

If an attorney enters a satisfaction of judgment upon a payment of less than the full amount, he will be personally liable to his client for the unpaid balance.² Likewise, in the assignment of a judgment the attorney is without authority so to do except upon the payment of a sum equal to the amount of the judgment; but if he assigns it for a less sum the receiving of the money by the client will be a ratification of the act of the attorney in making the assignment.³

The power of an attorney ceases with the termination of the relation, after which the acts performed by attorneys are unwarranted and will not bind the client.⁴

§ 1269. Duties and liabilities to client. (a) Generally.—The office of an attorney is one of trust and confidence. Therefore, the highest degree of good faith is required of him, and the courts will closely and jealously scrutinize the dealings between attorneys and their clients and will relieve the clients from any undue consequences resulting from them, whenever the good faith of the attorney does not clearly appear.⁵ The greatest degree of fairness is exacted and the burden of showing the good faith of the transaction between attorney and client, whether of contract, gift, or conveyance, is upon the attorney. The absence of such proof is treated as constructive fraud.⁶

¹ *People v. Quick*, 92 Ill., 580.

An attorney of an infant, by settlement or compromise of a pending suit, binds his client to the same extent as in other cases. *Chicago & A. R. R. Co. v. Lammert*, 19 Ill. App., 135.

² *People v. Cole*, 84 Ill., 327.

³ *Marshall v. Moore*, 36 Ill., 321.

⁴ *Ruckman v. Alwood*, 44 Ill., 183; *McLain v. Watkins*, 43 Ill., 24.

⁵ *Ross v. Payson*, 160 Ill., 349; *Staley, Admx. v. Dodge, Admrs.*, 50 Ill., 43; *Jennings v. McConnell*,

17 Ill., 148; *Greeley v. Smith*, 13 Ill. App., 43; *Robinson v. Hawes*, 56 Mich., 136; *Gott v. Brigham*, 41 Mich., 228; *Gray v. Emmons*, 7 Mich., 533; *Starr v. Vanderheyden*, 9 Johns. (N. Y.), 253; *Zugo v. Laughlin*, 23 Ind. 170.

⁶ *Elmore v. Johnson*, 143 Ill., 513; *Roby v. Colehour*, 135 Ill., 300; *Jennings v. McConnel*, 17 Ill., 148.

Attorney must counsel client against wasting estate.—The attorney acting as the legal adviser of his client is in duty bound to coun-

The legal duty of the attorney to the client is in the exercise of care, skill, diligence and integrity. When the attorney has used these he is not responsible for errors or mistakes incident to the exercise of his vocation. He must use as much diligence in and about his client's business as a prudent man would with his own. He must not be guilty of fraud or deception to the injury of his client, nor put his client to unnecessary expense. He must expedite suits when it is to his client's advantage that he do so, and prevent unnecessary delay, with the same object in view.¹ But he is not an insurer of the result in a case in which he is employed, unless he makes a special contract to that effect and for that purpose.² The lawyer is expected to be honest and diligent and to use a reasonable degree of care. He is only liable for *gross negligence*. He is also expected to possess such skill as is usually possessed by good practitioners in his particular branch of the law practice. He is only liable for *gross ignorance*.³

sel such client against the reckless disposition of his estate. *Ross v. Payson*, 160 Ill., 349.

An attorney cannot take advantage of client's reckless disposition to waste his estate, and take a conveyance of his property to himself for an inadequate consideration. *Ross v. Payson*, 160 Ill., 349.

Attorney a trustee, when.—It is said that where an attorney deceives his client and his acts are resulting in benefit of himself to the detriment of his client, he acts as trustee for his client and must make a proper settlement. *Trotter v. Smith*, 59 Ill., 240; *Alwood v. Mansfield*, 59 Ill., 496.

Deed from client to attorney not even color of title.—When. A deed made by an aged client to his attorney for an inadequate consideration is not color of title made in good faith. Consequently possession thereunder and payment of taxes for seven years will not give title by

adverse possession. *Ross v. Payson*, 160 Ill., 349.

Laches does not apply to prevent relief against the abuse of the relation of trust and confidence arising between attorney and client, unless the defendant will be injured, because of the delay, by granting the relief. *Ross v. Payson*, 160 Ill., 349.

¹ *Cornelius v. Wash*, Breese, 98; *Kenyon v. Schreck*, 52 Ill., 382; *Pitt v. Yalden*, 4 Burr. (Eng.), 2060; *Eggleston v. Boardman*, 37 Mich., 14.

² *Babbitt v. Bumpus*, 73 Mich., 331.

³ *Wharton on Negligence*, §§ 746-9; *Wharton on Agency*, § 596; *Stevens v. Walker*, 55 Ill., 151; *Wallpole v. Carlyle*, 32 Ind., 415; *Stumps v. Beene*, 37 Ala., 627; *Gambart v. Hart*, 44 Ga., 542; *Cox v. Sullivan*, 7 Ga., 144; *Harter v. Morris*, 18 Ohio St., 492; *Bowman v. Tallman*, 27 N. Y. Pr., 212; *Watson v. Muirhead*, 57 Pa., 161.

Furthermore, he is entitled to the benefit of the rule that every one should be presumed to have discharged his legal and moral obligations until the contrary appears, and when made to appear, the extent of the damages must also be affirmatively shown.¹ For example, where a client undertakes to hold an attorney liable for not collecting a claim given him for that purpose, he must show, not only that the claim was good and collectible but that it was not collected because of the negligence of the attorney, that he was injured by the attorney's mismanagement of the business, and to what extent.² A member of a firm being employed as an attorney will entitle the client to the united skill of all, whether he consults all or not, unless there is a special arrangement as to the services of the one only. Ordinarily the relation of attorney and client exists between the client and every member of the firm.³

§ 1270. (b) *In the management of the cause.*—The attorney should, either before the commencement of the suit, or immediately afterwards, obtain all practical information as to the law and evidence of the case by a careful perusal and examination of the papers and documents in the cause,⁴ and be in personal communication with the client,⁵ and make examination of witnesses and proof.⁶ He should in due time make the necessary preparations for the trial or hearing, by procuring the production of the requisite documents and the necessary

¹ *Goodman v. Walker*, 80 Ala., N. S., 482; *Cox v. Sullivan*, 7 Ga., 144; *Gambart v. Hart*, 44 Ga., 542; *Godfrey v. Dalton*, 6 Bing., 468.

² *Staple v. Staples*, 85 Va., 76; *Joy v. Morgan*, 35 Minn., 184; *Bruce v. Baxter*, 75 Tenn., 477; *Cochrane v. Little*, 71 Md., 323.

Other attorneys as expert witnesses.—It is competent to show by other lawyers that in their opinion the advice given was not such as a prudent and careful lawyer of ordinary capacity and intelligence would, or

ought to have given, under the circumstances proved by other witnesses in the case. *Cochrane v. Little*, 71 Md., 323.

Declaration in suit against attorney, see *Ib.*

³ *Smith v. Brittenham*, 109 Ill., 540.

⁴ *Thwaites v. Mackerson*, 3 Carr. & P. (Eng.), 341.

⁵ *Hopkins v. Smith*, 3 Moore (Eng.), 237.

⁶ *Harvey v. Mount*, 8 Beav. (1 Eng.), 439.

witnesses.¹ Then, since the trial of the cause is not concluded until a verdict has been rendered and the jury discharged, it is the duty of the attorney to remain in, or be present at the court during its session until this is done and the trial ended.²

The practice of the court in sending for parties or counsel who have absented themselves before the end of the trial is a matter of courtesy, and not of right.³

§ 1271. (c) In the collection of money.—It is the duty of the attorney immediately upon the collection of a claim to give his client notice thereof and to await instructions. Unless such circumstances exist as amount to a waiver of demand no action will lie against an attorney for money collected until a demand is made; ⁴ but in the absence of proof the law will presume notice and demand made in reasonable time after the money is collected, and then the action against the attorney therefor will be deemed to have accrued. When the attorney, by false representations, conceals from his client the fact that he has collected the client's money, the cause of action does not accrue until the discovery of that fact. Whenever the wrong of the attorney causes the delay and not the laches of the client the attorney cannot take advantage of his own wrong and plead the statute of limitations.⁵

§ 1272. (d) In the purchase of real estate.—An attorney is bound by the utmost good faith in all his dealings with his client. Where the attorney of a judgment creditor bids off in his own name an undivided interest in lands upon which he has levied an execution, he holds such interest for his client's

¹ *De Rouffigny v. Peale*, 3 Taunt. (Eng.), 484.

² *Hudson v. Minneapolis, etc., Ry. Co.*, 44 Minn. 52.

³ *Wiggins v. Downer*, 67 How. (U. S.), 100; *Cooper v. Morris*, 48

J. L., 607; *Compare Graham v. Smith*, 90 Ga., 676.

⁴ *Taylor v. Bates*, 5 Cow. (N. Y.), 376; *Lilly v. Hoyt*, 5 Hill (N. Y.), 309.

⁵ *Chapman v. Burt*, 77 Ill., 337; *Cutting v. Weigh*, 20 N. Y., 120; *Rathbone v. Ingles*, 7 Wend. (N. Y.), 320; *Voss v. Bachop*, 5 Kans., 67.

benefit and must release it on demand; and if he refuses, the client can hold him as a trustee and require him to account or compel him to convey.¹ An attorney can in no case, without his client's consent, buy and hold, otherwise than in trust, any adverse title or interest touching the thing to which his employment relates.²

Deeds of land made by clients to attorneys will be closely scrutinized by the courts and if an attorney has by such a deed secured a larger compensation than his services were really worth a court of equity will set such deed aside.³ Before a client will be held to have ratified such a deed, made under circumstances rendering it voidable, it must appear that at the time of the alleged ratification the client was aware of the nature and extent of his actual rights.⁴

The act of an attorney in advising or encouraging a client to invest in a bad title, and thereafterwards himself buying up a better title, and asserting it as against his former client, will not be tolerated. The attorney will not even be allowed to set up his ignorance of the law or his negligence at the time of advising his client, as an excuse for the act and as against the claim of his client acquired by his advice.⁵

§ 1273. (e) **In the investigation of title.**—The first duty of the purchaser's attorney, on receiving the abstract of title, is to read carefully through it, in order to see whether, on the face of it, a proper title appears to be disclosed, and if the abstract is properly framed (which a competent person can soon ascertain), it is then his duty to carefully examine every deed or instrument constituting or affecting the title—comparing with the original deeds if accessible. But it has been held in England that it was the duty of the purchaser's solicitor to "search" (meaning to search the records themselves) for any incumbrance upon the property, such as judgments, etc., as he has been held liable to his client for any omission on this

¹ Taylor v. Young, 56 Mich., 285.

² Baker v. Humphrey, 101 U. S., 104; McDowell v. Milroy, 69 Ill., 498.

³ Elmore v. Johnson, 143 Ill., 513.

⁴ Roby v. Colehour, 135 Ill., 300.

The alleged ratification in this case was the directing of former tenants to pay rent to the attorney. Roby v. Colehour, 135 Ill., 300.

⁵ Gibbons v. Hoag, 95 Ill., 45.

point.¹ This, however, is now, in this country, the business of the abstractor—the original examiner of the title who is liable for ordinary care and diligence, when he engages in that business for a compensation.²

The attorney is only liable for negligence in the examination of that which he engages to examine, whether the same be the record of the title, or the abstract of that record. In either case he is liable for want of reasonable care and skill. If, through his carelessness, or that of his clerk, loss ensues, an action therefor may be maintained.³

An action against an attorney for negligence in the examination of a title can only be maintained by the client and not by some person with whom the attorney has held no contract relation.⁴

§ 1274. Liability of client to attorney—Compensation.—

The client is liable to make compensation to his attorney for services rendered in good faith and in a proper manner; and in the absence of any express contract the attorney is entitled to so much as the services were reasonably worth.⁵ A statement of account between an attorney and client is not conclusive upon the client.⁶ There can, however, be no recovery

¹ Brooks v. Day, 2 Dick. (Eng.), 572; Foreshell v. Coles, Peak, Ad. Cas., 286.

² Story on Bailments, 431; Wharton on Negligence, 749; Weeks on Attorneys at law, § 285.

³ Wharton on Agency, § 597.

⁴ Savings Bank v. Ward, 100 U. S., 195; Dundee Mortgage, etc., Co. v. Hughes, 10 Sawyer, (U. S.), 144.

⁵ Elmore v. Johnson, 143 Ill., 513; Price v. Hay, 132 Ill., 543; Schnell v. Schlernitzauer, 82 Ill., 439; Union Mut. Ins. Co. v. Buchanan, 100 Ind., 63; Knight v. Rusk, 77 Cal. 410; Detroit v. Whittemore, 27 Mich., 281; Starin v. Mayor, 106 N. Y., 82. Even though the client may receive no benefit as a result. Bills v. Polke, 72

Tenn. 494; Brackett v. Sears, 15 Mich., 244.

Fifty dollars for drawing and filing an appeal bond is exorbitant. Schnell v. Schlernitzauer, 82 Ill., 439.

Where an attorney by procuring the execution of a deed from a client to him thereby secures a larger compensation for his services than they are really worth the client may have the deed set aside by bill in equity filed within a reasonable time. Elmore v. Johnson, 143 Ill., 513.

⁶ Hopkinson v. Jones, 28 Ill. App., 409.

Contract indivisible.—Where a special contract existed between an attorney and client to the effect that

of compensation for services alleged to have been rendered, unless there has been some contract express or implied, or created by law, which will render the client liable to the attorney.¹

Where there is a special contract fixing the amount of compensation of the attorney's services he will have no right to charge a fee for his legal services above the compensation provided in the contract.² Furthermore, the services rendered must be those specified in the contract. Where a power of attorney attached to a promissory note allows a certain attorney's fee in case of confession of judgment under the power it will not justify the court in allowing such fee in an ordinary suit on the note.³

A demand by an attorney upon his client for a certain compensation, is only a proposition to receive that amount for the debt. If the payment is refused, the recovery cannot be limited to the amount of the demand, if the services are shown to be of greater value.⁴ But where there is a special contract to pay a contingent fee of a certain price per day for successfully defending a suit, and the client abandon the suit, the attorney cannot recover a greater amount than the contingent fee would have been.⁵ And if an attorney neglects to furnish his client with a statement of extra expenses in the suit, beyond the amount of costs recovered of the adverse party,

he was to receive one-fourth of the lands recovered by him or a certain share realized upon a compromise and the client rightfully discharged the attorney for inattention to business and employed other counsel, it was held the discharged attorney could not recover upon the principle of *quantum meruit*. *Walsh v. Shumway*, 65 Ill., 471.

¹ *Evans v. Mohr*, 42 Ill. App., 225.

Compensation as assistant counsel.—Where an attorney renders services in a case at the request of the client's attorney, with the knowledge of the client, who silently acquiesces therein, he is entitled to re-

cover from the client for his services. (*Eggleston v. Boardman*, 37 Mich., 14; *Hogate v. Edwards*, 65 Mich., 372.) But if the client does not, in some manner, show his assent to the employment or retention of the second attorney he will not be liable for the fees. *Price v. Hay*, 132 Ill., 543; *Matter of Hynes*, 105 N. Y., 560; *Sedgwick v. Bliss*, 23 Neb., 617; but in case of distance, etc., see *ante*, § 1268.

² *Hughes v. Zeigler*, 70 Ill., 38.

³ *Dowty v. Holtz*, 85 Ill., 525.

⁴ *Miller v. Beal*, 26 Ind., 284; *Ingersoll v. Morse*, 33 Miss., 667.

⁵ *Rubel v. Elliot*, 30 Ill. App., 62.

the amount recovered will be presumed to be all that he has a right to claim.¹

When a demand is given to an attorney for collection, there is no implied agreement on his part that he will in the first instance, look to the demand as a means of satisfying his claim for services, or that he will wait for his pay until it is determined whether or not it is collectible.² But it has been held that where an attorney was retained to collect certain judgments, he could not demand his fee until the judgments were collected, or the collections shown to be impossible.³

Where an attorney has made certain collections and has made a settlement with his client, a court will deem such settlement to be conclusive upon the attorney as to his charges and if a collection is inadvertently omitted he will only be entitled to charge the same rate as that in the settlement.⁴

The statutes provide in certain cases for the taxation of attorneys' fees as part of the costs in the case and in certain cases fix the rate of compensation to be recovered. When the statute fixes the rate of compensation the law implies a promise on the part of the client to pay the attorney at least the statutory rate of compensation, and the burden of proving that the attorney undertook to perform the services for a less rate rests upon the client, and such an agreement, it is said, should be made out by evidence equal to a positive declaration.⁵

¹ *Matter of Blakely*, 5 Paige (N. Y.), 311.

² *Nichols v. Scott*, 12 Vt., 47.

³ *Succession of Zenon*, 34 La. Ann., 1187.

⁴ *Phenix Ins. Co. v. McKenzie & Calkins*, 38 Ill. App., 630.

⁵ *Brady v. Mayor*, 1 Sand. (Eng.), 569.

Attorneys' fees may be taxed as costs in a decree of foreclosure where a proper clause was contained in the mortgage showing an agreement that the same be done. *Haldeman v. Massachusetts Mut. Life Ins. Co.*, 120 Ill., 390.

In an action against a railway for

not fencing its road, attorneys' fees are recoverable as a penalty for the nonperformance of such duty. *Peoria, Decatur & E. Ry. Co. v. Duggan*, 109 Ill., 537.

In actions brought on behalf of a mechanic, artisan, miner, laborer, servant, or employe for wages earned, due and owing according to the terms of the contract of employment; and after demand made in writing at least three days before the suit is brought for a sum not exceeding the amount found to be due and owing, a reasonable attorney's fee is recoverable as costs, which shall not be less than five dollars in

Where the statute allows attorneys' fees to be recovered as part of the costs it is the duty of a court and not of the jury to fix the amount of the fee.¹

When a court fixes the amount of the attorneys' fees the compensation will be measured by what is customary for such legal services where contracts have been made in advance with persons competent to contract, and not what is reasonable, just and proper in a particular case. The allowance will not be measured by what the attorney thinks is reasonable, but what is the usual charge. The court should exercise its own judgment and not be wholly governed by the opinions of attorneys as to the value of the same.²

One acting as a regular practicing attorney, but having no license as such, cannot recover for the services so rendered.³

§ 1275. Proving the retainer.—An attorney cannot recover for his professional services, unless he can show, in some way, that he has been employed as such. The fact that he has rendered beneficial services will raise a presumption of a promise to pay where they were rendered with knowledge of the client, to accept them, understanding that he was to become liable therefor.⁴

In support of his claim for compensation, the attorney can prove his original employment by the client, or the performance of services with the knowledge of the client and the recognition of the relationship of attorney and client by the client during the progress of the business.⁵ The fact that an attorney has prepared a bill in chancery for the party as complain-

a Justice's Court and not less than ten dollars in a court of record. Rev. Stat., Chap. 13, ¶ 13, § 1. Further see Rev. Stat., Chap. 79, ¶ 57, § 22, ¶ 58, § 23. No attorney's fee can be recovered in these cases if the amount recovered in the suit is less than the amount named in the demand in writing. *Fletcher v. Massey*, 49 Ill. App., 36.

¹ *Fletcher v. Massey*, 49 Ill. App., 36.

² *Dorsey v. Corn*, 2 Ill. App., 533.

³ *Tedrick v. Hiner*, 61 Ill., 189; Rev. Stat., Chap. 13, ¶ 1, § 1.

⁴ *Chicago, St. Charles & Miss. R. Co. v. Larned*, 26 Ill., 218; *Siegel v. Hanchett*, 33 Ill. App., 634; *Turner v. Myers*, 23 Ia., 391; *Webb v. Browning*, 14 Mo., 354.

⁵ *Jackson v. Crofton*, 66 Ala., 29.

ant and has then signed the party's names to it with the name of his firm of attorneys, affords unmistakable evidence of the relation of attorney and client.¹

The value of services are what they are usually worth as determined by the process usually charged for similar services; at the same time, the professional skill, standing and experience, the questions involved and the result of the case must be taken into account. The amount, however, charged by an attorney in a given case is not admissible in evidence to fix the value of the services rendered in the same cause by the attorney of the other parties; nor does the amount paid in a particular case necessarily fix the amount to be paid in all like cases.²

An attorney is himself a competent witness to testify as to the value of his services in an action to recover therefor, and he may show by his own testimony the extent of his experience and knowledge, and give his judgment as to the value of his services, and may also testify as to his knowledge of the charges of other attorneys for like services in similar cases.³ It is also competent to call other attorneys as expert witnesses and have them to testify what in their opinion they deem the services to be worth under the circumstances proven by other witnesses.⁴ The burden of proving the utmost fairness and good faith in a controversy between an attorney and client always rests upon the attorney. He must show the justice of his demands. This is because of the greater facilities of the attorney for imposing upon the client and because of the presumption that always arises against the validity of contracts of purchase, gift, etc. The absence of such proof is by a court of equity treated as constructive fraud.⁵

¹ Burnham v. Roberts, 70 Ill., 19.

² Reynolds v. McMillan, 63 Ill., 46;
Eggleston v. Boardman, 37 Mich.,
14.

³ Chamberlain v. Rogers, 79 Mich.,
219; Babbitt v. Bumpus, 73 Mich.,
331.

⁴ Kelly v. Richardson, 69 Mich.,
430; Turnbull v. Richardson, 69
Mich., 400.

As to the manner in proving the incompetency of attorneys, see *ante*, § 1269.

⁵ Elmore v. Johnson, 143 Ill., 513;
Roby v. Colehour, 135 Ill., 300; Jen-
nings v. McConnel, 17 Ill., 148; Hop-
kins v. Jones, 28 Ill. App., 410.

As to an attorney being held as trustee for his client, when his acts result in benefit to himself and det-

§ 1276. **Attorney's lien for services.**—In this State an attorney has what is designated as a "retaining lien" upon all papers or documents of the client placed in the attorney's hands in his professional character or in the course of his professional employment, and it makes no difference for what purpose such papers were placed in the attorney's hands;¹ but an attorney does not, in the absence of express contract, have a special lien upon the judgment or decree rendered in a suit prosecuted by him or upon the real estate, moneys, fund, or other property recovered by means of his legal services and skill.² He has no lien on the subject-matter of the suit, and cannot in any wise impair the right of his client to transfer the same *pendente lite*,³ or the right of other creditors to acquire a lien upon the property or fund, or a surplus thereof, though remaining in his hand, while his demand is yet unpaid.⁴ The attorney may, however, by previous agreement with his client, acquire an equitable lien on a judgment recovered, or on the subject-matter of the suit, or the proceeds thereof.⁵ In such a case the attorney is regarded as the equitable assignee of so much of the judgment as may be necessary to satisfy his demand for services rendered.⁶

While an attorney possesses a "retaining lien" upon the documents *in his possession*, the possession of such documents is indispensable to the lien. If the attorney voluntarily surrender the possession his lien will be gone.⁷

riment to the interest of his client, see *Trotter v. Smith*, 59 Ill., 240; *Alwood v. Mansfield*, 59 Ill., 496.

¹ *Sanders v. Seelye*, 128 Ill., 631.

² *Story v. Hull*, 143 Ill., 506; *Sanders v. Seelye*, 128 Ill., 631; *Nichols v. Pool*, 89 Ill., 491.

³ *LaFramboise v. Grow*, 56 Ill., 197.

⁴ *Lucas v. Campbell*, 88 Ill., 447.

⁵ *Hawk v. Ament*, 28 Ill. App., 390.

⁶ *Wells v. Eslam*, 40 Mich., 218.

⁷ *Nichols v. People*, 89 Ill., 491.

Rule of attorney to surrender papers—When court has no authority

to make such order.—When the relation of attorney and client exists it may be proper for a court to order the attorney to show cause why he should not surrender documents in his possession, but when it is contended that the attorney did not receive the documents in his professional capacity, but as a custodian merely, a request for a rule on the attorney to surrender them is inconsistent with the position that he did not receive them professionally, to be used in the suit. *Sanders v. Seelye*, 128 Ill., 631.

TABLE OF CASES.

[References are to pages, Vol. I., pp. 1-960; Vol. II. pp. 961-1496.]

A.

- Abbington v. Lipscomb (1 Gale & D. 233), 168.
 Abbott v. Semple (25 Ill. 107), 767, 769.
 Abend v. Terre Haute, etc. (111 Ill. 202), 1105.
 Abend Case (111 Ill. 202), 1089.
 Abrahams v. Jones (20 Ill. App. 83), 604, 772, 1120.
 Abrams v. Pomeroy (13 Ill. 133), 907.
 Achilles v. Achilles (137 Ill. 589), 1057.
 Ackerman v. Lyman (20 Wis. 454), 103.
 Adair v. Adair (51 Ill. App. 301), 1222.
 Adde v. Zang (41 Iowa 536), 1031.
 Adam v. Arnold (86 Ill. 185), 84, 85, 1170.
 Adams v. Adams (23 Ind. 50), 100.
 Adams v. Bartlett (5 Gilm. (Ill.) 170), 436, 440.
 Adams v. Chicago Trust Sav. Bank (54 Ill. App. 672), 820, 917.
 Adams v. Cutrich (53 Ill. 361), 453, 605.
 Adams v. Freeman (9 Johns. (N. Y.) 117), 151.
 Adams v. Funk (53 Ill. 219), 34.
 Adams v. McDonald (29 Ga. 571), 257.
 Adams v. Merritt (10 Ill. App. 275), 299.
 Adams v. Miller (14 Ill. 71), 409.
 Adams v. Robinson (40 Ill. 40), 1257.
 Adams v. Robinson (1 Pick (Mass.) 462), 1483.
 Adams v. Russell (85 Ill. 284), 1107.
 Adams v. Smith (58 Ill. 417), 1097, 1144.
 Adams v. Wood (51 Mich. 411), 180.
 Adams Ex. Co. v. King (3 Ill. App. 316), 771, 861.
 Addems v. Suver (89 Ill. 482), 1145, 1146.
 Adkins v. Mitchell (67 Ill. 511), 398.
 Adlard v. Muldoon (45 Ill. 193), 85, 896.
 Aetna Ins. Co. v. Stevens (48 Ill. 31), 856, 1301, 1395.
 Aetna Life Ins. Co. v. Paul (37 Ill. App. 439), 209.
 Affeld v. People (12 Ill. App. 502), 902, 907.
 Agnew v. Fults, (119 Ill. 296), 1259.
 Agnew v. Perry (120 Ill. 655), 254.
 Aholtz v. Dufree (21 Ill. App. 144), 1133, 1219.
 Aholtz v. Zellar (88 Ill. 24), 255, 256, 276.
 Ainsworth v. Allen (Kirby (Conn.) 145), 49.
 Aird v. Haynie (36 Ill. 174), 799.
 Albany City Ins. Co. v. Whitney (70 Pa. St. 248), 288.
 Albewan v. Booth (21 How. (U. S.) 506), 1341.
 Albin v. People (46 Ill. 372), 1361.
 Alday v. Kenworthy (49 Ill. App. 608), 1206.
 Aldea v. Garver (32 Ill. 33), 118.
 Aldeman v. Montcalm Judge (41 Mich. 550), 1145.
 Alden v. Yeoman (29 Ill. App. 53), 312.
 Alderson v. Ennor (45 Ill. 128), 84, 156.
 Alderton v. Emmons (4 Com. B. 479), 1478.
 Aldrich v. City of Polo (8 Ill. App. 45), 376, 377.
 Aldrich v. Dunham (16 Ill. 403), 94.
 Alexander v. Cunningham (111 Ill. 511), 1105.
 Alexander v. Fink (12 Johns (N. Y.) 218), 927.
 Alexander v. People (96 Ill. 96), 1107.
 Alexander v. Rundle (75 Ill. 85), 163.
 Alexander v. Town of Mt. Sterling (71 Ill. 366), 1103.
 Alfred v. Kankakee & S. W. Ry. Co. (92 Ill. 609), 1395.
 Allaire v. Ouland (2 Johns (N. Y.) 52), 504.
 Allcorn v. Rafferty (4 J. J. Marsh (Ky.) 220), 968.
 Alldritt v. First Nat. Bank of Morrison (22 Ill. App. 192, s. c. 22 Ill. App. 24), 1170, 1173.
 Allen v. Breusing (32 Ill. 505), 846, 856, 892.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Allen v. Hartfield (76 Ill. 358), 512.
 Allen v. Hawks (13 Pick. (Mass.) 79), 1479.
 Allen v. Hickey (53 Ill. App. 437), 425.
 Allen v. Hoffman (12 Ill. App. 573), 982, 1278.
 Allen v. LeMoyné (101 Ill. 655), 1253.
 Allen v. McKibben (5 Mich. 449), 483.
 Allen v. Meyer (73 N. Y. 1), 290.
 Allen v. Michel (38 Ill. App. 313), 909.
 Allen v. Nichols, Jr. (68 Ill. 250), 1068.
 Allen v. Payne (45 Ill. 339), 1073.
 Allen v. Scott (13 Ill. 80), 903.
 Allen v. Stenger (74 Ill. 119), 90.
 Allen v. Tobias (77 Ill. 169), 250-1416.
 Allen v. Watt (69 Ill. 655), 808, 818, 877.
 Allen v. Watt (79 Ill. 284), 352.
 Alley v. Limbert (35 Ill. App. 592), 1204, 1221, 1260.
 Alley v. McCabe (147 Ill. 410), 1204, 1216.
 Alley v. McCabe (46 Ill. App. 368), 1218.
 Allison v. Allison (34 Ill. App. 385), 1266.
 Allison v. Chandler (11 Mich. 542), 132.
 Allison v. People (45 Ill. 37), 1120.
 Almond v. Bonnell (76 Ill. 536), 255, 754.
 Alpena Lumber Co. v. Fletcher (48 Ill. 555), 1397.
 Alston v. Brownell (4 Ill. App. 17), 876.
 Alter v. Jaffrey (114 Ill. 470), 1069.
 Altes v. Hinkler (36 Ill. 275), 521.
 Althrop v. Beckwith (14 Ill. App. 628), 1006.
 Alvis v. Morrison (63 Ill. 181), 1028, 1378.
 Alwood v. Mansfield (59 Ill. 496), 1487, 1496.
 Alwood v. Mansfield (33 Ill. 452), 1440, 1442.
 Alwood v. Rutman (21 Ill. 200), 1437.
 Amann v. People (76 Ill. 188), 805.
 Ambler v. Whipple (139 Ill. 311), 785, 1090.
 Amboy v. Lansing, Etc., Ry. Co. (13 Mich. 439), 1408.
 Ambrose v. Root (11 Ill. 501), 398.
 Ambrose v. Weed (11 Ill. 488), 380.
 American v. Rimpert (75 Ill. 228), 1006.
 American Bank v. Indiana Banking Co. (114 Ill. 483), 354.
 American Central Ins. Co. v. Hettler (46 Ill. App. 416), 346.
 American Central Ry. Co. v. Miles (52 Ill. 174), 34.
 Am. Exchange Nat. Bank v. Moxley (50 Ill. App. 314), 11, 12, 352, 1163.
 American Express Co. v. Bruce (50 Ill. 201), 1146.
 American Express Co. v. Haggard (37 Ill. 465), 802, 811.
 American Express Co. v. Parsons (44 Ill. 312), 169.
 American Express Co. v. Pinckney (29 Ill. 392), 786.
 American Ins. Co. v. Arbuckle (32 Ill. App. 369), 112.
 American Ins. Co. v. Rosenagel (77 Pa. St. 507), 1042.
 American Ins. Co. of Chicago v. Crawford (89 Ill. 62), 1101.
 American Ins. Co. of Chicago v. Crawford (7 Ill. App. 29), 91, 1096.
 American Loan & T. Co. v. Minnesota & N. W. Ry. Co. (157 Ill. 641), 773.
 American Order U. W. v. Jessee (50 Ill. App. 101), 452.
 Ames v. Snider (55 Ill. 498), 805.
 Ames v. Weben (8 Wend (N. Y.) 545), 710.
 Ames & Frost Co. v. Strachurski (145 Ill. 192), 1090.
 Amick v. Young (69 Ill. 542), 382, 990, 1005.
 Ammerman v. Teeter (49 Ill. 400), 1146.
 Amory v. Fellows (5 Mass. 219), 1024, 1022.
 Amos v. Sinnott (4 Scam. (Ill.) 440), 172, 841, 852, 1000.
 Anderson v. Courtright (43 Mich. 161), 262.
 Anderson v. Field (6 Ill. App. 307), 1172, 1173, 1216.
 Anderson v. Friend (71 Ill. 475), 51, 214, 1015.
 Anderson v. Friend (85 Ill. 135), 213, 216.
 Anderson v. Gray (134 Ill. 550), 272.
 Anderson v. Hapler (34 Ill. 436), 173.
 Anderson v. Irwin (101 Ill. 411), 1042, 1043.

[References are to pages, Vol. I., pp. 1-980; Vol. II., pp. 981-1498.]

- Anderson v. Jacobson (66 Ill. 522), 901, 1042.
 Anderson v. McCormick (129 Ill. 308), 258, 975, 1090.
 Anderson v. Richards (22. Ill. 217), 784.
 Anderson v. Semple (2 Gilm. (Ill.) 455), 1113.
 Anderson v. Smith (71 Ill. App. 354), 150.
 Anderson v. Talcott (1 Gilm. 365), 173, 841.
 Anderson v. Tennessee (10 How. (U. S.) 311), 271.
 Anderson Pressed Brick Co. v. Sobkowiak (148 Ill. 573), 10.
 Andreas v. Ketchum (77 Ill. 377), 1085, 1097, 1098.
 Andrews v. Allen (9 Serg. & R. (Pa.) 241), 122.
 Andrews v. Campbell (94 Ill. 577), 981.
 Andrews v. Cleveland (3 Wend (N. Y.) 437), 790.
 Andrews v. Frye (104 Mass. 234), 1020.
 Andrews v. Rumsey (75 Ill. 598), 1194.
 Aneals v. People (134 Ill. 402), 1063.
 Anglo-American Packing Co. v. Baier (20 Ill. App. 376), 1073.
 Anheuser Busch Ass'n v. Hutmacher (127 Ill. 652), 971, 1057.
 Annely v. Ded Saussure (12 S. C. 488), 1482.
 Annett v. Carstairs (3 Campb. 354), 54.
 Anonymous (40 Ill. 53), 1254, 1258.
 Anonymous (40 Ill. 54), 1258.
 Anonymous (40 Ill. 57), 1270.
 Anonymous (40 Ill. 77), 1252.
 Anonymous (2 Barn. & Adol. 766), 1461.
 Anthony v. International Bank (92 Ill. 225), 974.
 Anthony v. Wheeler (130 Ill. 128), 1090.
 Anthony v. Wilson (14 Pick. (Mass.) 303), 836.
 Anthony Impl. v. Ward (22 Ill. 181), 876.
 Appleby v. Brown (24 Ill. 143), 121.
 Arasmith v. Temple (11 Ill. App. 39), 218.
 Arcade Co. v. Allen (51 Ill. App. 305), 1205, 1207.
 Archer v. Clafin (31 Ill. 306), 324, 462, 510, 800, 810, 820, 846, 881, 1003.
 Archer v. Ross (2 Scam. 303), 18.
 Archer v. Spillman (1 Scam. (Ill.) 553), 883.
 Archibald v. Argall (53 Ill. 307), 808, 820.
 Arenz v. Reihle (1 Scam. (Ill.) 340), 1160, 1250.
 Armacost v. Lindley (116 Ind. 295), 165.
 Arms v. City of Knoxville (32 Ill. App. 604), 687.
 Armson v. Forsyth (40 Ill. 49), 387.
 Armstrong v. Caldwell (1 Scam. (Ill.) 546), 572.
 Armstrong v. Cooley (5 Gilm. (Ill.) 509), 693.
 Armstrong v. Crill (51 Ill. App. 501), 818.
 Armstrong v. Crilly (152 Ill. 646), 955.
 Armstrong v. People (74 Ill. 178), 396.
 Armstrong v. Webster (30 Ill. 333), 843, 857, 864, 881.
 Armstrong Adm. v. Bartram (44 Ill. 422), 506, 507.
 Armstrong & Co. v. Barrett (46 Ill. App. 193), 1270.
 Arnold v. Bournique (144 Ill. 133), 1090.
 Arnold v. Nye (11 Mich. 456), 972.
 Arnold v. Nye (23 Mich. 286), 1454.
 Arnold v. Shields (5 Dana (Ky.) 21), 1317.
 Arnold v. Thorpe (9 Ill. App. 357), 1240.
 Arnott v. Friel (50 Ill. 174), 849, 869.
 Artel v. People Use, etc. (54 Ill. 228), 187.
 Artz v. Robertson (50 Ill. App. 27), 1015, 1120.
 Asay v. Hay (89 Pa. St. 77), 998.
 Asay v. Sparr (26 Ill. 115), 1440.
 Asher v. Mitchell (7 Ill. App. 127), 1270.
 Ashlock v. Linder (50 Ill. 169), 1029, 1098.
 Ashlock v. Wilder (50 Ill. 169), 1096.
 Atchison, T. & S. F. Ry. Co. v. Baltz (44 Ill. App. 558), 1222.
 Atchison T. & S. F. Ry. Co. v. Feehan (149 Ill. 202), 1062, 1103, 1111, 1120.
 Atchison, T. & S. F. Ry. Co. v.

[References are to pages, Vol. I., pp. 1 960; Vol. II., pp. 961-1496]

- Goetz & Brada Mfg. Co. (51 Ill. App. 151), 27, 1048.
 Atchison, T. & S. F. Ry. Co. v. Pratt (53 Ill. App. 263), 1143.
 Atchison, etc. Ry. Co. v. Rice (36 Kans. 600), 25.
 Atkins v. Byrnes (71 Ill. 326), 852, 1434, 1435.
 Atkins v. Huston (5 Ill. App. 326), 1234, 1237.
 Atkins v. Moore (82 Ill. 240), 195, 197.
 Atkinson v. Foster (134 Ill. 472), 1176.
 Atkinson v. Lester (1 Scam. (Ill.) 407), 1412, 1422.
 Atkinson v. Newcastle, etc., L. R. (6 Exch. 404), 108.
 Atkinson v. Scott (36 Mich. 18), 489.
 Atlantic Dock Co. v. Leavitt (54 N. Y. 40), 117.
 Ator v. Rix (21 Ill. App. 309), 173, 192.
 Attberry v. Jackson (15 Ill. App. 276), 93.
 Attorney Gen. v. Barstow (4 Wis. 669), 1325, 1323.
 Attorney General v. Chicago Ry. Co. (112 Ill. 520), 857, 1335.
 Atwood v. Buck (113 Ill. 271), 1261.
 Auchmuty v. Ham (1 Denio (N. Y.) 495), 69.
 Aulger v. Clay (109 Ill. 487), 764, 1259.
 Aulger v. Smith (34 Ill. 534), 1030, 1042.
 Ault v. Rawson (14 Ill. 484), 965, 1022, 1084, 1085.
 Aurault v. Chamberlin (33 Barb. (N. Y.) 229), 996.
 Aurora Ins. Co. v. Eddy (55 Ill. 213), 1097.
 Austin v. Bainter (50 Ill. 308), 1275.
 Austin v. Chicago, R. I. & P. Ry. (91 Ill. 35), 233.
 Austin v. Dufour (110 Ill. 85), 767, 1284.
 Austin v. Morse (8 Wend. (N. Y.) 473), 640.
 Austin v. People (102 Ill. 261), 1080.
 Avery v. Babcock (35 Ill. 175), 1237.
 Avery v. Inhabitants (3 Mass. 160), 508.
 Avery v. Moore (133 Ill. 74), 1009, 1087, 1107, 1126.
- Avery v. Swords (28 Ill. App. 202), 1099.
 Ayer v. Bartell (9 Pick. (Mass.) 156), 145.
 Ayer v. City of Chicago (149 Ill. 262), 1163.
 Ayers v. Chicago (111 Ill. 406), 454, 668, 687, 1000, 1105.
 Ayers v. Metcalf (39 Ill. 307), 933, 1029.
 Ayres v. Birtch (35 Mich. 15), 132, 133.
 Ayres v. Butler (60 Mich. 40), 1299.
 Ayers v. Kelley (11 Ill. 17), 839, 903.
 Ayers v. Richards (12 Ill. 146), 479.
- B.**
- Babbitt v. Bumpus (73 Mich. 331), 1487, 1495.
 Babcock v. Babcock (46 Mo. 243), 999.
 Babcock v. Lisk (57 Ill. 327), 1050.
 Backus v. Richardson (5 Johns (N. Y.) 476), 778.
 Backus v. Spalding (116 Mass. 418), 81.
 Bacon v. Lawrence (26 Ill. 53), 376, 377, 395.
 Badger v. Batavia Paper Mfg. Co. (70 Ill. 302), 160, 1098.
 Baer v. Lichten (24 Ill. App. 311), 107, 1005.
 Bagley v. Grand Lodge A. O. U. W. (131 Ill. 498), 1086, 1126.
 Bailey v. Campbell (1 Scam. (Ill.) 47), 102, 1111, 1259.
 Bailey v. Clay (4 Rand. (Va.) 341), 512.
 Bailey v. Cowles (86 Ill. 333), 856, 870.
 Bailey v. Freeman (4 Johns. (N. Y.) 284), 493.
 Bailey v. Godfrey (54 Ill. 507), 163, 166, 1006.
 Bailey v. Valley Nat. Bank (127 Ill. 332), 304, 844.
 Bailey & Co. v. Valley Nat. Bank (21 Ill. App. 642), 844.
 Baily v. Hardy (12 Ill. 450), 971.
 Baines v. Kelly (73 Ill. 181), 382, 396.
 Balnter v. Lawson (24 Ill. App. 634), 1442.
 Balrd v. Daily (68 N. Y. 547), 1056.
 Baird v. Hooker (8 Ill. App. 306), 1033.
 Balrd v. Trustees of Schools (106 Ill. 657), 1103.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Balts v. People (132 Ill. 428), 1234.
 Balts v. People (26 Ill. App. 431), 1217.
 Baker v. Cassidy (16 Barb. (N. Y.), 177), 107.
 Baker v. Fuller (21 Pick. (Mass.) 16), 512.
 Baker v. Hayes (28 Ill. 387), 1412.
 Baker v. Humphrey (101 U. S. 104), 1490.
 Baker v. Hunt (40 Ill. 264), 1006.
 Baker v. Johnson (2 J. J. Marsh (Ky.) 547), 510.
 Baker v. Michigan S. & N. I. Ry. Co. (42 Ill. 73), 1049, 1086.
 Baker v. People (105 Ill. 452), 1204.
 Baker v. Robinson (49 Ill. 299), 1062, 1098, 1103, 1146.
 Baldney v. Retchie (1 Starkey 333), 1043.
 Baldwin v. Banks (20 Ill. 48), 924.
 Baldwin v. City of Chicago (68 Ill. 418), 377.
 Baldwin v. Ferguson (35 Ill. App. 393), 321, 348.
 Baldwin v. Freyendall (10 Ill. App. 106), 1170.
 Baldwin v. McClelland (50 Ill. App. 645), 766, 1159, 1160, 1163, 1168, 1174, 1182, 1204, 1206, 1250.
 Baldwin v. Murphy (82 Ill. 485), 767.
 Ball v. Benjamin (73 Ill. 39), 27, 1000, 1048, 1051.
 Ball v. Bruce (21 Ill. 161), 222.
 Ball v. Chadwick (46 Ill. 28), 1414, 1417.
 Ball v. Hooten, Admr. (85 Ill. 159), 1144.
 Ball v. Leonard (24 Ill. 146), 1483.
 Ball v. Miller (38 Ill. 110), 1171, 1172, 1177.
 Ball v. Peck (40 Ill. 105), 1268.
 Ball v. Schaffer (112 Ill. 341), 1190.
 Ball v. Shattuck (16 Ill. 209), 417, 421, 422.
 Ballance v. Curtenius (3 Gilm. (Ill.) 449), 917.
 Ballance v. Flood (52 Ill. 49), 753.
 Ballance v. Frisby (2 Scam. (Ill.) 63), 397.
 Ballance v. Leonard (40 Ill. 72), 1208, 1210, 1253.
 Ballance v. Rankin (12 Ill. 420), 753.
 Ballance v. Samuel (3 Scam. (Ill.) 380), 314.
 Ballance v. Underhill (3 Scam. (Ill.) 453), 1395.
 Ballou v. Hushing (46 Ill. App. 174), 1005.
 Baluss Case (28 Mich. 507), 1466.
 Banallac v. People (31 Mich. 200), 589.
 Bancke v. Ryan (3 Blackf. (Ind.), 472), 471.
 Banchwitz v. Tyman (11 Ill. App. 186), 1005.
 Bancroft v. Eastman (2 Gilm. (Ill.) 259), 809, 815.
 Bancroft v. Sheehan (21 Hun (N. Y.) 550), 998.
 Bane v. Detrick (52 Ill. 19), 160, 164.
 Bangor Furnace Co. v. Magill (108 Ill., 656), 1202.
 Bangs v. Brown (110 Ill. 96), 1195.
 Bank v. Fellows (28 N. H. 302), 1478.
 Bank v. Fordyce (9 Pa. St. 245), 1049.
 Bank of Auburn v. Aiken (18 Johns (N. Y.) 137), 822.
 Bank of Chicago v. Hull (74 Ill. 106), 594, 791, 876.
 Bank of Columbia v. Patterson (7 Cranch 299), 109.
 Bank of Michigan City v. Haskell (124 Ill. 587), 1126.
 Bank of Montreal v. Page (98 Ill. 109), 1098.
 Bank of United States v. Strong (9 Wend. (N. Y.) 451), 954.
 Bannan v. Mitchell (6 Ill. App. 17), 145.
 Bannon v. People (1 Ill. App. 497), 983.
 Baptist v. Mulford (3 Halst. (N. Y.) 182), 109.
 Baptist Education Society v. Carter (72 Ill. 247), 32.
 Baragwanath v. Wilson (4 Ill. App. 80), 918, 919.
 Barber v. P. C. & St. L. Ry. Co. (93 Ill. 342), 376.
 Barber v. Rose (5 Hill (N. Y.) 70), 898.
 Barber v. Trustees of Schools (51 Ill. 396), 48, 144.
 Barber v. Whitney (29 Ill. 439), 777, 778.
 Barbour v. Perry (41 Ill. App. 613), 869.
 Barbour v. White (37 Ill. 164), 50.
 Barclay v. Ross (32 Ill. 211), 847.
 Braden v. Briscow (36 Mich. 254), 1082.
 Bardell v. School Trustees (4 Ill. App. 94), 114.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Bardill v. Trustees of School (4 Ill. App. 94), 518.
 Burger v. Hobbs (67 Ill. 592), 1222.
 Barker v. Garvey (83 Ill. 184), 1050.
 Barker v. Haskell (9 Cush. 319), 1035.
 Barker v. Koozier (80 Ill. 205), 523, 1120.
 Barker v. Kuhic (38 Ia. 305), 1472.
 Barker v. Turnbull (51 Ill. App. 226), 896.
 Barley v. Roosa (59 Hun. (N. Y.) 617), 474.
 Barlow v. Stanford (82 Ill. 209), 922.
 Barnacoat v. Gunpowder (1 Met. 230), 7.
 Barnes v. Barber (1 Gilm. 401), 152.
 Barnes v. Bartell 15 Pick. (Mass.) 71), 177.
 Barnes v. Brookman (107 Ill. 317), 775, 924.
 Barnes v. Gottschalk (3 Mo. App. 111), 1319.
 Barnes v. Hamon (71 Ill. 609), 207, 747, 1123.
 Barnes v. Harris (7 Cush. (Mass.) 576), 1472.
 Barnes v. Hathaway (66 Barb. (N. Y.) 452), 98.
 Barnes v. Johnson (84 Ill. 95), 90.
 Barnes v. Means (82 Ill. 379), 102.
 Barnes v. Rembarz (150 Ill. 193), 1119, 1125.
 Barnett v. Graff (52 Ill. 170), 906.
 Barnett v. Warren (82 Ala. 557), 89.
 Barney v. Keith (5 Wend. (N. Y.) 502), 117.
 Barney v. Patterson (6 Har. & J. (Md.) 182), 288.
 Barns v. Whitaker (22 Ill. 606), 868.
 Barnum v. Balt (5 W. Va. 10), 221.
 Barnum v. Waterbury (38 Mich. 280), 604.
 Barnwell v. Lucas (2 Barn. & C. 745), 1017.
 Barnwell v. Renwick (7 Barn. & C. 536), 151.
 Barr v. Village of Auburn (89 Ill. 361), 1037.
 Barrelett v. Bellgard (71 Ill. 280), 170, 827, 1100.
 Barrett v. Bacon (18 Mich. 247), 1294.
 Barrett v. Hineckley (124 Ill. 32), 11.
 Barrett v. Spalds (70 Ill. 408), 213.
 Barrett v. Trainor (50 Ill. App. 420), 1416.
 Barrett and Wife v. Gaston (1 Ill. (Breese) 253), 1235.
 Barron v. Illinois Cent. Ry. Co. (1 Biss. (U. S.) 412), 46.
 Barrow v. Window (71 Ill. 214), 896.
 Barrows v. City of Sycamore (49 Ill. App. 590), 454, 668, 687.
 Barrows v. People (11 Ill. 121), 935.
 Barrusco v. Madden (2 Johns (N. Y.) 148), 520.
 Barry v. Peterson (48 Mich. 263), 227.
 Bartholomew v. St. Louis, etc., Ry. Co. 53 Ill. 227), 1006.
 Bartell v. Bauman (12 Ill. App. 450), 334, 341, 342, 354.
 Bartelott v. International Bank (119 Ill. 259), 834, 861, 881, 1004, 1076.
 Bartleson v. Mason (53 Ill. App. 644), 174, 178, 184.
 Bartlett v. Board of Education (59 Ill. 364), 1094, 1101.
 Bartlett v. Hoyt (29 N. H. 317), 46.
 Bartlett v. Sullivan (87 Ill. 219), 966, 1442.
 Bartley v. Richtmeyer (4 Comst. 38), 53.
 Barton v. Gray (48 Mich. 169), 502, 522.
 Barton v. Gray (57 Mich. 624), 502.
 Barton v. Kane (17 Wis. 37), 1045.
 Barzzel & Hawkins v. Usher (1 Ill. (Breese) 35), 924.
 Bash v. Christian (77 Ind. 290), 1392.
 Baskin v. Wilson (6 Cow. (N. Y.) 471), 404.
 Bass v. Chicago, B. & Q. Ry. Co. (28 Ill. 9), 682.
 Bates v. Ball (72 Ill. 108), 1095.
 Bates v. Barber (4 Cush. (Mass.) 107), 1065.
 Bates v. Campell (25 Wis. 613), 258.
 Bates v. Cartwright (36 Ill. 518), 896.
 Bates v. Circuit Judge (82 Mich. 291), 1317.
 Bates v. Jenkins (1 Ill. (Breese) 411), 323, 810.
 Bates v. Williams (43 Ill. 494), 1116.
 Bath v. Valdez (70 Cal. 357), 261.
 Bathrick v. Detroit P. & T. Co. (50 Mich. 629), 737.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

Batterman v. Pierce (3 Hill (N. Y.) 174),	895.	Becker v. Dupree (4 Ill. App. 480),	1436.
Batterson v. Chicago Ry. Co. (49 Mich. 184),	451, 455, 477, 504, 508, 512, 519, 668.	Becker v. German Mut. Fire Ins. Co. (68 Ill. 412),	457, 1002, 1004.
Batterton v. Yoakum (17 Ill. 288),	254.	Becker v. People (54 Ill. App. 490),	1259.
Battishill v. Humphrey (64 Mich. 494),	995.	Bedell v. Janney (4 Gilm. 183),	124.
Bauchwitz v. Tyman (11 Ill. App. 186),	1097.	Beebe v. Morrell (76 Mich. 114),	295, 297.
Bauer v. Bell (74 Ill. 223),	155.	Beebe v. Knapp (28 Mich. 53),	665.
Baxtrom v. Chicago & N. W. Ry. Co. (117 Ill. 150),	1201.	Beebe v. Kosknick (55 Mich. 604),	1060.
Bayles v. Burgard (48 Ill. App. 372),	1123.	Beecher v. James (2 Scam. 462),	304.
Beach v. First M. E. Church (96 Ill. 177),	32.	Beecher v. Pettee (40 Mich. 181),	479, 501, 503.
Beach v. Jeffery (1 Ill. App. 284),	851, 863.	Beemis v. Homer (145 Ill. 567),	883.
Beach v. Lee (2 Dall. 256),	506.	Beel v. Pierce (11 Ill. 91),	1422.
Beach v. Miller (51 Ill. 206),	40.	Beer v. Phillips (1 Ill. (Breese) 44),	786, 1260.
Beach v. Schmultz (20 Ill. 185),	311.	Beers v. Henderson (45 N. Y. 665),	1485.
Beacher v. James (2 Scam. (Ill.) 462),	768.	Beers v. Shannon (73 N. Y. 297),	474.
Beadle County Nat. Bank v. Hyman (33 Ill. App. 618),	985.	Beers v. Williams (16 Ill. 68),	865.
Beall v. Blake (13 Ga. 217),	941.	Beesley v. Chicago Jrnymn. Pbs. Assn. (44 Ill. App. 278),	1307.
Bean v. Elton (44 Ill. App. 442),	480.	Beesley v. Hamilton (50 Ill. 88),	846, 908.
Beard v. Skeldon (113 Ill. 584),	51.	Behymer v. Odell (31 Ill. App. 350),	115.
Beardsley v. Gosling (86 Ill. 58),	878.	Beidler v. Fish (14 Ill. App. 29),	1096, 1099.
Beardsley v. Hill (61 Ill. 354),	21.	Belcher v. Van Duzen (37 Ill. 281),	1086.
Beardsley v. Beardsley (23 Ill. App. 317),	339, 1277.	Beldam v. Levisohn (51 Ill. App. 48),	898.
Bearrs v. Ford (108 Ill. 16),	1048.	Beldin v. Innis (84 Ill. 78),	1145, 1150.
Beattie v. Whipple (154 Ill. 273),	40.	Beldin v. Perkins (78 Ill. 449),	90, 896.
Beatman v. Hale (17 Johns (N. Y.) 134),	540.	Belford v. Beatty (46 Ill. App. 359),	1217.
Beatman v. Peck (5 Hill (N. Y.) 513),	929.	Bellingall v. Gear (4 Ill. (3 Scam.) 575),	1378.
Beatty v. Hilliard (55 N. H. 429),	1392.	Bell v. Chapman (10 Johns (N. Y.) 183),	802.
Beatty v. Nickerson (73 Ill. 605),	868.	Bell v. Gordon (86 Ill. 501),	1146.
Beaubien v. Brimckerhoff (2 Scam. (Ill.) 269),	17.	Bell v. Prewitt (62 Ill. 361),	1057.
Beaubien v. Hamilton (3 Scam. 213),	12.	Bell v. Puller (2 Taunt (Eng.) 285),	789.
Beauchamp v. Bosworth (3 Bibb. (Ky.) 115),	505.	Bell v. Senneff (83 Ill. 122),	1102.
Beaulien v. Parsons (2 Minn. 37),	998.	Bell v. Thompson (34 Ill. 539),	481.
Baumont v. Yantz (1 Ill. (Breese) 26),	654.	Bellant v. Brown (78 Mich. 294),	522, 523.
Becker v. Dupree (75 Ill. 167),	153, 1440.	Belleville Nail Mill Co. v. Chiles (78 Ill. 14),	787.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Belleville Savings Bank v. Born-
man (124 Ill. 200), 1051.
- Bellingall v. Duncan (2 Gilm. (Ill.)
591), 936.
- Bellingall v. Gear (3 Scam. (Ill.)
575), 759.
- Belk v. Belk (97 Ind. 73), 965.
- Belk v. Cooper (34 Ill. App. 649),
1015.
- Bellows v. Shannon (2 Hill (N. Y.)
86), 1133.
- Belton Admx. v. Fisher (44 Ill. 32),
34, 35, 458, 1161.
- Bemis v. Home (145 Ill. 567), 771.
- Bemis v. Horner (44 Ill. App. 317),
820, 877, 882, 883, 916.
- Benefield v. Albert (132 Ill. 665),
258.
- Benevolent Ass'n Paid Fire Dept.
v. Farwell (5 Ill. App. 240),
1191.
- Benjamin v. McConnell (4 Gilm.
(Ill.) 536), 844.
- Benjamin v. Stremple (13 Ill. 466),
162, 165, 169.
- Benneson v. Savage (119 Ill. 135),
1261.
- Bennett v. Appleton (25 Wend. (N.
Y.) 371), 133.
- Bennett v. Avont (34 Tenn. 152),
300.
- Bennett v. Beam (42 Mich. 346),
226, 546, 547.
- Bennett v. Connelly (103 Ill. 50),
1094, 1202.
- Bennett v. Great Western Tele-
graph Co. (53 Ill. App. 276), 34.
- Bennett v. O'Brien (37 Ill. 250),
101, 1005.
- Bennett v. Pierson (82 Ill. 424),
382.
- Bennett v. Smith (40 Mich. 211),
789.
- Bennison v. Savage (119 Ill. 135),
1259.
- Bennitt v. Wilmington Star Min-
ing Co. (119 Ill. 9), 857, 858.
- Bensley v. Brockway (27 Ill. App.
410), 892, 1099.
- Bentley v. Brownson (1 Scam. (Ill.)
240), 274.
- Bentley v. Lill (40 Ill. 58), 1274.
- Bentley v. O'Brien (111 Ill. 53),
1434.
- Bentley v. Smith (3 Caines (N. Y.)
170), 471.
- Benton v. Fisher (44 Ill. 32), 508.
- Bercher v. Stock (49 Ill. App. 270),
746.
- Bergen v. Riggs (40 Ill. 61), 1240,
1252, 1254.
- Berger v. Jacobs (21 Mich. 215), 48.
- Beringer v. Cobb (58 Mich. 557),
522.
- Bernard v. Brown (31 Ill. App.
385), 1285.
- Berndt v. Armknecht (50 Ill. App.
467), 35.
- Bernhard v. Brown (31 Ill. App.
385), 1134.
- Bernstein v. Roth (145 Ill. 189),
1202.
- Bernstein v. Walker (25 Ill. App.
224), 170.
- Berringer v. Cobb (58 Mich. 557),
502.
- Berry v. Krone (46 Ill. App. 82),
1364.
- Berry v. Metzler (7 Cal. 418), 968.
- Berry v. Wilkinson (1 Scam. (Ill.)
164), 514, 935.
- Bertholf v. Quinlan Bros. & Co.
(68 Ill. 297), 160.
- Bertrand v. Taylor (87 Ill. 235),
1252.
- Berna v. Hovious (17 Cal. 542),
293.
- Beseler v. Stephani (71 Ill. 400),
1097.
- Besley v. Dumas (6 Ill. App. 291),
94.
- Besse v. Sawyer (28 Ill. App. 248),
1141.
- Best v. Davis (44 Ill. App. 624),
880.
- Bester v. Walker (4 Gilm. 14), 106.
- Bestor v. Moss (61 Ill. 497), 1147.
- Bestor v. Powell (2 Gilm. (Ill.)
119), 1042.
- Betting v. Hobbett (142 Ill. 72),
462, 1003.
- Beveridge v. Chetlain (1 Ill. App.
231), 434.
- Beveridge v. Hewitt (8 Ill. App.
467), 10.
- Beveridge v. Wagner (48 Ill. 525),
719, 720.
- Bickersdike v. Allen (157 Ill. 95),
1359, 1361.
- Biederman v. Brown (49 Ill. App.
483), 1141.
- Biederman v. O'Connor (117 Ill.
493), 1152.
- Bienvenu v. Factors, etc., Ins. Co.
(33 La. Ann. 209), 1452.
- Bigelow v. Andress (31 Ill. 322),
334.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1494.]

- Bigelow v. Hall (91 N. Y. 145), 1031.
 Bigelow v. Johnson (13 Johns. 429), 605.
 Biggins v. People (106 Ill. 270), 78.
 Bill v. Jones (17 N. H. 307), 351.
 Bill v. Mulford (80 Ill. 82), 1210, 1221.
 Billings v. Chapin (2 Ill. App. 555), 1424.
 Billings v. Lafferty (31 Ill. 318), 201, 386.
 Bills v. Polk (72 Tenn. 494), 1491.
 Bills v. Stanton (69 Ill. 51), 418, 419, 1228.
 Bimeler v. Dawson (4 Scam. 536), 1161.
 Binz v. Tyler (79 Ill. 248), 513, 1161.
 Birbeck v. Tucker (2 Hall (N. Y.) 121), 1043.
 Bird v. Bird (40 Me. 392), 1042.
 Birks v. Gillitt (13 Ill. App. 369), 98.
 Birks v. Houston, Admr. (63 Ill. 77), 971.
 Birmingham Fire Ins. Co. v. Pulver (126 Ill. 329), 1052, 1057, 1084, 1085.
 Birmingham Fire Ins. Co. v. Pulver (27 Ill. App. 17), 1107.
 Bishop v. American Preserving Co. (51 Ill. App. 418), 184.
 Bishop v. Busse (69 Ill. 403), 1147.
 Bishop v. Bell (2 Ill. App. 551), 213, 215.
 Bishop v. Fennerty (45 Miss. 570), 290.
 Bishop v. Morris (22 Ill. App. 564), 1252.
 Bishop v. Nelson (83 Ill. 601), 6.
 Bishop v. Young (2 Bos. & P. 78), 113.
 Bishop Hill Colony v. Edgerton (26 Ill. 54), 94, 411, 973.
 Bissell v. City of Kankakee (64 Ill. 249), 1161.
 Bissell v. Curran (69 Ill. 20), 891.
 Bissell v. Lloyd (6 Ill. App. 465), 1226.
 Bissell v. Price (16 Ill. 408), 1028, 1051.
 Bissell v. Ryan (23 Ill. 466), 1118.
 Bitter v. Saathoff (98 Ill. 566), 1104.
 Black v. Hepburn (3 Yeates (Pa.) 331), 249.
 Black v. Wabash, etc., Ry. Co., (111 Ill. 351), 1050, 1057, 1061.
 Black v. Womer (100 Ill. 328), 463.
 Blackburn v. Mann (85 Ill. 222), 997.
 Blackford v. Newberry (100 Ill. 484), 1309.
 Bladwell v. Sleggein (Dyer, 219), 112.
 Blain v. Foster (33 Ill. App. 297), 161.
 Blair v. Ray (5 Ill. App. 453), 1160.
 Blair v. Ray (103 Ill. 615), 1206.
 Blair v. Reading (96 Ill. 130), 1272.
 Blair v. Sonnett (134 Ill. 78), 364.
 Blair v. Sharp (1 Ill. (Breese) 30), 737.
 Blake v. Miller (118 Ill. 500), 906.
 Blalock v. Randall (76 Ill. 224), 131, 151, 157, 212.
 Blanchard v. Burbank (16 Ill. App. 375), 153.
 Blanchard v. L. S. & M. S. Ry. Co. (126 Ill. 416), 679.
 Blanchard v. Morris (15 Ill. 35), 1143.
 Blatchford v. Boynton (18 Ill. App. 378), 30.
 Blatchford v. Newberry (100 Ill. 484), 14.
 Blattner v. Frost (44 Ill. App. 580), 112.
 Bletch v. Johnson (40 Ill. 116), 468.
 Blick v. Brigg (6 Ala. 687), 510.
 Bliss v. Heasty (61 Ill. 338), 290, 327.
 Bliss v. Smith (78 Ill. 359), 340, 347.
 Blitz v. Union Steamboat Co. (51 Mich. 558), 245.
 Block v. Blum (33 Ill. App. 643), 383, 384.
 Block v. Jacksonville (36 Ill. 301), 1209.
 Blockley v. Sheldon (7 Johns. (N. Y.) 32), 1112, 1116.
 Bloom v. Crane (24 Ill. 48), 1277.
 Bloom v. Goodner (1 Ill. (Breese) 63), 1078, 1427.
 Bloore v. Potter (9 Wend. (N. Y.) 480), 1404.
 Blue v. Christ (4 Ill. App. 351), 135.
 Blumenfeldt v. Halsman (30 Ill. App. 388), 213.
 Board of Auditors v. People (38 Ill. App. 239), 1302.
 Board of Commrs. v. Spittler (13 Ind. 235), 1320.
 Board of Education v. Greenbaum & Sons (39 Ill. 609), 457, 598, 1004, 1071, 1073.
 Board of Education v. Hoag (21 Ill. App. 588), 1135.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Board of Education v. Taft (7 Ill. App. 571), 116, 1070.
 Board of Health v. East Saginaw (45 Mich. 257), 249.
 Board of Supervisors v. Manny (56 Ill. 160), 92.
 Board of Supervisors v. People (118 Ill. 459), 1293, 1295.
 Board of Supervisors v. People (159 Ill. 242), 1315.
 Board of Supervisors v. People (16 Ill. App. 305), 1295.
 Board of Supervisors of Kane Co. v. Young (31 Ill. 194), 407, 421.
 Board of Trustees v. Beale (6 Ill. App. 536), 15.
 Board of Trustees v. Mishlimer (78 Ill. 22), 1040.
 Bobind v. Swisher (66 Ill. 536), 1116.
 Bock v. Weigant (5 Ill. App. 643), 863, 1063.
 Boddie v. Tender Boiler Mfg. Co. (51 Ill. 302), 348, 354.
 Bodiner v. Swisher, etc., (66 Ill. 536), 1117.
 Bocker v. Hess (34 Ill. App. 332), 826.
 Bogardus v. Trial (1 Scam. (Ill.) 63), 589, 775.
 Bogart v. Brown (5 Pick (Mass.) 17), 1041.
 Boggs v. Bindskoff (23 Ill. 66), 299, 323, 810, 824.
 Bogue-Badenoch Co. v. Bogden (33 Ill. App. 252), 1259.
 Bois v. Henney (32 Ill. 130), 1061.
 Bolden v. Sherman (101 Ill. 483), 259.
 Boley v. Barutlo (150 Ill. 192), 263.
 Bolling v. Mayor of Parkersburg (3 Rand. (Va.) 563), 250.
 Bolton v. Cowgill (71 Ill. 585), 1386.
 Bolton v. Martin (1 Dall. 296), 416.
 Bolton v. McKinley (72 Ill. 703), 1175.
 Bond v. Wood (69 Ill. 282), 1116.
 Bond & Menard v. Betts (1 Ill. (Breese) 205), 457.
 Bonesteal v. Lynd (8 How. (N. Y.) Pr. 226), 1045.
 Bonnell v. Bowman (53 Ill. 460), 1006.
 Bonnell v. Wilder (67 Ill. 327), 1005, 1148.
 Bonnet v. Glattfeldt (120 Ill. 166), 86, 1031, 1057, 1059.
 Bonney v. Seely (2 Wend. (N.Y.) 481), 107.
 Bonney v. Weir & Craig Mfg. Co. (51 Ill. App. 380), 1085.
 Book v. Wiley (102 Ill. 84), 917.
 Boone v. Purnell (20 Md. 607), 1077.
 Boone v. Stone (3 Gilm. (Ill.) 537), 456.
 Boorman v. Freeman (12 Ill. 165).
 Booth v. Hynes (54 Ill. 363), 1050.
 Booth v. Rees (26 Ill. 46), 209.
 Borchsenius v. Canutson (100 Ill. 82, s. c. 7 Ill. App. 365), 892, 893, 911, 1175.
 Borders v. Murphy (78 Ill. 81), 252, 290.
 Borders v. Murphy (125 Ill. 577), 1259.
 Born v. Staaden (24 Ill. 320), 342, 249.
 Borwell v. Schultz (50 Ill. App. 161), 1085, 1098.
 Boscowitz v. Adams Exp. Co. (93 Ill. 523), 234, 673.
 Bosman v. Akley (39 Mich. 710), 108.
 Bostwick v. Blake (145 Ill. 85), 326.
 Bostwick v. Williams (40 Ill. 113), 1268.
 Both v. Koehler (51 Ill. App. 370), 365.
 Botkin v. Osborne (39 Ill. 101), 56.
 Botsford v. O'Connor (57 Ill. 72), 417, 422.
 Botsford v. Sweet (49 Mich. 120), 1409.
 Boureseau v. Evening Journal Co. (63 Mich. 426), 451.
 Bouressen v. Detroit Co. (63 Mich. 425), 742.
 Bourland v. Kipp (55 Ill. 376), 1375.
 Bourland v. Stickles (26 Ill. 497), 921.
 Bourne v. Stout (62 Ill. 261), 213, 1103, 1147.
 Bourreseau v. Detroit E. J. Co. (63 Mich. 425), 737.
 Bowden v. Bowden (75 Ill. 143), 1194.
 Bowen v. Allen (113 Ill. 53), 1048.
 Bowen v. Bowen (74 Ind. 470), 1117.
 Bowles v. Bowles (3 Gilm. (Ill.) 408), 1236.
 Bowen v. Davis (21 Ill. App. 206), 404.
 Bowen v. Pope (125 Ill. 28), 341.

- [References are to pages, Vol. I., pp. 1-900; Vol. II., pp. 961-1496.]

- Bowen v. Pope (26 Ill. App. 233), 334.
 Bowen v. Schuler (41 Ill. 192), 176.
 Bowen v. Wilcox & Gibbs S. M. Co. (86 Ill. 111), 813, 854, 878.
 Bower v. Chicago West Division Ry. Co. (136 Ill. 101), 275, 277, 278.
 Bowers v. Green (1 Scam. (Ill.) 42), 1233.
 Bowers v. People (74 Ill. 418), 1141.
 Bowlan v. Lambke (57 Ill. App. 334), 1252.
 Bowles v. McEllen (16 Ill. 30), 41.
 Bowles v. Rouse (3 Gilm. (Ill.) 400), 767.
 Bowlsville Mining Co. v. Pulling (89 Ill. 58), 21.
 Bowman v. Tallman (27 N. Y. Pr. 212), 1487.
 Bowman v. Mehrling (34 Ill. App. 380), 1426.
 Bowman v. St. John (43 Ill. 337), 151.
 Bowman v. Wettig (39 Ill. 416), 1043.
 Bowman v. Wood (41 Ill. 203), 414, 820, 982.
 Bowser v. Birdsell (49 Mich. 5), 549.
 Boyd v. Buckingham (10 Humph. (Tenn.) 151), 288.
 Boyd v. Humphreys & Co. (53 Ill. App. 422), 1186, 1193.
 Boyd v. Kocher (31 Ill. 295), 394.
 Boyd v. Merrill (52 Ill. 151), 55, 57.
 Boyd v. State (17 Ga. 194), 1078.
 Boyden v. Frank (20 Ill. App. 160), 178, 179, 190.
 Boyden v. Reed (57 Ill. 458), 168.
 Boyer v. Sweet (3 Scam. (Ill.) 120), 1034.
 Boyer v. Yates City (47 Ill. App. 115), 1070.
 Boyle v. Cater (24 Ill. 49), 966.
 Boyle v. Levi (73 Ill. 175), 982.
 Boyle v. Levings (28 Ill. 314), 139, 163, 165, 1134.
 Boyle v. Village of Bradford (90 Ill. 416), 1070.
 Boylston v. Bain (90 Ill. 283), 1002, 1103.
 Boynton v. Boynton (25 How. (N. Y.) Pr. 490), 1045.
 Boynton v. Champlin (40 Ill. 63), 1253.
 Boynton v. Holmes (38 Ill. 59), 1107.
 Boynton v. Phelps (52 Ill. 210), 1117.
 Boynton v. Reynolds (2 Mo. 79), 836.
 Boynton v. Robb (41 Ill. 349), 504.
 Brackensleek v. Vahle (48 Ill. App. 312), 1420.
 Brackett v. Bullard (12 Met. (Mass.) 308), 166.
 Brackett v. People (72 Ill. 593), 1332.
 Brackett v. Sears (15 Mich. 214), 1491.
 Bradbury v. Helms (92 Ill. 35), 86, 100.
 Bradford v. City of Chicago (25 Ill. 411), 91, 92.
 Bradley v. Arnold (16 Vt. 382), 293.
 Bradley v. Barbour (74 Ill. 475), 19.
 Bradley v. Barbour (65 Ill. 431), 835.
 Bradley v. King (44 Ill. 339), 863.
 Bradley v. Parks (83 Ill. 169), 1098.
 Bradley v. Rees (113 Ill. 327), 1050.
 Bradshaw v. Hoblett (4 Scam. (Ill.) 53), 787.
 Bradshaw v. McKinney (4 Scam. (Ill.) 54), 979.
 Bradshaw v. Morehouse (1 Gilm. (Ill.) 395), 785, 907.
 Bradshaw v. Newman (1 Ill. (Breese) 133), 865.
 Brady v. Mayor (1 Sand. (Eng.) 569), 1493.
 Brady v. Pullman Palace Car Co. (42 Ill. App. 399), 18, 1220, 1224.
 Brady v. Spurck (27 Ill. 478), 777.
 Brady v. Whitney (24 Mich. 154), 170.
 Bragg v. City of Chicago (73 Ill. 152), 1153.
 Braidwood v. Weiller (89 Ill. 606), 876, 975.
 Brand v. Henderson (107 Ill. 141), 480, 486, 549.
 Brand v. Hinchman (68 Mich. 590), 212, 218.
 Brand v. Whelan (18 Ill. App. 186), 501, 1209.
 Brandt v. McEntree (53 Ill. App. 467), 1086.
 Branigan v. Rose (3 Gilm. (Ill.) 123), 784, 808.
 Brannan v. Strauss (75 Ill. 234), 1069.
 Brant v. Gallup (111 Ill. 487), 1000, 1001, 1105, 1107, 1108.
 Brant v. Gallup (117 Ill. 640), 1286.

[References are to pages, Vol. I., pp. 1-900; Vol. II., pp. 961-1496.]

Brant v. Klein (17 Johns (N. Y.) 335),	1042.	Broadwell v. Paradise (81 Ill. 76),	194.
Brant v. Till (96 Ill. 608),	1200,	Brobston v. Cahill (64 Ill. 356),	1040.
	1201.		
Brantigam v. While (73 Ill. 561).	52.	Brockman v. McDonald (16 Ill. 112),	458, 1167.
Breen v. Sullivan (5 Ill. App. 449),	660, 885.	Brockman v. Sieverling (6 Ill. App. 512),	902.
Brenhamer v. State (123 Ind. 577),	969.	Brokaw v. Comms. of Highways (130 Ill. 482),	1295, 1296, 1301.
Brennan v. Academy of Christian Bros. (85 Ill. 509),	382.	Brokaw v. Helsey (20 Ill. 303),	859.
Brennan v. Shinkle (89 Ill. 604),	194.	Bromley v. Goff (75 Mich. 213),	507.
Brennan v. Tirtsort (49 Mich. 397),	886.	Bromley v. People (150 Ill. 297),	1135, 1149.
Brenner v. Coerber (42 Ill. 497),	1149.	Bronson v. Earl (17 Johns (N. Y.) 65),	404.
Brent v. Shook (36 Ill. 125),	457,	Brooking v. Deamond (27 Ga. 58),	257.
	468, 474.		
Bressler v. Baum (42 Ill. 190),	166.	Brooks v. Brady (53 Ill. App. 155),	92, 889.
Bressler v. People (117 Ill. 422),	12,	Brooks v. Bruyn (18 Ill. 539),	1414,
	1070, 1098.		1425.
Brewbacker v. Poage (1 T. B. Mon. (Ky.) 123),	471.	Brooks v. Bruyn (35 Ill. 392),	257,
Brewer v. Jacobs (22 Fed. R. 217),	217.		258.
Brewster v. Riley (19 Ill. App. 581),	328.	Brooks v. Bruyn (40 Ill. 64),	1234.
Brewster v. Sackett (1 Cow. (N. Y.) 572 n. a.),	790, 793.	Brooks v. Day (2 Dick. (Eng.) 572),	1491.
Brewster v. Scarborough (2 Scam. (Ill.) 280),	17.	Brooks v. Kearns (86 Ill. 547),	1483.
Brewster v. Stewart (3 Wend. (N. Y.), 441),	442.	Brooks v. Taylor (65 Mich. 208),	605.
Bride v. Watt (23 Ill. 507),	259.	Broomley v. Goodwin (95 Ill. 118),	1094.
Bridge Co. v. L. N. A. & St. L. Ry. Co. (72 Ill. 506),	1234, 1235.	Bross v. Cairo & V. Ry. Co. (9 Ill. App. 363),	897.
Bridges v. Stephenson (10 Ill. App. 369),	700, 982.	Broughton v. Manchester Water Co. (3 B. & Ald.1),	109.
Briggs v. Brown (3 Hill (N. Y.) 87),	840.	Broughton v. Smart (59 Ill. 440),	1008, 1146.
Brigham v. Atha (84 Ill. 43),	594.	Brown v. Barnes (6 Ala. 694),	510.
Brigham v. Hawley (17 Ill. 38),	888, 895.	Brown v. Berry (47 Ill. 175),	1062,
Brill v. Flagler (23 Wend. (N. Y.) 354),	1048.		1147.
Bringard v. Stillwagen (41 Mich. 54),	154.	Brown v. Booth (66 Ill. 419),	883.
Bringham v. R. R. Co. (78 Mich. 570),	247.	Brown v. Boyce, Jr. (68 Ill. 294),	160.
Bristow v. Caplett (92 Ill. 17),	1280.	Brown v. Burnett (10 Ill. App. 279),	215, 524, 737, 749, 872,
Bristow v. Lane (21 Ill. 194),	27,		873.
	55, 784.	Brown v. Calumet River Ry. Co. (125 Ill. 600),	1063.
Bristol v. Phillips (3 Scam. (Ill.) 287),	1216.	Brown v. City of Aurora (109 Ill. 165),	1279.
Britton v. Lorenz (45 N. Y. 57),	1471.	Brown v. City of Chicago (117 Ill. 21),	416.
		Brown v. City of Joliet (22 Ill. 123),	1194.
		Brown v. Clement (68 Ill. 192),	1209.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1406.]

- Brown v. County Treasurer (54 Mich. 132), 1409.
 Brown v. Everhart (32 Wis. 205), 1051.
 Brown v. Galesburg Pressed Brick Co. (132 Ill. 648), 1031, 1036, 1177.
 Brown v. Gary (43 Ill. App. 482), 344.
 Brown v. Hull (16 Vt. 673), 471.
 Brown v. Illinois Cent. Mut. Ins. Co. (42 Ill. 366), 775, 801.
 Brown v. Keller (30 Ill. 63), 1166.
 Brown v. Keller (32 Ill. 151), 123.
 Brown v. Leavitt (26 Me. 261), 1391.
 Brown v. Lehigh & Franklin Coal Co. (40 Ill. 602), 1208.
 Brown v. Lobdell, Farwell & Co. (50 Ill. App. 559), 759.
 Brown v. Luehrs (1 Ill. App. 74), 1063.
 Brown v. Manchester (1 Pick. (Mass.) 232), 138.
 Brown v. Marshall (47 Mich. 576), 999.
 Brown v. Matthews (79 Ga. 392), 1472.
 Brown v. Moores (6 Gray (Mass.) 451), 1066.
 Brown v. People (24 Ill. App. 72), 1370.
 Brown v. Robertson (123 Ill. 631), 365, 374.
 Brown v. Rounsavell (78 Ill. 589), 117.
 Brown v. Searle (104 Ind. 218), 216.
 Brown v. Smith (83 Ill. 30), 916.
 Brown v. Smith (24 Ill. 196), 55.
 Brown v. Straight (19 Ill. 88), 463.
 Brown v. Tuttle (27 Ill. App. 389), 928.
 Browne v. Beardsley (3 Cases Rep. (N. Y.) 173), 928.
 Brownell v. Baker (5 Ill. App. 571), 1199.
 Brownell v. Gratiot Sup'v'rs (49 Mich. 414), 1314.
 Brownell v. Welch (91 Ill. 523), 1201.
 Brownell v. Yarwood (41 Ill. 115), 814, 817.
 Brownfield v. Brownfield (58 Ill. 152), 1217.
 Browning v. Jones (53 Ill. App. 597), 217, 224, 225.
 Brownlee v. Bolton (44 Mich. 218), 549.
 Bruce v. Baxter (75 Tenn. 477), 1488.
 Bruce v. Nicopolo (11 Exch. 133), 1042.
 Bruner v. Dyball (42 Ill. 34), 159, 167, 168, 178, 180.
 Bruner v. Ingraham (1 Scam. (Ill.) 566), 436.
 Bruner v. Madison Co. 111 Ill. 11), 1010.
 Bruschke v. N. Chicago Schnetzen Verein (145 Ill. 433), 768.
 Brush v. Blanchard (19 Ill. 30), 775.
 Brush v. Fowler (36 Ill. 53), 151, 1413, 1414, 1428.
 Brush v. Seguin (24 Ill. 254), 1068, 1135.
 Bruson v. Clark (151 Ill. 495), 1139, 1182.
 Brushber v. Stegeman (22 Mich. 266), 652.
 Bryan v. City of East St. Louis (12 Ill. App. 390), 270.
 Bryan v. Smith (25 Scam. (Ill.) 47), 1043, 1186.
 Bryant v. Dana (3 Gilm. (Ill.) 344), 36, 917.
 Bryant v. Hendee (40 Mich. 543), 1409.
 Bryant v. People (71 Ill. 32), 8, 13, 1246.
 Bryant v. Simonean (51. Ill. 324), 301.
 Bryson v. Crawford (68 Ill. 362), 935.
 B. S. Green Co. v. Blodgett (49 Ill. App. 180), 1005.
 Buchanan v. Goeling (3 Ill. App. 635), 153, 310.
 Buchanan v. McLennan (105 Ill. 56), 1146.
 Buchanan v. Meisser (105 Ill. 638), 888.
 Buckman v. Doods (6 Ill. App. 24), 290, 308.
 Buck v. County of Hamilton (99 Ill. 507), 1192.
 Buckingham v. Fisher (70 Ill. 121), 312.
 Buckland v. Conway (16 Mass. 396), 1483.
 Buckland v. Goddard (36 Ill. 206), 409, 1208.
 Buckler v. Gockley (18 Ill. App. 496), 745.
 Buckles v. Harlan (54 Ill. 361), 800, 814.
 Buckley v. Boutellier (61 Ill. 293), 916.
 Buckley v. Great Western Ry. Co. (18 Mich. 121), 1121.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Buckley v. Holmes (19 Ill. App. 530), 519, 520.
 Bucklin v. Hasterlick (51 Ill. App. 132), 326.
 Buckman v. Alwood (40 Ill. 128), 1249.
 Buckmaster v. Beamer (3 Gilm. (Ill.) 97), 409.
 Buckmaster v. Cool (12 Ill. 74), 148, 1208.
 Buckmaster v. Grundy (1 Scam. (Ill.) 310), 629.
 Buckner v. Hamilton (16 Ill. 487), 57.
 Buettner v. Norton Mfg. Co. (90 Ill. 415), 388, 390, 1204.
 Buff v. Jarrett (94 Ill. 475), 1050.
 Bullinger v. People (95 Ill. 394), 1010, 1080, 1103.
 Bulkley v. Devine (127 Ill. 406), 1048.
 Bull v. City of Quincy (9 Ill. App. 127), 1005.
 Bull v. City of Quincy (52 Ill. App. 186), 94.
 Bull, Administrator, etc., v. Harris (31 Ill. 487), 100.
 Bullen v. Dawson (139 Ill. 633), 1171.
 Bullock v. Babcock (3 Wend. (N. Y.) 391), 72.
 Bulmer v. Worthington (3 Ill. App. 463), 1222.
 Bunker v. Green (48 Ill. 243), 37, 70, 71, 166, 461, 1178, 1276.
 Bunn v. Gardiner (18 Ill. App. 94), 1170, 1172.
 Bunn v. Hoyt (3 Johns (N. Y.) 255), 1116, 1117.
 Buntain v. Curtis (27 Ill. 374), 1395, 1401.
 Burdett v. Hunt (25 Me. 419), 167.
 Burger v. Farmers' Ins. Co. (71 Pa. St. 422), 1051.
 Burgess v. Davis (138 Ill. 578), 1326.
 Burgwin v. Babcock (11 Ill. 28), 844, 888, 986.
 Burhans v. Village of Norwood Park (138 Ill. 147), 981, 1144.
 Burk v. Andis (98 Ind. 59), 1011.
 Burk v. Savage (3 Allen (Mass.) 408), 46.
 Burke v. Ward (50 Ill. App. 283), 1027.
 Burkett v. Bond (12 Ill. 87), 1110.
 Brukhart v. Merry (88 Ind. 438), 966.
 Burklow v. People (89 Ill. 123), 1268.
 Burlingame v. Burlingame (7 Cow. (N. Y.) 93), 471, 483, 502.
 Burlingame v. Davis (13 Ill. App. 602), 890.
 Burnan v. Webster (5 Mass. 370), 605.
 Burnap v. Cook (32 Ill. 168), 27, 865.
 Burnaps v. Dennis (4 Ill. (3 Scam.) 478), 38, 524.
 Burnap v. Matrh (13 Ill. 335), 211, 795, 1477.
 Burnap v. White (14 Ill. 303), 1237.
 Burnap v. Wight (14 Ill. 303), 861.
 Burnett v. Briscoil (4 Johns. (N. Y.) 235), 776.
 Burnett v. Simpkins (24 Ill. 265), 226.
 Burnham v. Roberts (70 Ill. 19), 1473.
 Burns v. Nash (23 Ill. App. 552), 1171, 1192.
 Burns v. Nichols (89 Ill. 480), 393, 1004.
 Burns v. People (126 Ill. 282), 1141, 1210.
 Burnside v. Potts (23 Ill. 411), 1385, 1390.
 Burrall v. Jacot (1 Barb. (N. Y.) 165), 482.
 Burrass v. Hewett (3 Scam. (Ill.) 224), 881.
 Burrill v. N. Y. Salt Co. (14 Mich. 34), 648.
 Burroughs v. Bayne (5 H. & N. 296), 159.
 Burroughs v. Clancey (53 Ill. 30), 897.
 Burroughs v. Morse (48 Mich. 420), 482.
 Burst v. Wayne (13 Ill. 664), 1217, 1220.
 Burt v. McFadden (58 Ill. 479), 1390.
 Burt v. Panjaud (99 U. S. 180), 258.
 Burton v. Curyed (40 Ill. 520), 182, 183, 184.
 Burton v. Driggs (20 Wall. (U. S.) 125), 1043.
 Burton v. Rathbone Sard & Co. (23 Ill. App. 654), 381.
 Burton v. Waples (3 Harring (Mich.) 75), 469.
 Burwell v. Orr (84 Ill. 465), 1176.
 Busch v. Nester (70 Mich. 525), 177.
 Bush v. Brooks (70 Mich. 446), 487.
 Bush v. Hanson (70 Ill. 480), 6, 1169.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Bush v. Kindred (20 Ill. 93), 1146.
 Bush v. Stanley (122 Ill. 406), 1042.
 Bushnell v. Bishop Hill Colony (28 Ill. 204), 62.
 Bushworth v. Taylor (12 Law J. B. B. 80), 168.
 Busse v. Agnew (10 Ill. App. 527), 1395.
 Buster v. Newkrik (20 Johns. (N. Y.) 75), 136.
 Butler v. Cornell (148 Ill. 276), 894, 1063, 1405, 1408.
 Butler v. Hildreth (5 Metc. (Mass.) 49), 141.
 Butler v. Merhrling (15 Ill. 488), 193.
 Butler v. Randall (25 Ill. App. 586), 894.
 Butler v. St. Louis Life Ins. Co. (45 Va. 93), 1055.
 Buxbaum & Co. v. Dunham (51 Ill. App. 240), 339.
 Byars v. City of Mt. Vernon (77 Ill. 467), 390, 1136.
 Bybee v. Ashby (2 Gilm. 151), 152, 411.
 Byne (1 Sw. & B. (Eng.) 316), 416.
 Byrne v. Aetna Ins. Co. (5 Ill. 321), 1002.
 Byrne v. Clark (31 Ill. App. 651), 1209.
 Byrne v. McNulty (2 Gilm. (Ill.) 424), 870.
- C.**
- Cable v. Cooper (15 Johns. (N. Y.) 152), 152, 710.
 Cable v. Ellis (120 Ill. 135), 1283.
 Cadbourn v. Franklin (5 Gray (Mass.) 312), 998.
 Cadwallader v. Harris (76 Ill. 370), 605.
 Cadwell v. Farrell (28 Ill. 438), 130.
 Cadwell v. Pray (41 Mich. 309), 180.
 Cady v. Norton (14 Pick. (Mass.) 236), 1022.
 Cady v. Walker (62 Mich. 157), 1392.
 Cahen v. Continental Ins. Co. (69 N. Y. 300), 1041.
 Cahoon v. Ellis (18 Vt. 500), 351.
 Cain v. Ingham (7 Cow. (N. Y.) 478), 992.
 Cairo & St. L. Ry. Co. v. Holbrook (72 Ill. 419), 760, 919.
 Cairo & St. L. Ry. Co. v. Hindman (85 Ill. 581), 344.
 Cairo & St. L. Ry. v. Killenberg (92 Ill. 142), 350.
 Cairo & St. L. R. R. Co. v. Koerner (3 Ill. App. 248), 1479.
 Cairo & St. L. Ry. Co. v. Mahoney (82 Ill. 73), 1042.
 Cairo & St. L. R. R. Co. v. Murray (82 Ill. 76), 398.
 Cairo & St. L. Ry. v. Parrot (92 Ill. 194), 256.
 Cairo & St. L. Ry. Co. v. People (92 Ill. 97), 140.
 Cairo & St. L. R. R. Co. v. Wiggins Ferry Co. (82 Ill. 230), 1421, 1422.
 Cairo & St. L. R. R. Co. v. Woolsey (85 Ill. 370), 143.
 Cairo & Vin. Ry. Co. v. Dodge (72 Ill. 253), 483, 846.
 Calco Nat. Bank v. Shaw (79 Me. 376), 969.
 Caldwell v. Cassidy (8 Cow. (N. Y.) 271), 572, 583.
 Caldwell v. Lawrence (84 Ill. 161), 28, 601.
 Caldwell v. Richmond (64 Ill. 30), 115, 604, 836.
 Calhoun v. O'Neal (53 Ill. 354), 1103, 1141.
 Calhoun v. Wright (3 Scam. (Ill.) 74), 881, 902.
 Callaghan v. Myers (89 Ill. 566), 154, 155, 380, 1099, 1100.
 Callanan v. Port Huron, etc., Ry. Co. (61 Mich. 15), 1390.
 Calkins v. Chandler (36 Mich. 320), 539.
 Calumet Furniture Co. v. Reinhold (51 Ill. App. 323), 1148, 1273.
 Calumet Paper Co. v. Knight & Leonard Co. (43 Ill. App. 566), 803.
 Calumet River Ry. Co. v. Moore (124 Ill. 329), 1098, 1101, 1143.
 Camden v. Belknap (21 Wend. (N. Y.) 354), 1145.
 Camden v. Robertson (2 Scam. (Ill.) 507), 802.
 Cameron v. Blackman (39 Mich. 108), 1031.
 Cameron v. Browning (78 Ill. 208), 614.
 Cameron v. Savage (40 Ill. 76), 1249, 1252.
 Cameron v. Stratton (14 Ill. App. 270), 1482.
 Camfield v. Patterson (33 Ga. 561), 1352.
 Camp v. Allen (7 Hals. 1), 517.

[References are to pages, Vol. I., pp. 1-930; Vol. II., pp. 931-1496.]

- Camp v. Hogan (73 Ill. 228), 392.
 Camp v. Morgan (21 Ill. 255), 80.
 Camp v. Small (44 Ill. 37), 785,
 1375.
 Campau v. Dewey (9 Mich. 381),
 1060.
 Campbell v. Brunk (25 Ill. 225), 29.
 Campbell v. Campbell (22 Ill. 664),
 8, 13.
 Campbell v. Campbell (138 Ill.
 612), 1063, 1072.
 Campbell v. Conover (26 Ill. 64),
 1135.
 Campbell v. Day (90 Ill. 363), 98.
 Campbell v. Goodard (17 Ill. App.
 382), 1171, 1172, 1175.
 Campbell v. Head (13 Ill. 122),
 182, 183, 193.
 Campbell v. People (22 Ill. 234),
 1370.
 Campbell v. Perkins (8 N. Y. 430),
 73.
 Campbell v. Smith (71 N. Y. 26),
 28.
 Campbell v. Whetstone (3 Scam.
 (Ill.) 361), 296, 304.
 Campeau v. Bemis (35 Ill. App.
 37), 163.
 Campeau v. Brown (48 Mich. 145),
 1405, 1409.
 Campo v. Morgan (31 Mich. 281),
 502.
 Camp Point Mfg. Co. v. Ballou
 Adm'r (71 Ill. 417), 1001.
 Campu v. Dubois (39 Mich. 274),
 270.
 Canal Bank v. Bank of Albany (1
 Hill (N. Y.) 287), 87.
 Canal Co. v. Roberts (72 Mich. 49),
 899.
 Candler v. Rossiter (10 Wend. (N.
 Y.) 487), 871.
 Cankey v. Mitchell (1 Ill. (Breese)
 383), 838.
 Canning v. McMillan (55 Ill. App.
 236), 1105.
 Cannon v. Kinney (3 Scam. (Ill.)
 9), 137, 138.
 Cannon v. People (141 Ill. 270),
 996.
 Cantwell v. State (27 Ind. 505),
 183.
 Capek v. Kropik (129 Ill. 509),
 1263.
 Capen v. De Stelger Glass Co. (105
 Ill. 548), 1060, 1198.
 Capes v. Burgess (135 Ill. 61), 334,
 339, 1270.
 Capps v. Smith. (3 Scam. (Ill.)
 177), 87, 849.
 Caraker v. Anderson (27 Ill. 358),
 354.
 Carbine v. Pringle (90 Ill. 302),
 1071.
 Cardesa v. Humes (8 Serg. & R.
 (Pa.) 65), 837.
 Cariker v. Anderson (27 Ill. 358),
 337, 415, 1373.
 Carl v. McGonigal (58 Mich. 567),
 177.
 Carle v. People (12 Ill. 285), 112.
 Carley v. Vance (17 Mass. 391),
 516.
 Carney v. Tully (74 Ill. 375), 1008.
 Carpenter v. Ambrosen (20 Ill.
 170), 1086, 1146.
 Carpenter v. Blake (2 Lans. (N. Y.)
 200), 1055.
 Carpenter v. Blake (10 Hun. (N.
 Y.) 358), 102.
 Carpenter v. First National Bank
 (19 Ill. App. 549), 827, 994, 1028,
 1100, 1175.
 Carpenter v. Hoyt (17 Ill. 529),
 809.
 Carpenter v. Moers (26 Ill. 162),
 1379.
 Carpenter v. Oswego Ry. Co. (24
 N. Y. 655), 251.
 Carpenter v. People (3 Gilm. (Ill.)
 147), 1186.
 Carpenter v. Shereby (71 Ill. 427),
 1165.
 Carr v. Barnett (21 Ill. App. 137),
 181.
 Carr v. Miner (40 Ill. 33), 1246,
 1247.
 Carr v. Miner (42 Ill. 179) 1042,
 1051, 1114.
 Carr v. Miner (92 Ill. 604), 764, 863,
 1277.
 Carrico v. People (123 Ill. 198),
 1331.
 Carrigan v. Hardy (46 Ill. 502),
 1146.
 Carroll v. Ballance (26 Ill. 9), 1378.
 Carroll v. City of Jacksonville (2
 Ill. App. 481), 381.
 Carroll v. Grand Trunk Ry. Co.
 (19 Mich. 94), 1409.
 Carroll v. Holmes (19 Ill. App.
 564), 1269.
 Carson v. Clark (1 Scam. (Ill.)
 113), 857.
 Carson v. Merle (4 Ill. (3 Scam.)
 168), 114, 381.
 Carter v. Carter (14 Pick. (Mass.)
 428), 81.
 Carter v. Lockwood (15 Ill. App.
 73), 351.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Carter v. Talcott (10 Vt. 471), 1485.
 Carter v. White (32 Ill. 509), 451, 1222.
 Cartier v. Troy Lumber Co. (35 Ill. App. 449), 1080.
 Cartwright v. Clopton (25 Mich. 285), 1080.
 Cary-Lombard Lumber Co. v. Hunt (44 Ill. App. 314), 1259.
 Cary v. Scherer (55 Ill. App. 422), 1253.
 Casey v. Curtis (41 Ill. App. 236), 1192.
 Casey v. Horton (36 Ill. 234), 304.
 Cass v. Campbell (63 Ill. 259), 1146.
 Cassady v. Board of Trustees (93 Ill. 394), 523.
 Cassady v. Laughlin (3 Blackf. 134), 119.
 Cassady v. Trustees of Schools (94 Ill. 589), 1185.
 Cassell v. Fitzsimmons (9 Ill. App. 78), 1282.
 Cassem v. Galvin (53 Ill. App. 419), 467, 1026.
 Casper v. People (6 Ill. App. 28), 115.
 Cast v. Roff, Admr. (26 Ill. 452), 1002.
 Casting v. Casting (47 Ill. 439), 376, 397.
 Castle v. Judson (17 Ill. 381), 820, 878.
 Castleberry v. Fennell (4 Ala. 642), 474.
 Caswell v. Caswell (24 Ill. App. 548), 1268.
 Caswell v. Cooper (18 Ill. 532), 1117.
 Caswell v. Fitzsimmons (9 Ill. App. 78), 1279.
 Catlett v. People (151 Ill. 16), 1324, 1331, 1332, 1334.
 Catlin v. Michigan Cent. Ry. Co. (66 Mich. 358), 520.
 Caukins v. Chandler (36 Mich. 320), 97.
 Cavener v. Shinkle (89 Ill. 161), 174, 1002.
 Caveney v. Wieller (90 Ill. 158), 1104.
 Center v. Gibney (71 Ill. 557), 1423.
 Central Ry. Co. v. Allmon (147 Ill. 471), 1058.
 Central Branch, etc., v. Andrews (41 Kans. 370),
 Central Branch W. P. R. R. Co. v. Shoup (28 Kans. 394), 1485.
 Central Trust Co. v. Wabash Ry. Co. (32 Fed. 685), 1402.
 Cervený v. Chicago Daily News Co. (35 Ill. App. 560), 210.
 Cervený v. Chicago Daily News Co. (139 Ill. 345), 208, 772.
 Chace v. DeWolf (69 Ill. 47), 1204.
 Chadsey v. Harrison (11 Ill. 151), 34.
 Chadsey v. Lewis (1 Gilm. 153), 27.
 Chadsey v. McCreery (27 Ill. 253), 28, 29.
 Chadwick v. Butler (28 Mich. 349), 549.
 Chadwick v. United States (3 Fed. Rep. 750), 1045.
 Chair Co. v. Lyon (73 Mich. 438), 176.
 Challenor v. Milligan (110 Ill. 666), 1257.
 Challenor v. Niles (78 Ill. 78), 1358, 1359, 1361.
 Chamberlin v. Chamberlin (116 Ill. 480), 1078.
 Chamberlain v. Cox (2 N. J. L. 333), 114.
 Chamberlain v. McCarty (63 Ill. 262), 1133.
 Chamberlin v. Ossipee (60 N. H. 212), 1031.
 Chamberlin v. Rogers (79 Mich. 219), 1495.
 Chamberlain v. Sands (27 Me. 458), 1031.
 Chambers v. Ross (1 Dutcher (25 N. J.) 293), 104.
 Chandler v. Allison (10 Mich. 460), 649.
 Chandler v. Childs (42 Mich. 129), 78, 897.
 Chandler v. Dore (184 Ill. 275), 556.
 Chandler v. Gray (1 Ill. (Breese) 88), 1398.
 Chandler v. Horne (2 Moo. & R. 423), 1012.
 Chandler v. Lincoln (52 Ill. 74), 841, 852.
 Chandler v. Mullamphy (2 Gilm. (Ill.) 464), 329.
 Chandler v. State (5 Har. & J. (Md.) 284), 505.
 Chanute v. Martin (25 Ill. 49), 336, 337, 347, 350, 368.
 Chapin v. Billings (91 Ill. 539), 1414.

[References are to pages, Vol. I., pp. 1-900; Vol. II., pp. 961-1496.]

- Chapin v. Curtenius (15 Ill. 427), 753.
 Chapin v. Foss (75 Ill. 280), 27, 104.
 Chapin v. Thomson (7 Ill. App. 288), 809, 1006.
 Chapman v. Burt (77 Ill. 337), 1146, 1484, 1489.
 Chapman v. Cowrey (50 Ill. 512), 213, 215, 1096, 1097, 1098, 1103.
 Chapman v. Chapman (129 Ill. 386), 1141, 1266.
 Chapman v. Knowles (34 Ill. App. 558), 1184.
 Chapman v. Shattuck (3 Gilm. (Ill.) 49), 36, 977.
 Chapman v. Stewart (63 Ill. 332), 1147.
 Chapman v. Wright (20 Ill. 120), 116.
 Charlesworth v. Wilson (16 Ill. 338), 188, 1038.
 Chase v. Benham (10 Wend. (N. Y.) 200), 923.
 Chase v. Cheney (58 Ill. 509), 5.
 Chase v. City of Chicago (25 Ill. App. 274), 1081.
 Chase v. Debolt (2 Gilm. (Ill.) 371), 1146.
 Chase v. McDowell (24 Ill. 236), 1437.
 Chase v. Sycamore & Courtland Ry. (38 Ill. 215), 1034.
 Chapman v. Stuckey (22 Ill. App. 31), 306.
 Chatroop v. Borgard (40 Ill. 279), 340.
 Chatterton v. Saul (16 Ill. 149), 173, 183.
 Chavis v. Reed (40 Ill. 55), 1266, 1268.
 Cheatham v. Tillotson (5 Johns. (N. Y.) 543), 456.
 Cheatham v. Trotter (Peck (Tenn.) 198), 288.
 Cheevers v. Circuit Judge (45 Mich. 6), 1298.
 Cheney v. Bonnell (58 Ill. 268), 1146.
 Cheney v. City Nat'l Bank of Chicago (77 Ill. 562), 414.
 Cheney v. Teese (113 Ill. 444), 1195.
 Chesny v. Meadows (90 Ill. 430), 1099.
 Chester & T. C. R. Co. v. Lickiss (72 Ill. 521), 570.
 Chestnut v. Chestnut (77 Ill. 346), 40, 912, 1358.
 Chicago A. & St. L. Ry. Co. v. Stover (63 Ill. 358), 1147.
 Chicago & A. Ry. Co. v. Adler (129 Ill. 335), 453, 622, 681, 991, 1031, 1090.
 Chicago & A. Ry. Co. v. Bragonier (13 Ill. App. 467), 234, 1082, 1097, 1100, 1269.
 Chicago & A. Ry. Co. v. Buttolf (66 Ill. 347), 991.
 Chicago & A. Ry. Co. v. Byrum (48 Ill. App. 41), 1003.
 Chicago Alton Ry. Co. v. Clampt (63 Ill. 95), 1276.
 Chicago, R. I. Ry. Co. v. Clough (134 Ill. 586), 1000.
 Chicago & A. Ry. Co. v. Dillon (123 Ill. 570), 607, 1081.
 Chicago & A. Ry. Co. v. Fletsam (123 Ill. 518), 1077, 1109.
 Chicago & A. R. R. Co. v. Fisher (31 Ill. App. 36), 685.
 Chicago & R. Ry. Co. v. Glenney (28 Ill. App. 364), 131, 861.
 Chicago & A. Ry. Co. v. Henneberry (28 Ill. App. 110), 242, 647.
 Chicago & A. Ry. Co. v. Howard (38 Ill. 414), 581.
 Chicago & A. Ry. Co. v. Johnson (116 Ill. 206), 1061, 1081, 1109.
 Chicago & Alton R. R. Co. v. Keegan (152 Ill. 413), 256.
 Chicago & Alton v. Kellam (92 Ill. 245), 230.
 Chicago & A. R. R. Co. v. Lamert (19 Ill. App. 135), 1063, 1486.
 Chicago & A. Ry. Co. v. Maher (91 Ill. 312), 146, 242.
 Chicago & A. Ry. Co. v. Michie, Admx. 83 Ill. 427), 1002.
 Chicago & A. Ry. Co. v. Mock, Admr. (72 Ill. 141), 1000.
 Chicago & A. Ry. Co. v. Murray (71 Ill. 601), 1125.
 Chicago & A. R. R. Co. v. Nelson (153 Ill. 89), 235.
 Chicago & A. Ry. Co. v. Pennell (94 Ill. 448), 241.
 Chicago & Alton Ry. Co. v. Pondrom (51 Ill. 333), 1143.
 Chicago & A. Ry. Co. v. Purvines (58 Ill. 38), 1147.
 Chicago & Alton R. R. Co. v. Ragland (84 Ill. 375), 346.
 Chicago & A. Ry. Co. v. Rice (71 Ill. 567), 1147.

[References are to pages, Vol. I., pp. 1-900; Vol. II., pp. 961-1496.]

- Chicago & A. Ry. v. Robinson (106 Ill. 142), 1085.
 Chicago & A. R. R. Co. v. Sanders (55 Ill. App. 87), 233.
 Chicago & A. Ry. Co. v. Shea (68 Ill. 471), 88.
 Chicago & A. Ry. Co. v. Shenk (30 Ill. App. 587), 1024.
 Chicago & Alton Ry. Co. v. Smith (78 Ill. 96), 260.
 Chicago & A. Ry. Co. v. Smith (10 Ill. App. 359), 789, 790, 793.
 Chicago & A. Ry. Co. v. Suffern (129 Ill. 274), 1295, 1304, 1305, 1310.
 Chicago & A. Ry. Co. v. Taylor (40 Ill. 280), 647.
 Chicago & A. R. R. Co. v. Willard (31 Ill. App. 435), 133.
 Chicago & A. Ry. v. S. & N. W. Ry. Co. (67 Ill. 142), 1053.
 Chicago, B. & Q. Ry. Co. v. Avery (109 Ill. 314), 1099.
 Chicago, B. & Q. Ry. Co. v. Bell (112 Ill. 360), 1002, 1202.
 Chicago, B. & Q. Ry. Co. v. Boger (1 Ill. App. 473), 1096.
 Chicago, B. & Q. Ry. Co. v. Bryan (90 Ill. 126), 1006.
 Chicago, B. & Q. Ry. Co. v. Barton (53 Ill. App. 69), 1067, 1122.
 Chicago, B. & Q. Ry. Co. v. City of Aurora (5 Ill. App. 395), 1256.
 Chicago, B. & Q. Ry. Co. v. Coleman (18 Ill. 297), 1167.
 Chicago, B. & Q. Ry. v. Damerall (81 Ill. 450), 140.
 Chicago, B. & Q. Ry. Co. v. Dickson (63 Ill. 151), 1085.
 Chicago, B. & Q. R. R. Co. v. Dickson (67 Ill. 122), 48, 51.
 Chicago, B. & Q. Ry. Co. v. Dickson (88 Ill. 431), 229, 1107, 1280.
 Chicago, B. & Q. Ry. Co. v. Dickson (143 Ill. 368), 647, 1071, 1094.
 Chicago, B. & Q. Ry. Co. v. Dunn (52 Ill. 451), 51, 1143.
 Chicago, B. & Q. Ry. Co. v. Greenfield (53 Ill. App. 424), 1124.
 Chicago, B. & Q. Ry. Co. v. Gregory (58 Ill. 272), 1053, 1098, 1147.
 Chicago, B. & Q. Ry. Co. v. Harwood (80 Ill. 88), 231.
 Chicago, B. & Q. Ry. Co. v. Harwood (90 Ill. 425), 686, 777, 1004, 1100.
 Chicago, etc., v. Johnson (103 Ill. 512), 231, 1035, 1097.
 Chicago, B. & Q. R. R. Co. v. Knox College (34 Ill. 195), 260, 264.
 Chicago, B. & Q. R. R. Co. v. Lee, Admx. (68 Ill. 576), 231, 1098, 1221.
 Chicago, B. & Q. R. R. Co. v. Lee, Admx. (87 Ill. 454), 1147.
 Chicago, B. & Q. Ry. Co. v. Maney (55 Ill. App. 588), 845.
 Chicago, B. & Q. Ry. Co. v. Martin (112 Ill. 16), 1053.
 Chicago, B. & Q. Ry. Co. v. Payne (59 Ill. 534), 1104.
 Chicago, B. & Q. Ry. Co. v. Perkins (125 Ill. 127), 933, 992, 1080.
 Chicago, B. & Q. R. R. Co. v. Shaffer (124 Ill. 112), 244.
 Chicago, B. & Q. R. R. Co. v. Stumps (69 Ill. 409), 1146.
 Chicago, B. & Q. Ry. Co. v. Sykes (96 Ill. 162), 238, 1098, 1099, 1104.
 Chicago, B. & Q. Ry. Co. v. Van Patton (64 Ill. 510), 229, 1147.
 Chicago, B. & Q. Ry. Co. v. Van Patton (74 Ill. 91), 1123.
 Chicago, B. & Q. Ry. Co. v. Warner (108 Ill. 538), 771, 773, 1000, 1010, 1084, 1096.
 Chicago, B. & Q. Ry. Co. v. Warner (123 Ill. 38), 1097.
 Chicago, B. & Q. Ry. Co. v. Warner (123 Ill. 28), 1100.
 Chicago, B. & Q. Ry. Co. v. Wilcox (12 Ill. App. 42), 410, 1002.
 Chicago Coal Co. v. Glass (34 Ill. App. 364), 827.
 Chicago City Ry. Co. v. Duffin (126 Ill. 100), 971.
 Chicago City Ry. Co. v. Duffin (24 Ill. App. 28), 1221, 1222.
 Chicago City Ry. Co. v. Jennings (157 Ill. 274), 228, 671.
 Chicago City Ry. Co. v. McLaughlin (146 Ill. 353), 1018, 1062, 1063, 1084.
 Chicago City Ry. Co. v. Mumford (97 Ill. 560), 229.
 Chicago City Ry. Co. v. Pelletier (134 Ill. 120), 1081.
 Chicago City Ry. Co. v. Robinson (27 Ill. App. 26), 1277.
 Chicago City Ry. Co. v. Van Vleck (143 Ill. 480), 1026, 1052, 1081, 1091, 1270.
 Chicago City Ry. Co. v. Young (62 Ill. 238), 1085, 1146.

[References are to pages, Vol. I., pp. 1-900; Vol. II., pp. 961-1496.]

- Chicago, C. C. & St. L. Ry. Co. v. Baddeley (52 Ill. App. 94), 679.
- Chicago, C. C. & St. L. Ry. Co. v. Rice (48 Ill. App. 51), 524.
- Chicago Dock & Canal Co. v. Kinzie (93 Ill. 415), 1042.
- Chicago D. & D. Co. v. McCarty (11 Ill. App. 553), 392.
- Chicago, D. & V. Ry. Co. v. Bank of North America (82 Ill. 493), 594, 877.
- Chicago Driving Park v. West (35 Ill. 496), 882.
- Chicago & Eastern I. R. R. Co. v. Blagden (33 Ill. App. 254), 339, 349.
- Chicago & E. I. Ry. Co. v. Goyette (133 Ill. 21), 462, 1206.
- Chicago & E. I. Ry. Co. v. Goyette (32 Ill. App. 574), 968.
- Chicago & E. I. Ry. Co. v. Goyette (132 Ill. 161), 643, 645, 773, 785.
- Chicago & E. I. Ry. Co. v. Hines (132 Ill. 161), 543, 645, 773, 785.
- Chicago & E. Ry. Co. v. Holland (122 Ill. 461), 1070, 1096.
- Chicago & E. I. Ry. Co. v. O'Connor (118 Ill. 586), 883, 1100.
- Chicago & E. I. R. R. Co. v. O'Connor (19 Ill. App. 591), 51.
- Chicago & E. I. Ry. Co. v. Vivans (142 Ill. 401), 1276.
- Chicago, etc., Ry. Co. v. Hughes (28 Mich. 186), 1392.
- Chicago & Evanston Ry. Co. v. Blake (116 Ill. 163), 1053, 1143.
- Chicago Fire Proof Co. v. Park Nat. Bank (145 Ill. 481), 37, 43, 1175, 1177.
- Chicago Forge and Bolt Co. v. Major (30 Ill. App. 276), 243.
- Chicago & G. T. Ry. Co. v. Perkins (17 Mich. 296), 1039.
- Chicago & G. W. Ry. etc., Co. v. Peck (112 Ill. 408), 1197.
- Chicago & G. W. Ry. Co. v. Wedel (144 Ill. 9), 1071.
- Chicago & G. E. Ry. Co. v. Voseburgh (45 Ill. 311), 1140.
- Chicago & I. R. R. Co. v. Lane (130 Ill. 116), 1223.
- Chicago & I. Ry. Co. v. N. Ill. & Iron Co. (36 Ill. 60), 1057.
- Chicago Legal News v. Brune (103 Ill. 317), 827.
- Chicago, M. & St. P. v. Doherty (53 Ill. App. 282), 650, 1151.
- Chicago, M. & St. P. Ry. Co. v. Harper (26 Ill. App. 621), 993, 1210, 1220.
- Chicago, M. & St. P. Ry. v. Hoek (118 Ill. 537), 985.
- Chicago, M. & St. P. Ry. Co. v. Hoyt (50 Ill. App. 583), 780, 1262.
- Chicago, M. & St. P. Ry. Co. v. Kendall (49 Ill. App. 398), 1036, 1055, 1073, 1109.
- Chicago, M. & St. P. Ry. Co. v. Krueger (124 Ill. 457), 1091, 1097, 1103.
- Chicago, M. & St. P. Ry. Co. v. Mason (27 Ill. App. 450), 1101.
- Chicago, M. & St. P. Ry. Co. v. Melville (66 Ill. 329), 1206.
- Chicago, M. & St. P. Ry. Co. v. O'Sullivan (143 Ill. 48), 1097.
- Chicago, M. & St. P. Ry. Co. v. Snyder (27 Ill. App. 476), 1095.
- Chicago, M. & St. P. Ry. Co. v. Walsh (150 Ill. 607), 1208, 1224.
- Chicago, M. & St. P. Ry. Co. v. Yando (127 Ill. 214), 1204.
- Chicago & N. W. R. R. Co. v. Ames (40 Ill. 249), 168.
- Chicago & N. W. Ry. Co. v. Andrews (148 Ill. 27), 1192.
- Chicago & N. W. Ry. Co. v. Bayfield (37 Mich. 205), 65.
- Chicago & N. W. Ry. Co. v. Benham (25 Ill. App. 248), 1211, 1216, 1222.
- Chicago & N. W. Ry. Co. v. Bouck (33 Ill. App. 123), 1123.
- Chicago & N. W. Ry. Co. v. Button (68 Ill. 409), 48, 51, 1103.
- Chicago & N. W. Ry. Co. v. Chapman (30 Ill. App. 504), 231.
- Chicago & N. W. Ry. Co. v. Clark (70 Ill. 276), 972.
- Chicago & N. W. Ry. Co. v. Cummings (20 Ill. App. 333), 1278.
- Chicago & N. W. Ry. Co. v. Diehl (52 Ill. 441), 1099.
- Chicago & N. W. Ry. Co. v. Dimick (96 Ill. 42), 233, 1134, 1148, 1155.
- Chicago & N. W. Ry. Co. v. Dunleavy (129 Ill. 132), 1122.
- Chicago & N. W. Ry. Co. v. Dunleavy (27 Ill. App. 438), 1094.
- Chicago & N. W. Ry. Co. v. Hintz (132 Ill. 265), 1483.
- Chicago & N. W. Ry. Co. v. Ingersoll (65 Ill. 399), 971.
- Chicago & N. W. Ry. Co. v.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Jenkins (103 Ill. 588), 410, 814, 916.
- Chicago & N. W. Ry. Co. v. Loebel (119 Ill. 515), 832.
- Chicago & N. W. Ry. Co. v. McCahill (56 Ill. 28), 1005, 1210.
- Chicago & N. W. Ry. Co. v. Moranda (108 Ill. 576), 1085.
- Chicago & N. W. Ry. Co. v. Nichols (57 Ill. 464), 80.
- Chicago & N. W. Ry. Co. v. Peacock (48 Ill. 253), 734, 1143.
- Chicago & N. W. Ry. Co. v. Pillmore (57 Ill. 265), 228.
- Chicago & N. W. Ry. Co. v. People (56 Ill. 365), 1304.
- Chicago & N. W. Ry. Co. v. Ryan (70 Ill. 211), 1146.
- Chicago & N. W. Ry. Co. v. Sawyer (69 Ill. 285), 88.
- Chicago & N. W. Ry. Co. v. Scheuring (4 Ill. App. 533), 1146.
- Chicago & N. W. Ry. Co. v. Schultz (55 Ill. 421), 47, 858.
- Chicago & N. W. Ry. Co. v. Snyder (117 Ill. 376), 1098, 1104.
- Chicago & N. W. Ry. Co. v. Snyder (128 Ill. 655), 1090.
- Chicago & N. W. Ry. Co. v. Swett (45 Ill. 197), 1098.
- Chicago P. & St. L. Ry. Co. v. Aldrich (134 Ill. 9), 1027.
- Chicago P. & St. L. Ry. Co. v. Blume (137 Ill. 448), 1107.
- Chicago P. & St. L. Ry. Co. v. Leah (152 Ill. 249), 1067.
- Chicago P. & St. L. Ry. Co. v. Leah (41 Ill. App. 584), 1067, 1207, 1259.
- Chicago P. & St. L. Ry. Co. v. Lewis (48 Ill. App. 274), 939, 1005.
- Chicago P. & St. L. Ry. Co. v. Nix (137 Ill. 141), 1070.
- Chicago P. & St. L. Ry. Co. v. Wolf (137 Ill. 360), 1068, 1074, 1266.
- Chicago Public Stock Exchange v. McClaughry (50 Ill. App. 358), 967, 1273, 1478, 1480.
- Chicago & Pac. R. R. Co. v. Kaehler (79 Ill. 354), 425.
- Chicago & Pac. Ry. Co. v. Stein (75 Ill. 41), 968.
- Chicago & Pac. Ry. Co. v. Munger (78 Ill. 300), 44, 63, 802, 811.
- Chicago Planing Mill Co. v. Merchants' Nat. Bank (86 Ill. 587), 427.
- Chicago Planing Mill Co. v. Merchants' Nat. Bank (97 Ill. 294), 427, 1285.
- Chicago R. & S. W. Ry. Co. v. Town of Marselles (107 Ill. 313), 1135.
- Chicago, R. I. & P. Ry. Co. v. Bell, Admr. (70 Ill. 102), 1063.
- Chicago, R. I. & P. Ry. Co. v. Boyce (73 Ill. 510), 1086.
- Chicago, R. I. & P. Ry. Co. v. Clough (134 Ill. 586), 1000, 1007, 1069, 1122, 1141.
- Chicago, R. I. & P. Ry. Co. v. Crandall (41 Ill. 234), 1146.
- Chicago R. I. & P. Ry. Co. v. Eininger (114 Ill. 79), 1075.
- Chicago, R. I. & P. Ry. Co. v. Fell (22 Ill. 333), 364, 419.
- Chicago, R. I. & P. Ry. Co. v. Hardt (138 Ill. 120), 256, 258, 1027.
- Chicago, R. I. & P. Ry. Co. v. Harmon (16 Ill. App. 31), 1222.
- Chicago, R. I. & P. Ry. Co. v. Henry (7 Ill. App. 322), 668.
- Chicago, R. I. & P. Ry. Co. v. Joliet (79 Ill. 25), 251.
- Chicago, R. I. & P. Ry. Co. v. Lewis (109 Ill. 120), 1091, 1098, 1277.
- Chicago Ry. Co. v. Loeb (118 Ill. 203), 857.
- Chicago, R. I. & P. Ry. Co. v. Mason (11 Ill. App. 525), 345, 346, 354, 1166.
- Chicago, R. I. & P. Ry. Co. v. McAra (52 Ill. 297), 1143.
- Chicago & R. I. Ry. Co. v. McKeane (40 Ill. 218), 936, 1008, 1147, 1149, 1150.
- Chicago, R. I. & P. Ry. Co. v. Moffitt (75 Ill. 524), 1059.
- Chicago & R. I. Ry. Co. v. Morris (26 Ill. 400), 46, 679, 680.
- Chicago & R. I. Ry. Co. v. Northern Ill. Coal & Iron Co. (36 Ill. 60), 1262.
- Chicago & R. I. Ry. Co. v. O'Connor (119 Ill. 586), 51.
- Chicago, R. I. & P. Ry. Co. v. Otto (52 Ill. 416), 1098, 1143.
- Chicago Ry. Co. v. People (73 Ill. 54), 1007.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Chicago. R. I. & P. Ry. Co. v. Reidy (66 Ill. 43), 1103, 1146.
 Chicago, R. I. & P. Ry. Co. v. Todd (91 Ill. 70), 807.
 Chicago. R. I. & P. Ry. Co. v. Town of Calumet (151 Ill. 512), 378, 388, 397, 1160, 1207, 1222.
 Chicago & R. I. Ry. Co. v. Ward (16 Ill. 522), 981.
 Chicago & R. I. Ry. Co. v. Whipple (22 Ill. 105), 365.
 Chicago, St. Charles & M. R. R. Co. v. Larned (26 Ill. 218), 1494.
 Chicago & St. L. Ry. Co. v. Easterly (89 Ill. 56), 1167, 1209.
 Chicago, St. L. & W. Ry. Co. v. Gates (120 Ill. 86), 915.
 Chicago, St. L. & P. Ry. Co. v. Gross (133 Ill. 37), 1090.
 Chicago, St. L. & P. Ry. Co. v. Hutchinson (120 Ill. 587), 1100.
 Chicago & St. L. R. R. Co. v. Killenberg (82 Ill. 295), 349.
 Chicago & St. L. Ry. Co. v. Schumacker (77 Ill. 583), 1141.
 Chicago & St. L. R. R. Co. v. Woosley (85 Ill. 370), 258, 241.
 Chicago & St. L. R. R. Co. v. Beach (29 Ill. App. 157), 144.
 Chicago S. Branch Dock Co. v. Dunlap (32 Ill. 207), 888.
 Chicago S. E. W. Co. v. Congdon B. S. M. Co. (111 Ill. 309), 419, 426.
 Chicago Stamping Co. v. Bignall (54 Ill. App. 312), 807.
 Chicago Stamping Co. v. Hanchett (25 Ill. App. 198), 1005.
 Chicago Theological Seminary v. Gage (103 Ill. 175), 1193.
 Chicago West Div. Ry. Co. v. Hughes (69 Ill. 170), 1097.
 Chicago West Div. Ry. Co. v. Ingraham (131 Ill. 659), 524, 1063, 1098, 1109.
 Chicago West Div. Ry. Co. v. Lambert (119 Ill. 255), 1054, 1071, 1097.
 Chicago W. D. Ry. Co. v. Mills (91 Ill. 39), 229, 1100.
 Chicago W. D. Ry. Co. v. Mills (105 Ill. 63), 1000, 1006, 1009, 1098.
 Chicago & W. I. Ry. Co. v. Bingenheimer (116 Ill. 226), 991, 1095, 1099.
 Chicago & W. I. Ry. Co. v. De Marko (57 Ill. App. 382), 1216.
 Chicago & W. I. Ry. Co. v. Rolvink (31 Ill. App. 596), 679.
 Chicago & T. Coal Co. & Ry. Co. v. Lickiss (72 Ill. 521), 412, 916.
 Child v. Chappel (9 N. Y. 246), 249, 260.
 Churchill v. Croker (25 Ga. 479), 1475.
 Cicotte v. Wayne Co. (44 Mich. 173), 791, 793.
 Cicotte v. County of Wayne (59 Mich. 509), 791, 1300.
 Cincinnati, L. & C. Ry. Co. v. Ducharme (4 Ill. App. 179), 1095.
 Citizens' Gaslight & Heat Co. v. O'Brien (19 Ill. App. 231), 1052.
 Citizens' Gas Light etc. Co. v. Granger (118 Ill. 266), 1069.
 City Electric Ry. Co. v. Jones (101 Ill. 47), 1265.
 City Ins. Co. v. Commercial Bank (68 Ill. 349), 326.
 City of Abingdon v. McCrew (49 Ill. App. 355), 1086.
 City of Abingdon v. Meadows (28 Ill. App. 442), 1095, 1106.
 City of Alton v. Kirsch (68 Ill. 231), 390, 436.
 City of Aurora v. Gillett (56 Ill. 132), 1103.
 City of Aurora v. Hillman (90 Ill. 61), 1035.
 City of Aurora v. Peanlington (92 Ill. 564), 1096.
 City of Bloomington v. Annett (16 Ill. App. 119), 52.
 City of Bloomington v. Legg Admr. (131 Ill. 9), 1073.
 City of Bloomington v. Purdue (99 Ill. 329), 1103.
 City of Bloomington v. Schweg (110 Ill. 219), 1036.
 City of Bunker Hill v. Johnson (12 Ill. App. 255), 1216.
 City of Cairo v. Bross (99 Ill. 521), 1196.
 City of Cairo v. Everett (107 Ill. 75), 1303.
 City of Carlyle v. Carlyle, W. L. & P. Co. (140 Ill. 445), 888, 884.
 City of Champaign v. McMurray (76 Ill. 353), 258.
 City of Champaign v. Patterson (50 Ill. 51), 1107.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- City of Chester v. Porter (47 Ill. 661), 1147.
 City of Chester v. Wilson (15 Ill. App. 239), 1227.
 City of Chicago v. Babcock (143 Ill. 358), 832, 927.
 City of Chicago v. Bixby (84 Ill. 82), 1100.
 City of Chicago v. Cameron (120 Ill. 447), 1259.
 City of Chicago v. Crooker (2 Ill. App. 279), 236.
 City of Chicago v. Dignan (14 Ill. App. 128), 1002.
 City of Chicago v. Gosslin (91 Ill. 48), 1197.
 City of Chicago v. Halsey (25 Ill. 485), 56.
 City of Chicago v. Hislop (61 Ill. 86), 1142.
 City of Chicago v. Laville (83 Ill. 482), 1143.
 City of Chicago v. Leseth (142 Ill. 642), 1081, 1332.
 City of Chicago v. Major (18 Ill. 349), 679.
 City of Chicago v. McDonough (112 Ill. 85), 1109.
 City of Chicago v. McGinn (51 Ill. 266), 251.
 City of Chicago v. McGliven (78 Ill. 347), 1052, 1081.
 City of Chicago v. McGraw (75 Ill. 566), 52.
 City of Chicago v. Moore (139 Ill. 201), 1002, 1003, 1093, 1094, 1096, 1100, 1103, 1108.
 City of Chicago v. People (80 Ill. 496), 1327.
 City of Chicago v. Rogers (61 Ill. 68), 1113, 1114.
 City of Chicago v. Sansum (87 Ill. 182), 1303, 1307, 1310, 1314.
 City of Chicago v. Schmidt, etc., (107 Ill. 186), 1099.
 City of Chicago v. Smith (48 Ill. 107), 1103, 1143, 1147.
 City of Chicago v. Spear (66 Ill. 154), 48.
 City of Chicago v. Stuart (53 Ill. 83), 88, 93.
 City of Chicago v. Vulcan Iron Works (2 Ill. App. 189), 14.
 City of Chicago v. Watson (6 Ill. App. 344), 236, 237.
 City of Decatur v. Fisher (53 Ill. 407), 1054, 1143.
 City of East St. Louis v. Hackett (85 Ill. 382), 272, 273.
 City of East St. Louis v. Thomas (9 Ill. App. 412), 893, 894, 900, 982.
 City of East St. Louis v. Underwood (105 Ill. 308), 1313.
 City of Elgin v. Beckwith (118 Ill. 367), 1100.
 City of Elgin v. Joslyn (136 Ill. 525), 83, 98, 101, 1109, 1124, 1280.
 City of Elgin v. Kimball (90 Ill. 536), 1003.
 City of Elgin v. Renwick (86 Ill. 498), 1078.
 City of Flora v. Naney (151 Ill. 472), 1122.
 City of Fond du Lac v. Bonesteel (22 Wis. 251), 452.
 City of Freeport v. Isbell (83 Ill. 440), 1096, 1098.
 City of Hoopeston v. Eads (32 Ill. App. 75), 236.
 City of Jacksonville v. Allen (25 Ill. App. 54), 547.
 City of Jacksonville v. Cherry (39 Ill. App. 617), 1204, 1207.
 City of Joliet v. Henry (11 Ill. App. 154), 1000.
 City of Lanark v. Dougherty (153 Ill. 163), 232.
 City of La Salle v. Porterfield (138 Ill. 114), 461.
 City of Macomb v. Smithers (6 Ill. App. 470), 236, 237.
 City of Mattoon v. Bowles (48 Ill. App. 528), 1270.
 City of Mendota v. Fay (1 Ill. App. 418), 1149.
 City of Mt. Carmel v. Howell (137 Ill. 91), 1273.
 City of Mt. Vernon v. Brooks (39 Ill. App. 426), 1057.
 City of Mt. Vernon v. Lee (36 Ill. App. 24), 1208.
 City of Mt. Vernon v. Satterfield (53 Ill. App. 39), 1134.
 City of Nashville v. Weiser (54 Ill. 245), 1228.
 City of Olney v. Harvey (50 Ill. 453), 1303.
 City of Ottawa v. People (48 Ill. 233), 1295, 1302, 1303.
 City of Pana v. Humphreys (39 Ill. App. 641), 759.
 City of Pekin v. McMahon (154 Ill. 141), 235.
 City of Pekin v. McMahon (53 Ill. App. 189), 143.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1490]

- City of Pekin v. Winkle (77 Ill. 56), 1117.
 City of Peru v. French (55 Ill. 318), 1146.
 City of Petersburg v. Whitnack (48 Ill. App. 633), 1185.
 City of Quincy v. Warfield (25 Ill. 317), 827.
 City of Sandwich v. Dolan (141 Ill. 430), 1061, 1078.
 City of Shawneetown v. Baker (85 Ill. 563), 84.
 City of Shawneetown v. Mason (82 Ill. 337), 993.
 City of Springfield v. Dalby (139 Ill. 34), 1060, 1107.
 City of Springfield v. Doyle (76 Ill. 202), 687.
 City of Springfield v. Hickox (2 Gilm. (Ill.) 241), 890.
 City of Springfield v. Rosenmeyer (52 Ill. App. 301), 237, 462, 647, 1003.
 City of Sterling v. Merrill (124 Ill. 522), 1096, 1098, 1103, 1141.
 City of Sumner v. Scaggs (52 Ill. App. 551), 237, 1098.
 City of Virden v. Allan (107 Ill. 505), 1193.
 Chichester v. Whiteleather (51 Ill. 259), 1096.
 Chickering v. Failles (26 Ill. 507), 422, 423, 979, 1377, 1378.
 Chickering v. Raymond (115 Ill. 362), 161.
 Chickering-Chase Bros. Co. v. DeVoll (55 Ill. App. 442), 1389.
 Childs v. Butler & Co. (53 Ill. 156), 459.
 Chiles v. Davis (58 Ill. 411), 255.
 Chiniquy v. Catholic Bishop of Chicago (41 Ill. 148), 265.
 Chipdale v. Mason (4 Camp. 174), 999.
 Chippewa Lumber Co. v. Insurance Co. (80 Mich. 116), 1390.
 Chippus v. Yancy (1 Ill. (Breese) 19), 835.
 Chittenden v. Evans (48 Ill. 52), 1085, 1097, 1099, 1117, 1147.
 Choate v. Hathaway (73 Ill. 518), 1222.
 Christ v. Wray (76 Ill. 204), 968.
 Christman v. Peck (90 Ill. 150), 1295.
 Christmas v. Russell (5 Wall 303), 775.
 Christy v. Ogle (33 Ill. 296), 891, 896.
 Christy v. Stafford (123 Ill. 463), 549, 1127, 1255, 1276.
 Christy & Co. v. Illinois Cent. Ry. Co. (88 Ill. 394), 1007.
 Chudleigh v. Chicago, R. I. & P. Ry. Co. (51 Ill. App. 491), 42, 1182.
 Chumasero v. Gilbert (24 Ill. 293).
 Church v. Clark (21 Pick. (Mass.) 310), 459.
 Churchill v. Abraham (22 Ill. 456), 306.
 Churchill v. Alpena Judge (56 Mich. 536), 1138.
 Churchill v. Chicago & A. Ry. Co. (67 Ill. 390), 846.
 Churchward v. Steady (14 East. 249), 136.
 Chute v. State (19 Minn. 271), 1032.
 Clafin v. Dunne (129 Ill. 241), 1167, 1179.
 Clafin v. Godfrey (21 Pick. (Mass.) 1), 489.
 Clapp v. Martin (33 Ill. App. 438), 1132.
 Clapp v. Ranch (90 Ill. 468), 975.
 Clark v. Barber (44 Ill. 349), 1414, 1417, 1418, 1419.
 Clark v. Bartlett (44 Ill. 439), 1414.
 Clark v. Bond (29 Ind. 355), 1066.
 Clark v. Chicago B. & Q. Ry. (92 Ill. 43), 234.
 Clark v. Clough (62 N. H. 693), 969.
 Clark v. Cushing (52 Cal. 617), 293.
 Clark v. Day (93 Ill. 480), 256, 273.
 Clark v. Ewing (87 Ill. 344), 979.
 Clark v. Field (42 Mich. 342), 1026.
 Clark v. Foote (8 Johns. (N. Y.) 421), 693.
 Clark v. Ford (41 Ill. App. 199), 627, 789, 896.
 Clark v. Grant (2 Wend. (N. Y.) 254), 416.
 Clark v. Hatfield (88 Ill. 440), 1147.
 Clark v. Houghton (12 Gray (Mass.) 38), 1041.
 Clark v. Lewis (35 Ill. 417), 181.
 Clark v. Marfield (77 Ill. 258), 975, 1259.
 Clark v. Moore (3 Mich. 55), 88.
 Clark v. Pagetor (45 Ill. 185), 1107, 1147.
 Clark v. People (1 Ill. (Breese) 266), 340, 376.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Clark v. Roberts (1 Ill. (Breese) 222), 323.
 Clark v. Thompson (47 Ill. 25), 255.
 Clark v. Wabash Ry. Co. (52 Ill. App. 104), 1106.
 Clark v. Weiss (87 Ill. 438), 512.
 Clark v. Willis (16 Ill. 61), 1209.
 Clark & Bosquit v. Lauman (52 Ill. App. 637), 917.
 Clarkson v. E. & N. S. Dispatch (6 Ill. App. 284), 420.
 Classen v. Cuddigan (21 Ill. App. 591), 1141.
 Clause v. Bullock Printing Press Co. (25 Ill. App. 84), 245, 820, 892, 968, 1210, 1232.
 Clay v. Boyer (5 Gilm. (Ill.) 506), 146.
 Clayburg, Einstein & Co. v. Ford (3 Ill. App. 542), 307, 310.
 Claycomb v. Butler (36 Ill. 100), 1399.
 Claycomb v. McCoy (48 Ill. 110), 489.
 Claycomb v. Munger (51 Ill. 373), 846, 912.
 Claves v. Thayer (3 Hill (N. Y.) 564), 1019.
 Claves v. White (83 Ill. 540), 80, 91, 889, 1004, 1141.
 Clay F. & M. Ins. Co. v. Wusterhausen (75 Ill. 286), 903, 906, 1005.
 Clayton v. Heidelberg (17 Miss. 623), 1317.
 Cleary v. Cummings (28 Ill. App. 237), 1141.
 Cleaver v. Webster (73 Ill. 607), 975.
 Cleaves v. Herbert (61 Ill. 126), 175.
 Clement v. Brown (30 Ill. 43), 1075.
 Clement v. Bushway (25 Ill. 200), 1146.
 Clement v. McConnell (14 Ill. 154), 490, 1100.
 Clemson v. Krupper (1 Ill. (Breese) 210), 1207, 1280.
 Clemson & Waters v. State Bank of Ill. (1 Scam. (Ill.) 45), 768, 882, 1161, 1259.
 Cleveland v. Skinner (56 Ill. 500), 437.
 Cleveland C. C. & St. L. Ry. Co. v. Braddely (52 Ill. App. 94), 1085, 1104, 1109.
 Cleveland C. C. & St. L. Ry. Co. v. Monks (52 Ill. App. 627), 1122.
 Clevenger v. Dunaway (84 Ill. 367), 1070, 1443.
 Clews v. Bank (105 N. Y. 398), 995.
 Clifford v. Cochrane (10 Ill. App. 570), 203.
 Clifford v. Drake (14 Ill. App. 75, s. c. 110 Ill. 135), 1031, 1209.
 Clifford v. Luhring (69 Ill. 401), 1147.
 Clifford v. Town of Eagle (35 Ill. 444), 769.
 Clifford v. Waldrop (23 Ill. 336), 367.
 Clinton v. Strong (9 Johns (N. Y.) 370), 87.
 Cline v. Toledo St. L. & K. Ry. Co. (41 Ill. App. 516), 1216.
 Clinton v. Rowland (24 Barb. (N. Y.) 634), 1077.
 Clinton W. C. Co. v. Gardiner (99 Ill. 151), 461, 542.
 Cloves v. Williams (3 Bing. (N. C.) 868), 113.
 Clough v. Hoffman (5 Wend (N. Y.) 500), 513.
 Clough v. Kyne (51 Ill. App. 120), 1216.
 Clow v. Gilbert (54 Ill. App. 134), 182, 315.
 Clymore v. Williams (77 Ill. 618), 290, 308, 327.
 Coal Field Co. v. Peck (98 Ill. 139), 307, 1279.
 Coats v. Barrett (49 Ill. App. 275), 1160, 1166.
 Coates v. Cunningham (100 Ill. 463), 1254.
 Coates v. Mayor (7 Cow. (N. Y.) 546), 527.
 Coates v. Preston (105 Ill. 470), 57.
 Cobb v. Judge (43 Mich. 289), 1454, 1467.
 Cobb v. Knapp (71 Mich. 621), 55.
 Cobb v. Lavalley (89 Ill. 331), 254, 260, 271.
 Cobb v. People (84 Ill. 511), 6.
 Coburn v. Mellen (19 N. H. 198), 351.
 Cochran v. Ammon (16 Ill. 316), 134, 155, 1148.
 Cochrane v. Little (71 Ind. 323), 1488.
 Cochrane v. Tuttle (75 Ill. 260), 213.

[References are to pages, Vol. I., pp. 1-900; Vol. II., pp. 961-1496.]

- Coddington v. Hoblitt (49 Ill. App. 60), 868, 1070.
 Coduan v. Jenkins (14 Mass. 93), 81.
 Coffey v. Fosselman (72 Ill. 69), 971, 1194.
 Coffee v. United States (8 Wall. 516), 114.
 Coffin v. Vincent (12 Cash (Mass.) 98), 1031.
 Cofoid v. Bishop (11 Ill. App. 117), 1414.
 Cogshall v. Beasley (76 Ill. 445), 462, 1208.
 Cohn v. Brownstone (93 Cal. 362), 966.
 Cohen v. Smith (33 Ill. App. 344), 327, 1481, 1482.
 Cohens v. Virginia (6 Wheaton (U. S.) 409), 1232.
 Colburn v. Barton (14 Ill. App. 449), 185.
 Colby v. McGee (48 Ill. App. 294), 202, 205, 215, 217.
 Cole v. Atkinson (6 Ill. App. 353), 368.
 Cole v. Chapman (2 Scam. (Ill.) 34), 453.
 Cole v. Jessup (10 N. Y. 96), 1032.
 Cole v. Joliet Opera House Co. (79 Ill. 96), 867.
 Cole v. Muscatine (14 Iowa 396), 109.
 Cole v. Wells (49 Mich. 451), 250.
 Collar v. Patterson (137 Ill. 403), 1090.
 Collier v. Moulton (7 Johns. (N. Y.) 111), 644.
 Collins v. Blantern (2 Wills. 347), 830.
 Collins v. Claypole (1 Ill. (Breese) 212), 1148.
 Collins v. Gibbs (2 Burrow's Rep. 890), 512.
 Collins v. Hayte (50 Ill. 353), 214, 217, 218.
 Collins v. Hazelton (65 Mich. 22), 547.
 Collins v. Monteny (3 Ill. App. 182), 404.
 Collins v. People (98 Ill. 584), 1078.
 Collins v. Reilly (104 U. S. 324), 1121.
 Collins v. Robertson (2 Scam. (Ill.) 509), 789.
 Collins v. Waggoner (Breese 186), 153.
 Collins v. Waters (54 Ill. 485), 1096.
 Colt v. Root (17 Mass. 229), 512, 513, 516.
 Columbian Accident Co. v. Sandford (50 Ill. App. 424), 524.
 Columbia Bank v. Jacobs (10 Mich. 349), 291.
 Colwell v. Brower (75 Ill. 516), 994.
 Combs v. Steeles (80 Ill. 101), 978.
 Comiskey v. Breen (7. Ill. App. 369), 214, 215, 1001.
 Commercial Bank v. Chicago, St. P. & K. C. Ry. Co. (160 Ill. 401), 1200, 1202.
 Commercial Bank v. Hewes (17 Wend. (N. Y.) 94), 1022.
 Commercial Bank v. Low (19 Wend. (N. Y.) 98), 930.
 Commercial Ins. Co. v. Mehman (48 Ill. 313), 934.
 Commercial Ins. Co. v. Scammon (122 Ill. 601), 985.
 Commercial Ins. Co. v. Treasury Bank (61 Ill. 482), 1120, 1151.
 Commercial Nat. Bank v. Canniff (51 Ill. App. 579), 1005.
 Commercial Nat. Bank v. Canniff (151 Ill. 329), 1199, 1202.
 Commercial Nat. Bank v. Proctor (98 Ill. 558), 34.
 Commercial Nat. Bank of Peoria v. Newman (55 Ill. App. 534), 342.
 Commissioners v. Barry (66 Ill. 496), 920.
 Commissioners v. Duckett (20 Md. 468), 108.
 Commissioners v. Harper (38 Ill. 103), 366, 1240.
 Commissioners v. People (66 Ill. 339), 1295.
 Commissioners, etc. v. People (73 Ill. 203), 1301.
 Commissioners of Drainage District v. Griffin (134 Ill. 330), 365, 366.
 Commissioners of Highways v. Newly (31 Ill. App. 378), 1239.
 Commissioners of Highways v. People (13 Ill. App. 253), 1311.
 Commissioners of Highways v. People (19 Ill. App. 253), 1301, 1302, 1307.
 Commissioners of Highways v. Snyder (15 Ill. App. 645), 1295, 1302.
 Commissioners of Highways v. Village of Rockalls (3 Ill. App. 464), 1238.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496]

- Commissioners of Swan town-
ship v. People (31 Ill. 97), 1204,
1314.
- Commonwealth v. Breckenridge
(1 Serg. & R. (Pa.) 18), 1467.
- Commonwealth v. Burk (114 Mass.
261), 1032.
- Commonwealth v. Eastman (1
Cush. (Mass.) 189), 998.
- Commonwealth v. Ford (130 Mass.
64), 1031.
- Commonwealth v. Gibbs (4 Gray
(Mass.) 146), 1474.
- Commonwealth v. Ingrahan (7
Gray (Mass.) 146), 1065.
- Commonwealth v. Jeffries (7 Allen
(Mass.) 548), 1039.
- Commonwealth v. Jeffs (132 Mass.
6), 1031.
- Commonwealth v. Murray (11
Serg. & R. (Pa.) 73), 1324.
- Commonwealth v. Nichols (114
Mass. 285), 1018, 1019.
- Commonwealth v. Perkins (1 Pick.
(Mass.) 388), 468.
- Commonwealth v. Pratt (126 Mass.
462), 1020.
- Commonwealth v. Shattuck (4
Cush. (Mass.) 101), 1411.
- Commonwealth v. Shaw (4 Cush.
(Mass.) 594), 1019.
- Compher v. People (12 Ill. 290),
772, 910.
- Compton v. Payne (69 Ill. 354), 81.
- Comstock v. Hitt (40 Ill. 121), 1274.
- Comstock v. Judge of Wayne (30
Mich. 98), 1298.
- Comstock v. Purple (49 Ill. 160),
1078.
- Conant v. Griffin (48 Ill. 410), 839.
- Concordia Cemetery Ass'n v. Minn.
& N. W. Ry. Co. (121 Ill. 199),
1103.
- Condon v. Brockway (50 Ill. App.
625), 967.
- Cone v. Woodward (65 Ill. 447),
1421.
- Coney v. Pepperdine (48 Ill. App.
403), 1102.
- Confrey v. Stark (73 Ill. 187), 52,
157.
- Conklin v. Bush (8 Pa. St. 514),
122.
- Conkling v. Ridgely (112 Ill. 36),
1170.
- Conley v. Good (Breese 97) (135),
57.
- Conn v. Caldwell (1 Gilm. (Ill.)
531), 290, 323.
- Conn M. L. Ins. Co. v. Ellis (89 Ill.
516), 1146.
- Connah v. Hale (23 Wend. 462),
159.
- Connecticut M. L. Ins. Co. v. Ellis
(89 Ill. 516), 1037.
- Connecting Ry. Co. v. W. St. L.
Ry. Co. (123 Ill. 594), 451, 454.
- Conner v. Goodman (104 Ill. 365),
257.
- Conner v. People (20 Ill. 381), 1370,
1359, 1380.
- Conradi v. Evans (2 Scam. (Ill.)
185), 784.
- Consolidated etc. Co. v. Young (24
Ill. App. 255), 1152.
- Consolidated Coal Co. of St. Louis
v. Bruce (47 Ill. App. 444), 453.
- Consolidated Coal Co. v. Maehl
(130 Ill. 551), 1118, 1122.
- Consolidated Coal Co. v. Peers
(150 Ill. 344), 1071, 1200.
- Consolidated Coal Co. v. Schaffer
(135 Ill. 210), 1096, 1122, 1134.
- Consolidated Coal Co. v. Wom-
bacher (134 Ill. 57), 1069.
- Consolidated Tank Line Co. v. Col-
lier (148 Ill. 259), 326.
- Constantine v. Wells (83 Ill. 192),
982.
- Continental Life Ins. Co. v. Rog-
ers (119 Ill. 476), 510, 511,
1000.
- Conveney v. Tannehill (1 Hill (N.
Y.) 33), 1017.
- Converse v. Wead (142 Ill. 132),
1049.
- Convey v. Campbell (52 Ind. 157),
1475.
- Conwell v. Watkins (71 Ill. 488),
310, 1180.
- Conyne, Stone & Co. v. Jones (51
Ill. App. 17), 302.
- Cook v. Cook (104 Ill. 98), 1257.
- Cook v. Foster (2 Gilm. (Ill.) 252),
144.
- Cook v. Howard (13 Johns. (N. Y.)
91), 138.
- Cook v. Hunt (24 Ill. 535), 1063,
1065.
- Cook v. Knowles (38 Mich. 316),
1050.
- Cook v. Larson (47 Kans. 70), 965.
- Cook v. Norwood (106 Ill. 558), 775,
971, 1091.
- Cook v. Perry (43 Mich. 623), 502,
522.
- Cook v. Renwick (16 Ill. 371), 600.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Cook v. Schroeder (55 Ill. 530), 1397.
 Cook v. Scott (1 Gilm. (Ill.) 333), 451, 775, 1086, 1117.
 Cook v. Sinnamon (47 Ill. 214), 458.
 Cook v. Skelton (20 Ill. 107), 759.
 Cook v. Wool (24 Ill. 295), 11.
 Cook and Brownell v. Yarwood (41 Ill. 115), 816, 820.
 Cook Co. v. C., B. & Q. R. R. Co. (35 Ill. 460), 87.
 Cooke v. Preble (80 Ill. 381), 898.
 Cookson v. Toole (59 Ill. 515), 61.
 Coon v. People (99 Ill. 386), 1026.
 Coon v. Plymouth Ry. Co. (31 Mich. 178), 518.
 Cooper v. Buckingham (3 Scam. (Ill.) 546), 881.
 Cooper v. Chitty (Burr 3), 159.
 Cooper v. Corbin (105 Ill. 224), 857.
 Cooper v. Johnson (27 Ill. App. 504), 1141.
 Cooper v. L. S. & M. S. Ry. (66 Mich. 261), 235.
 Cooper v. Landon (102 Mass. 58), 508.
 Cooper v. McNeill & Higgins Co. (43 Ill. App. 350), 1167.
 Cooper v. Morris (48 N. J. L. 607), 1489.
 Cooper v. Randall (59 Ill. 317), 1056, 1057.
 Cooper v. Tiller (46 Ill. 462), 1176.
 Cooper v. Town of Delavin (61 Ill. 96), 85.
 Cooper and Mass v. Hamilton (52 Ill. 19), 1478.
 Corbett v. Schumaker (83 Ill. 403), 26.
 Corey v. McDaniel (42 Ill. 512), 1146.
 Corey v. Russell (3 Gilm. (Ill.) 366), 1209.
 Corgan v. Frew (39 Ill. 31), 1063.
 Cornelius v. Boucher (1 Ill. (Breese) 32), 1260.
 Cornelius v. Vandersdall (1 Ill. (Breese) 23), 865.
 Cornelius v. Wash (1 Ill. (Breese) 98), 1482, 1487.
 Cornell v. Bostwick (3 Palge (N. Y.) 160), 788.
 Cornell v. Williams (20 Wall. (U. S.) 249), 6.
 Corning v. Woodling (46 Mich. 44), 1073.
 Cornogg v. Abraham (1 Yeates (Pa.) 18), 907.
 Corwith v. Colter (82 Ill. 585), 1146.
 Cossitt v. Hobbs (56 Ill. 231), 1098, 1103.
 Cothran v. Ellis (125 Ill. 496), 1088.
 Cothron v. Ellis (107 Ill. 413), 1127.
 Cotterell v. Cuft (4 Taunt 285), 508.
 Cottingham v. Owens (71 Ill. 397), 33.
 Cottingham v. Springer (88 Ill. 90), 1069, 1378.
 Cotton v. Holiday (59 Ill. 176), 1098.
 Cotton v. Walkins (6 Wis. 603), 166.
 Couch v. Hall (15 Ill. 263), 107.
 Couch v. Ingersoll (2 Pick. (Mass.) 292), 508, 509, 510, 512.
 Coughlin v. People (144 Ill. 140), 1136.
 County Court of Calhoun County v. Buck (27 Ill. 440), 1098.
 County Court of Mad. Co. v. People (58 Ill. 456), 1310.
 County Court of McCoupin Co. v. People (58 Ill. 191), 1295.
 County of Cook v. Sennott (37 Ill. App. 268), 15.
 County of DuPage v. Comrs. of Highways (142 Ill. 607), 1071.
 County of Jackson v. Hall (53 Ill. 440), 89, 932.
 County of La Salle v. Milligan (143 Ill. 321), 427, 1126, 1221.
 County of Montgomery v. Robinson (185 Ill. 174), 971.
 County of Platt v. Goodell (97 Ill. 84), 257, 1103.
 County of Pike v. People (11 Ill. 202), 1304, 1305, 1306, 1313.
 County of Rock Island v. State Bank (31 Ill. 543), 56, 805.
 County of Rock Island v. Steele (31 Ill. 543), 56, 805.
 County of Vermillion v. Knight (1 Scam. (Ill.) 97), 687.
 County of St. Clair v. People (85 Ill. 396), 1296.
 Courier v. Ford (26 Ill. 488), 308.
 Coursen v. Browning (86 Ill. 57), 870.
 Coursen v. Ely (37 Ill. 338), 1107.
 Coursen v. Hickson (78 Ill. 339), 414, 982, 1179, 1364, 1378.
 Courson v. Browning (78 Ill. 208), 19.
 Courtney v. Carr (6 Ia. 238), 291.
 Courtney v. Hogan (93 Ill. 101), 1048.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Courtwright v. Attorney General (43 Mich. 411), 619.
 Covell v. Banks (1 Scam. (Ill.) 525), 968.
 Covell v. Marks (1 Scam. (Ill.) 391), 462, 979.
 Covenant, etc. v. Spies (114 Ill. 463), 1009.
 Cover v. Armstrong (66 Ill. 267), 776.
 Coverdale v. Curry (48 Ill. App. 213), 1413.
 Covert v. Morrison (49 Mich. 133), 268.
 Covert v. Nolan (10 Ill. App. 629), 1097, 1099.
 Cowan v. Clark (35 Ill. 416), 1139, 1142.
 Cowles v. Litchfield (2 Scam. (Ill.) 356), 775.
 Cox v. Brackett (41 Ill. 222), 131, 671, 884, 982.
 Cox v. City of Tuscola (2 Ill. App. 628), 1270.
 Cox v. Cunningham (77 Ill. 545), 1416, 1418.
 Cox v. Jordan (86 Ill. 560), 462, 890, 892, 1443.
 Cox v. McLean (3 Ill. App. 45), 213.
 Cox v. Milner (23 Ill. 476), 310.
 Cox v. People (109 Ill. 457), 1223.
 Cox v. Reed (27 Ill. 434), 1365.
 Cox v. Streisser (62 Ill. 383), 481, 1087.
 Cox v. Sullivan (7 Ga. 144), 1487, 1488.
 Coykendall v. Grade & Strotz (46 Ill. App. 270), 1107.
 Cozzens v. Higgins (1 Abb. Dec. 45), 1042.
 Crabtree v. Fuquay (49 Ill. 520), 1146.
 Crabtree v. Green (36 Ill. 279), 979.
 Crabtree v. Hagenbaugh (25 Ill. 233), 86, 1063, 1064.
 Crabtree v. Kile (21 Ill. 180), 1064.
 Crabtree v. Welles (19 Ill. 55), 889.
 Craig v. Marine (16 Ill. App. 214), 1438.
 Craig v. Miller (133 Ill. 300), 1090, 1099, 1101.
 Craig v. Rohrer (63 Ill. 325), 1058.
 Craig v. Ward (9 Johns (N. Y.) 201), 87.
 Crain v. Gould (46 Ill. 294), 349.
 Crane v. Graseman (27 Mich. 443), 505.
 Crane v. Litchfield (2 Mich. 340), 1020.
 Crane v. Nelson (37 Ill. App. 597), 1227.
 Crate v. Kohlsaat (44 Ill. App. 460), 213, 216, 885, 890.
 Crawford v. Chicago, etc. Ry. Co. (112 Ill. 314), 1072.
 Crayne v. Wells (26 Ill. App. 574), 300.
 Creach v. Taylor (2 Scam. (Ill.) 248), 1089.
 Creager v. Blank (32 Ill. App. 615), 995.
 Creel v. Kirkham (47 Ill. 344), 83, 156, 1437.
 Creighton v. Village of Hyde Park (6 Ill. App. 272), 36.
 Creote v. Willey (83 Ill. 444), 1145.
 Crippen v. People (8 Mich. 117), 1160.
 Crisman v. Matthews (1 Scam. (Ill.) 148), 315.
 Cristman v. Cristman (36 Ill. App. 567), 205.
 Cristman v. Peck (90 Ill. 150), 1311.
 Crittenden v. French (21 Ill. 598), 452, 510.
 Crittenden v. Rogers (8 Gray (Mass.) 452), 1032.
 Crocker v. Bank (24 Me. 185), 291.
 Crocker v. Bragg (10 Wend. (N. Y.) 260), 728.
 Crockett v. Gilbert (9 Cush. (Mass.) 13), 771.
 Croff v. Ballinger (18 Ill. 200), 1412, 1427.
 Croke, Charles (553 1 Chitty's Pl., 64, 60), 49.
 Cromie v. Van Nortwick (56 Ill. 353), 1204.
 Cromine v. Tharp, Admr. (42 Ill. 120), 1259.
 Crons v. People (131 Ill. 56), 1146.
 Cronsillat v. McCall (5 Bin (Pa.) 433), 122.
 Crook v. People (106 Ill. 237), 1332.
 Crooke v. Skinner (44 Ill. 310), 108.
 Crosby v. Berger (11 Paige (N. Y.) 377), (s. c. 42 Am. Dec. 117, s. c. 4 Edw. (N. Y.) 252), 1471, 1473.
 Crosby v. Kiest (135 Ill. 458), 974.
 Crossman v. Railroad Co. (127 N. Y. 34), 141.
 Crossman v. Wohlleben (90 Ill. 537), 1177.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Croswell v. Byrens (9 Johns (N. Y.) 287), 1250.
 Crotty v. Morrissey (40 Ill. 477), 873.
 Crow v. Mark (52 Ill. 332), 104, 123.
 Crotty v. Wyatt (3 Ill. App. 388), 16, 1113, 1114.
 Crowell v. Maughs (2 Gilm. (Ill.) 419), 934.
 Crowley v. Crowley (80 Ill. 469), 1076.
 Crowner v. Crowner (44 Mich. 183), 1016.
 Crownover v. Bamburg (2 Ill. App. 162), 338.
 Crozier v. Cooper (14 Ill. 139), 1141.
 Cruickshank v. Brown (5 Gilm. (Ill.) 75), 111, 462, 479, 483.
 Cruickshank v. Comyns (24 Ill. 602), 468.
 Culbertson v. Chicago (111 Ill. 651), 1067.
 Culliner v. Nash (76 Ill. 515), 1208, 1216.
 Culver v. Barney (14 Wend. (N. Y.) 161), 929.
 Culver v. Colehour (115 Ill. 558), 967.
 Culver v. Hide and Leather Bank (78 Ill. 625), 820.
 Culver v. Johnson (83 Ill. 191), 878.
 Culver v. Johnson (90 Ill. 91), 832.
 Culver v. Phelps (130 Ill. 217), 413, 426.
 Culver v. Rumsey (7 Ill. App. 422), 151, 311.
 Culver v. Third Nat. Bank of Chicago (64 Ill. 528), 785, 1034.
 Culver v. Uthe (7 Ill. App. 468), 901, 902.
 Cummer v. Kent Circuit Judge (38 Mich. 351), 1047.
 Cumming v. Hackley (8 Johns. (N. Y.) 202), 488.
 Cumming v. Wilcox (47 Mich. 501), 793.
 Cummings v. Crawford (88 Ill. 312), 1138.
 Cummings v. Gassett (19 Vt. 308), 106.
 Cummings v. People (50 Ill. 132), 54, 56, 423, 457, 807, 1004.
 Cummins v. Holmes (107 Ill. 552), 1198.
 Cummins v. Holmes (109 Ill. 15), 175.
 Cummins v. Holmes (11 Ill. App. 158), 1170.
 Cumins v. Leighton (9 Ill. App. 186), 1109.
 Cunnea v. Williams (11 Ill. App. 72), 455, 901.
 Cunningham v. Craig (53 Ill. 252), 1222, 1397, 1400.
 Cunningham v. Wright (27 Ill. App. 334), 894.
 Currier v. Ford (26 Ill. 488), 324.
 Currier Imp. etc., v. Ford (26 Ill. 488), 176.
 Curry v. People Use, etc., (54 Ill. 263), 452, 510.
 Curtin v. Long (62 Ill. App. 36), 1211.
 Curtis v. Harrison (36 Ill. App. 287), 883.
 Curtis v. Sage (35 Ill. 22), 603, 1107.
 Curtis v. Seymour (1 Wend. (N. Y.) 106), 710.
 Cushing v. Dill (2 Scam. 461), 112.
 Cushman v. Hayes (46 Ill. 145), 775.
 Cushman v. Rice (1 Scam. (Ill.) 565), 367, 370.
 Cushman v. Savage (20 Ill. 330), 784.
 Cusick v. Campbell (68 Ill. 508), 1100.
 Custer v. Agnew (63 Ill. 194), 1483.
 Cutter v. Cambridge (6 Allen (Mass.) 20), 261.
 Cutting v. Weigh (20 N. Y. 120), 1489.

D.

- Dacy v. People (116 Ill. 555), 970.
 Daegling v. Schwartz (80 Ill. 320), 84.
 Daggy v. Cronnelly (20 Ind. 474), 1392.
 Daggett v. Gage (41 Ill. 465), 1048.
 Daggett v. Mensch (41 Ill. App. 403), 614, 1428.
 Daggett v. Mensch (141 Ill. 395), 614, 772, 840.
 Daggett v. Ream (5 Ill. App. 174), 1109.
 Dailey v. Phillips (52 Ill. App. 444), 1192.
 Dalby v. Campbell (26 Ill. App. 502), 196, 520.
 Dally v. Young (3 Ill. App. 39), 1167.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Dalson v. Bradberry (50 Ill. 82), 523.
 Dalton v. Clough (50 Ill. 47), 1146, 1148.
 Daly v. St. Patrick Catholic Church (6 Ill. App. 458), 15.
 Damron v. Sweetser (16 Ill. App. 339), 306, 807.
 Dana v. Adams (13 Ill. 691), 763.
 Dana v. Bryant (1 Gilm. (Ill.) 104), 796, 824, 867, 880.
 Danforth v. Danforth (111 Ill. 236), 804, 918.
 Daniels v. Aldrich (42 Mich. 458), 1054.
 Daniels v. Fifth Nat. Bank of Chicago (4 Scam. (Ill.) 54), 979.
 Daniels v. Osborne (71 Ill. 169), 404.
 Daniels v. Osborn (75 Ill. 615), 94.
 Daniels v. Shields (38 Ill. 197), 1209.
 Daniels v. Smith (15 Ill. App. 339), 83.
 Darley v. Regina (12 Clark & Fin. 520), 1322, 1323.
 Darlington v. Chamberlin (120 Ill. 585), 1276.
 Darlington v. Fredenhagen (18 Ill. App. 273), 479.
 Darmstaedter v. Armour (17 Ill. App. 285), 367, 370.
 Darst v. Bates (95 Ill. 493), 863.
 Dart v. Hercules (34 Ill. 395), 767, 768.
 Dartelott v. Internat. Bank (119 Ill. 259), 1091.
 Dartnell v. Howard (6 Dow. & R. 442), 520.
 Darwin v. Jones, Admr. (82 Ill. 107), 1194, 1227.
 Daube v. Tennison (54 Ill. App. 290), 1220, 1253.
 Davenport v. Springer (63 Ill. 278), 1085.
 David v. Bradley (79 Ill. 316), 197, 1216.
 Davidson v. Johnson (31 Ill. 523), 462, 1003.
 Davidson v. Otis (24 Mich. 123), 1240.
 Davidson v. Waldron (31 Ill. 120), 162.
 Davie v. Wisher (72 Ill. 262), 213, 216.
 Davies v. Kentucky Horse Breeders' Ass'n. (50 Ill. App. 81), 887.
 Davis v. Burton (3 Scam. (Ill.) 41), 115, 835.
 Davis v. Byrd (94 Ind. 525), 1011.
 Davis v. Easley (13 Ill. 192), 173.
 Davis v. Filer (40 Mich. 316), 104.
 Davis v. Forshee (34 Ill. 107), 1391.
 Davis v. Freeman (10 Mich. 188), 789.
 Davis v. Goodenough (27 Vt. 717), 100.
 Davis v. Hamilton (53 Ill. App. 94), 415, 1160.
 Davis v. Hoepner (44 Ill. 406), 1030, 1086.
 Davis v. Judd (6 Wis. 85), 117, 118.
 Davis v. Mann (43 Ill. App. 301), 1141.
 Davis v. Randall (26 Ill. 243), 267, 369.
 Davis v. Ransom (26 Ill. 100), 907, 1207.
 Davis v. Scarritt (17 Ill. 202), 874.
 Davis v. Schumaker (1 Rawle (Pa.) 135), 602.
 Davis v. Shapleigh (19 Ill. 386), 314.
 Davis v. State (35 Ind. 496), 1055.
 Davis v. Taylor (41 Ill. 405), 72, 163.
 Davis v. Wiley (3 Scam. (Ill.) 234), 627, 773.
 Davis v. Wilson (65 Ill. 525), 414, 1103.
 Dawson v. Cuning (50 Ill. App. 286), 379.
 Dawson v. Robbins (5 Gilm. (Ill.) 72), 1146.
 Day v. City of Clinton (5 Ill. App. 605), 1219.
 Day v. Porter (161 Ill. 235), 1026.
 Dayton v. Frye (29 Ill. 525), 852.
 Deam v. Lowy (44 Ill. App. 302), 1204.
 Dean v. Comstock (32 Ill. 173), 144.
 Dean v. Gecman (44 Ill. 286), 869.
 Dean v. Walker (107 Ill. 540), 84.
 Dearborn Laundry Co. v. Chicago & A. Ry. Co. (55 Ill. App. 438), 378, 1170.
 DeArms Case (10 Martin (Ia.) 123), 1464.
 Dearlove v. Herrington (70 Ill. 251), 144.
 Debois v. D., H. & C. Co. (12 Wend. (N. Y.) 33), 789.

[References are to pages, Vol. I., pp. 1-900; Vol. II., pp. 961-1496.]

- Decatur Bank v. St. Louis Bank 21 Wall 299), 492.
 Decker v. Dryant (7 Barb. (N. Y.) 182), 1077.
 DeClercq. v. Mungin (46 Ill. 112), 83, 156, 1107.
 Dedmeyer v. McGonegal (32 Mich. 131), 604.
 Deer v. Commissioners of Highways (109 Ill. 379), 365, 373.
 Deere v. Lewis (51 Ill. 254), 588, 1148.
 Deforest v. Frary (6 Cow. (N. Y.) 151), 576.
 DeForrest v. Oder (42 Ill. 500), 889.
 Degan v. Singer (41 Ill. 28), 833, 834.
 Dehler v. Held (50 Ill. 491), 849, 870.
 Dehmer v. Helmbacher Forge & Rolling Mills (7 Ill. App. 47), 339.
 Deitrick v. Highway Comrs. (6 Ill. App. 70), 1240.
 De Kentland v. Somers (2 Root (Conn.) 437), 468.
 Delahay v. Clement (2 Scam. (Ill.) 575), 784.
 Delahy v. McConnell (4 Scam. (Ill.) 156), 1135.
 DeLand v. Dixon Nat. Bank (111 Ill. 323), 1033, 1084.
 Delano v. Curtis (7 Allen (Mass.) 470), 168.
 De Leuw v. Carrigan (19 Ill. App. 193), 395, 1222.
 Delfosse v. Thomas (54 Ill. App. 635), 1277.
 Dement v. Rokker (126 Ill. 174), 33, 35, 1293, 1308, 1310, 1315.
 Demesmey v. Gravelin (56 Ill. 94), 91.
 Demme & Dierkes Furn. Co. v. McCable (49 Ill. App. 453), 1109.
 Demoss v. Hannaman (46 Ill. 185), 511.
 Den v. Craig (3 Green 191), 249.
 Denby v. Graff (10 Ill. App. 195), 908.
 Dencer v. Parsons (8 Ill. App. 625), 1109.
 Dengay v. Gardner (4 Mees & W. 6), 224.
 Deniston v. Hoagland (66 Ill. 265), 99.
 Denman v. Bayliss (22 Ill. 300), 1394, 1396.
 Denn v. Perkins (1 Hals. (N. J.) 415), 1396.
 Dennis v. Maynard (15 Ill. 477), 1440.
 Dennis v. Piper (21 Ill. App. 169), 846.
 Dennison v. Blumenthal (37 Ill. App. 385), 348.
 Dennison v. Richardson (14 East 356), 459.
 Dennison v. Taylor (142 Ill. 45), 348.
 Dent v. Davison (52 Ill. 109), 1218.
 Dental Examiners v. People (123 Ill. 227), 1296.
 Denver v. White River Boom Co. (51 Mich. 472), 49.
 Derby v. Gage (38 Ill. 23), 82.
 Dermott v. Jones (2 Wall 9), 81.
 DeRouffigny v. Peale (3 Taunt (Eng.) 484), 1489.
 Derry v. Lloyd (1 Chitt. Rep. 724), 790.
 Deshler v. Beers (32 Ill. 368), 1104, 1106.
 Detroit v. Jackson (1 Doug. (Mich.) 106), 1386.
 Detroit v. Whittemore (27 Mich. 281), 1491.
 Devanbaugh v. Nifer (3 Ind. App. 379), 973.
 Develing v. Sheldon (83 Ill. 390), 154, 221.
 Dwelling House Ins. Co. v. Butterfly (133 Ill. 534), 1068.
 Devine v. Edwards (100 Ill. 473), 1276.
 Devine v. Edwards (101 Ill. 138), 91, 94.
 Devine v. People (100 Ill. 290), 1224.
 Dewdney v. Palmer (4 Mees & Wels. 664), 1022.
 Dewey v. Alpena School District (43 Mich. 480), 88.
 Dewey v. Campau (4 Mich. 565), 1036.
 Dewey v. Humphrey (5 Pick. (Mass.) 187), 1154.
 Dewitt v. Baldwin (1 Root (Conn.) 138), 351.
 DeWitt v. Bradbury (94 Ill. 446), 259.
 Dewitt v. Prescott (51 Mich. 298), 1046.
 DeWolf v. Harris (4 Mason 512), 49.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- DeWolf v. McGinnis (106 Ill. 553), 784.
 DeWolf v. Strader (26 Ill. 225), 1478.
 Diamond Match Co. v. Powers (51 Mich. 145), 1315.
 Dibble v. Kampshall (2 Hill (N. Y.) 124), 791.
 Diblee v. Davison (25 Ill. 486), 799.
 Dick v. Eddings (42 Ill. App. (488), 481, 483.
 Dick v. Moore (85 Ill. 66), 425.
 Dickason v. Dawson (85 Ill. 53), 1416, 1420.
 Dickerson v. Hendryx (88 Ill. 66), 754, 846, 858, 1259.
 Dickerson v. Merriman (100 Ill. 342), 94.
 Dickey v. Town of Bruce (21 Ill. App. 445), 1219.
 Dickhut v. Durrell (11 Ill. 72), 10, 786, 1074, 1134.
 Dickinson v. Boyle (17 Mass. 78), 520.
 Dickinson v. Breeden (25 Ill. 186), 1042.
 Dickinson v. Dustin (21 Mich. 561), 1465.
 Dickinson v. Garland (49 Ill. App. 578), 842.
 Dickinson v. Railroad (7 W. Va. 390), 1391.
 Dickinson v. Whitney (4 Gilm. 407), 156.
 Dickson v. Kewanee Electric Light and Motor Co. (53 Ill. App. 379), 1034.
 Dickson v. Nichols (39 Ill. 272), 1010.
 Diefendorf v. Gage (7 Barb. (N. Y.) 18), 898.
 Diehl v. Evans (1 Serg. & R. (Pa.) 367), 1116.
 Dieter v. Smith (70 Ill. 168), 349, 1125.
 Dietrich v. Mitchell (43 Ill. 40), 837.
 Dietrich v. Rumsey (40 Ill. 50), 383.
 Dietrich v. Waldron (90 Ill. 115), 1074.
 Dignan v. Gilbert (43 Ill. App. 536), 1134.
 Dikeman v. Arnold (83 Mich. 218), 1470.
 Dillingham v. Russell (73 Tex. 47), 1078.
 Dillon v. State (6 Tex. 55), 1463.
 Dimick, Admr. v. Chicago & N. W. Ry. Co. (80 Ill. 338), 1125, 1204.
 Dimick v. Downs (82 Ill. 570), 1052, 1055, 1061, 1062, 1065.
 Dinot v. Phirshing (86 Ill. 83), 928.
 Dinot v. Reilly (2 Ill. App. 316), 26.
 Diogt v. Tanner (20 Wend. (N. Y.) 190), 1114.
 Disbrow v. Chicago & N. W. Ry. Co. (70 Ill. 246), 1000.
 Dishon v. Schorr (19 Ill. 59), 1035.
 Ditch v. Edwards (1 Scam. (Ill.) 127), 425, 979.
 Ditch v. People (31 Ill. App. 368), 759, 787.
 Ditch v. Sennott (116 Ill. 289), 1259.
 Ditch v. Trustees (8 Ill. App. 294), 1164.
 Diversy v. Moor (22 Ill. 331), 106.
 Dixon v. Donney (49 Iowa 166), 54.
 Dixon v. Haley (16 Ill. 145), 1415.
 Dixon v. Niccolls (39 Ill. 372), 1437.
 Doan v. Sibbit (61 Ill. 485), 367.
 Doane v. Lockwood (115 Ill. 490), 1088.
 Dobbins v. Cruger (106 Ill. 383), 1197.
 Dobbins v. First Nat. Bank (112 Ill. 553), 1180.
 Dobler v. Fisher (14 Serg. & R. (Pa.) 179), 489.
 Dobbins v. Higgins (78 Ill. 442), 968.
 Dobbins v. Wilson (107 Ill. 17), 313.
 Dock v. Day (3 Wend. (N. Y.) 357), 506.
 Dodd v. Doty (98 Ill. 393), 1004.
 Dodge v. Deal (28 Ill. 303), 971.
 Dodson v. Sears (25 Ill. 513), 1033.
 Doe v. Straddling (2 Stark. (Eng.) 187), 260.
 Doe v. Thompson (5 Cow. (N. Y.) 371), 261.
 Dole v. Clowe (21 Ill. App. 477), 454.
 Dole v. Hayden (1 Greenl. (Me.) 152), 87.
 Dole v. Kennedy (38 Ill. 281), 176.
 Dolin v. McQuade (61 Mich. 275), 669.
 Dolittle v. Chicago & Galena R. R. Co. (14 Ill. 381), 365.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Dolton v. Erb (53 Ill. 289), 259.
 Dolz v. Morris (10 Hun. N. Y.) 201, 1055.
 Donahue v. County of Will (100 Ill. 94), 365, 374.
 Donald v. Wagner (5 Mo. App. 56), 1474.
 Donald v. Wilson (79 Mich. 181), 1481.
 Donk Bros. & Co. v. Alexander (117 Ill. 330), 328.
 Donlan v. Daegling (80 Ill. 608), 1048.
 Donoghue v. Gardner (24 Ill. 565), 905.
 Donohue v. Indiana, etc., Ry. Co. (87 Mich. 13), 1116.
 Doran v. Gillespie (54 Ill. 366), 1414, 1420, 1422, 1423.
 Doran v. Miller (78 Ill. 34), 1059.
 Doremus v. Clarke (51 Ill. App. 435), 1146.
 Dormady v. State Bank (2 Scam. (Ill.) 236), 1044, 1089.
 Dorrdor v. Dudderar (88 Ill. 107), 173.
 Dorr v. Munsell (13 Johns (N. Y.) 430), 600, 836.
 Dorsey v. Corn (2 Ill. App. 533), 1494.
 Doth v. Smith (41 Ill. 314), 1103.
 Dotson v. State (6 Cald. (Tenn.) 545), 1411.
 Doty v. Burdick (83 Ill. 473), 1412, 1425.
 Doty v. Dexter (61 Mich. 348), 1480.
 Dougan v. Miller (8 Vroom. (N. J.) 182), 416.
 Dougherty v. People (118 Ill. 160), 1224.
 Dougherty v. Catlett (129 Ill. 431), 1000.
 Douglas v. Circuit Judge (42 Mich. 295), 604.
 Douglas v. Davis (2 McCord (S. C.) 218), 505.
 Douglas v. Gausman (68 Ill. 170), 226, 1143.
 Douglas v. Hill (29 Kans. 527), 1079.
 Douglas v. Maston (35 Ill. App. 538), 1260.
 Douglas v. Newman (5 Ill. App. 518), 916.
 Douglas v. Saterly (11 Johns. (N. Y.) 16), 54, 778.
 Douglas v. Soutter (52 Ill. 155), 1250.
 Douglass v. Suggs (36 Ill. App. 553), 1217.
 Douglass v. Tousey (2 Wend. (N. Y.) 352), 1117.
 Dourk v. Riggs (38 Ill. 320), 841.
 Dow v. Rattle (12 Ill. 373), 1167.
 Dowden v. Wilson (71 Ill. 485), 1042.
 Dowling v. Stewart (3 Scam. (Ill.) 193), 85, 1281.
 Downing v. Wright (51 Ill. 363), 1146.
 Dowty v. Holtz (85 Ill. 525), 1280, 1492.
 Doxey v. Miller (2 Ill. App. 30), 88.
 Doyle v. Douglas Machinery Co. (73 Ill. 273), 1003.
 Doyle v. Jessup (29 Ill. 400), 223.
 Doyle v. United States (11 Biss. (U. S.) 106), 1116.
 Doyle v. Wilkinson (120 Ill. 430), 1202.
 Draft v. Drew (14 Ill. App. 266), 1116.
 Drainage Comrs. v. Hudson (109 Ill. 659), 1222, 1263.
 Drake v. Drake (83 Ill. 526), 407, 798, 800, 801, 814, 815.
 Drake v. Perry (58 Ill. 122), 857.
 Draper v. Draper (59 Ill. 119), 415.
 Draper v. Draper (68 Ill. 17), 1016.
 Draper v. Hatfield (124 Mass. 53), 1046.
 Drawner v. Lomax (23 Ill. 496), 912.
 Drennan v. Bunn (124 Ill. 175), 94, 96, 108.
 Dressel v. Lonsdale (46 Ill. App. 454), 1143.
 Dressor v. McCord (96 Ill. 389), 339.
 Drew v. Beall (62 Ill. 164), 1210.
 Driggers v. Bell (94 Ill. 223), 1002, 1071.
 Driver v. Ford (90 Ill. 595), 1003.
 Driving Park v. West (35 Ill. App. 496), 986.
 Drovers' Nat. Bank v. O'Hara (119 Ill. 646), 93.
 Drummond v. Rondle (114 Ill. 412), 919.
 Drury v. Holden (121 Ill. 30), 1050.
 Dubois v. Glaub (52 Pa. St. 338), 49.
 Duchess Cotton Mfg. Co. v. Davis (14 Johns. (N. Y.) 238), 556.

[References are to pages, Vol. I., pp. 1-900; Vol. II., pp. 961-1496.]

- Ducker v. Wear & Boogher D. S. Co. (145 Ill. 653), 326.
 Ducommun v. Hysinger (14 Ill. 249), 618.
 Dudding v. Hill (15 Ill. 61), 102, 103.
 Dudley v. Lee (39 Ill. 339), 1417, 1427.
 Dueber Watch Case Co. v. Young (54 Ill. App. 383), 1107.
 Duffield v. Cross 13 Ill. 699), 1146, 1207.
 Duffin v. People (107 Ill. 133), 1036.
 Dugan v. Mahoney (11 Allen (Mass.) 573), 1031.
 Dugger v. Oglesby (99 Ill. 405), 1042.
 Dukes v. Gostling (3 Dowl. 619), 505.
 Dukes v. Rowley (20 Ill. 21), 1165.
 Duke of Norfolk v. Worthy (1 Campb. 337), 31.
 Dulaney v. Payne (101 Ill. 325), 80.
 Duncan v. Fletcher (1 Ill. (Breese) 323), 1400.
 Duncan v. Niles (32 Ill. 532), 85.
 Duncan v. Seeley (34 Mich. 369), 1032.
 Dundee Mortgage, etc., Co. v. Hughes (10 Sawyer (U. S.) 144), 1491.
 Dunderdale v. Westinghouse Electric Co. (51 Ill. App. 408), 343.
 Dunham v. City of Chicago (55 Ill. 357), 1253, 1260.
 Dunham v. Converse (28 Wis. 306), 160.
 Dunham v. Pratt (14 Johns. (N. Y.) 372), 631.
 Dunham v. South Park Comrs. (87 Ill. 185), 768, 919, 1254.
 Dunham v. Williams (36 Barb. (N. Y.) 136), 250.
 Dunham T. & W. Co. v. Dandelin (143 Ill. 409), 1103, 1261.
 Dunlap v. Buckingham (16 Ill. 109), 112.
 Dunlap v. Chicago, M. & St. P. Ry. Co. (151 Ill. 409), 785, 912.
 Dunlap v. Clark (25 Ill. App. 573), 1098.
 Dunlap v. Gregory (14 Ill. App. 601), 982.
 Dunlap v. Turner (64 Ill. 47), 799.
 Dunn v. Moore (16 Ill. 151), 87.
 Dunning v. Bank of Auburn (19 Wend. (N. Y.) 23), 954.
 Dunning v. Bird (24 Ill. App. 270), 140.
 Dunning v. Dunning (37 Ill. 306), 409.
 Dunning v. Fitch (66 Ill. 51), 138, 1147.
 Dunning v. South (62 Ill. 176), 174.
 Dunstedter v. Dunstedter (77 Ill. 580), 1413.
 Dunsworth v. Wood Machine Co. (29 Ill. App. 23), 789.
 Dupee v. Blake (148 Ill. 453), 911.
 Dupine v. McCausland (1 Ill. App. 395), 614.
 Durham v. Brown (24 Ill. 93), 1170, 1172.
 Durham v. Goodwin (54 Ill. App. 469), 149, 1100, 1109.
 Durand v. Grey (129 Ill. 9), 106.
 Durfree v. Grinnell (69 Ill. 371), 33.
 Durham v. Tucker (40 Ill. 519), 868.
 Dutcher v. Crowell (5 Gilm. (Ill.) 445), 330.
 Dye, Adm'x v. Noel, Ex'rs (85 Ill. 290), 367, 368.
 Dydacker v. Brosse (51 Ill. 357), 190.
 Dyer v. Flint (21 Ill. 80), 295, 299.
 Dyer v. Last (51 Ill. 179), 592.
 Dyer v. Rich (1 Metc. (Mass.) 180), 516.
 Dygert v. Gros (9 Barb. (N. Y.) 406), 107.
 Dyk v. De Young (133 Ill. 82), 1141.
 Dykes v. Wyman (67 Mich. 236), 1039, 1075.
 Dyre v. People (84 Ill. 624), 1141.

E.

- Eachus v. Trustees of I. & M. Canal (17 Ill. 535), 466, 467, 728.
 Eads v. Pitkin (3 Iowa 377), 114.
 Eagan v. Connelly (107 Ill. 458), 1038.
 Eagle Packet Co. v. Defries (94 Ill. 598), 229, 1097.
 Eakin v. Eakin (63 Ill. 160), 174.
 Eames v. Hennessy (22 Ill. 629), 318, 971.
 Eames v. Preston (20 Ill. 389), 156.
 Eames v. Rend (105 Ill. 506), 1098.
 Earl of Falmouth v. Thomas (1 Crompt. & M. 89), 545.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Earl v. Van Alstine (8 Barb. 630), 66.
 Earlville v. Carter (2 Ill. App. 34), 231.
 Eason v. Chapman (21 Ill. 33), 1064.
 East v. Cain (49 Mich. 474), 660, 811.
 East v. Crow (70 Ill. 91), 890, 1005, 1006.
 Easton v. Mitchell (21 Ill. App. 189), 101.
 East Saginaw, etc., Ry. v. Bohn (27 Mich. 503), 235.
 East St. Louis Conn. Ry. Co. v. Allen (54 Ill. App. 32), 850, 1107.
 East St. Louis Conn. Ry. Co. v. Enright (152 Ill. 246), 936, 1106.
 East St. Louis Con. Ry. Co. v. Gehring (54 Ill. App. 35), 1124.
 East St. Louis Con. Ry. Co. v. Jenks (54 Ill. App. 91), 227.
 East St. Louis Con. Ry. Co. v. O'Hara (150 Ill. 580), 231, 1080.
 East St. Louis Con. Ry. Co. v. O'Hara (49 Ill. App. 482), 229, 1124, 1146.
 East St. Louis El. Ry. Co. v. Cauley (148 Ill. 490), 1073, 1209.
 East St. Louis El. Ry. Co. v. Cauley (49 Ill. App. 310), 1149, 1207, 1221, 1260.
 East St. Louis El. Ry. Co. v. Stout (150 Ill. 9), 1074, 1149.
 East St. Louis El. Ry. Co. v. Stout (47 Ill. App. 546), 1273.
 East St. Louis Conn. Ry. Co. v. Shannon (52 Ill. App. 420), 524, 1106.
 East St. Louis Ice and Cold Storage Co. v. Crow (52 Ill. App. 573), 234.
 East St. Louis P. & P. Co. v. Hightower (92 Ill. 139), 235, 1098.
 Eastman v. Anthony (93 Ill. 599), 835.
 Eastman v. Armstrong (26 Ill. 216), 1390.
 Eastman v. People (93 Ill. 112), 1074.
 Eaton v. Fullett (11 Ill. 491), 424.
 Eaton v. Hill (50 N. H. 235), 72, 73.
 Eaton v. Larkins (5 Car. & P. 285), 1485.
 Eaton v. Strong (7 Mass. 321), 1133.
 Eberhart v. Page (89 Ill. 550), 876, 882.
 Ebersole v. First Nat. Bank of Morrison (36 Ill. App. 267), 773.
 Eckles v. Wolf (55 Ill. App. 310), 393, 1212.
 Economy Furniture Co. v. Chapman (54 Ill. App. 122), 161.
 Edbrooke v. Cooper (79 Ill. 582), 777, 778.
 Edins v. Williams (36 Ill. 252), 392, 824.
 Eddie v. Eddie (67 Ill. 98), 892.
 Eddy v. Brady (16 Ill. 306), 296, 909.
 Eddy v. Gage (147 Ill. 162), 254, 259, 270, 1090.
 Eddy v. Roberts (17 Ill. 505), 55.
 Edgerton v. Brackett (11 N. H. 218), 104.
 Edgerton v. Weaver (105 Ill. 43), 1004.
 Edgmon v. Ashelby (76 Ill. 161), 1146.
 Edmanson v. Andrews & Co. (35 Ill. App. 223), 1026.
 Edwards v. Evans (61 Ill. 492), 1163.
 Edwards v. Hill (11 Ill. 22), 807.
 Edwards v. Irons (73 Ill. 533), 1183.
 Edwards v. McCurdy (13 Ill. 496), 193, 852.
 Edwards v. McKay (73 Ill. 570), 425.
 Edwards v. Todd (1 Scam. (Ill.) 462), 889.
 Edwards v. Trustees of Schools (30 Ill. App. 528), 820, 843.
 Edwards v. Vandewack (13 Ill. 633), 1204, 1206.
 Egbert v. Greenwalt (44 Mich. 245), 225, 653, 703.
 Egerton v. Bird (6 Wis. 527), 257.
 Eggard v. Frick (76 Ga. 512), 165.
 Eggleston v. Boardman (37 Mich. 14), 102, 1487, 1492, 1495.
 Eggleston v. Buck (31 Ill. 254), 54, 1165.
 Eggleston v. Buck (24 Ill. 262), 791.
 Ehle v. Deitz (32 Ill. App. 547), 180.
 Eimer v. Richards (25 Ill. 289), 110, 306.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Eisendrath v. Knauer (64 Ill. 396), 161.
 Elam v. Badger (23 Ill. 498), 205, 737, 738.
 Elder v. Derby (98 Ill. 228), 118.
 Elder v. Hood (38 Ill. 533), 34.
 Elder v. Rouse (15 Wend. (N. Y.) 220), 112.
 Eldridge v. Hill (97 U. S. 92), 669.
 Eldridge v. Holway (18 Ill. 445), 1420.
 Eldridge v. Lancy (17 Pick. (Mass.) 352), 293.
 Eldridge v. Rowe (2 Gilm. 96), 85.
 Elgin Lumber Co. v. Langman (23 Ill. App. 250), 9.
 Ellison v. Wulff (26 Ill. App. 616), 96.
 Elizabethtown v. Lefler (23 Ill. 90), 1209, 1222.
 Elkins v. Wolfe (44 Ill. App. 376), 1170.
 Ellinger v. Bonneau (51 Ill. 94), 1006.
 Elliot v. Kiehl (32 Mo. App. 579), 301.
 Elliot v. Stevens (10 Ia. 418), 290.
 Elliott v. Brown (2 Wend. (N. Y.) 497), 133.
 Elliott v. Dalber (42 Ill. 467), 377, 1172.
 Elliott v. Leving (54 Ill. 213), 1224, 1252.
 Elliott v. Van Buren (33 Mich. 49), 654, 818.
 Ellis v. Von Ach (14 Ill. App. 194), 1237.
 Elmore v. Johnson (143 Ill. 513), 1478, 1479, 1486, 1490, 1491, 1495.
 Elrod v. Town of Barnadotte (53 Ill. 369), 56.
 Elson v. Comstock (150 Ill. 303), 143.
 Elston v. City of Chicago (40 Ill. 514), 93.
 Elston v. Kennicott (46 Ill. 187), 1051.
 Elston v. Kennicott (52 Ill. 272), 1072, 1282.
 Elston and W. G. R. Co. v. People (96 Ill. 584), 1097.
 Elwell v. Meesick (50 Conn. 272), 1043.
 Elwood v. Delfendorf (5 Barb. (N. Y.) 398), 107.
 Elwood v. Ruckman (21 Ill. 200), 852.
 Emerson v. Clark (2 Scam. (Ill.) 489), 1216.
 Emerson v. Weeks (58 Cal. 382), 995.
 Emery v. Ginnan (24 Ill. App. 65), 152.
 Emery v. Mohler (69 Ill. 221), 1048, 1050.
 Emmert v. Reinhardt (67 Ill. 481), 1436.
 Emmons v. Bishop (14 Ill. 152), 276.
 Emory v. Addis (71 Ill. 273), 1142, 1260.
 Emory v. Keighan (88 Ill. 482), 253, 861.
 Empire Car Co. v. Macey (115 Ill. 390), 348.
 Empire Fire Ins. Co. v. Real Estate Trust Co. (1 Ill. App. 391), 921.
 Endsley v. Johns (120 Ill. 469), 1000, 1071.
 Engel v. Sellers (51 Ill. App. 577), 1005, 1209.
 England v. Selby (93 Ill. 340), 1096, 1208.
 Englewood Con. Ry. Co. v. Chicago & E. I. Ry. Co. (117 Ill. 611), 1191.
 English v. Faulds (58 Ill. 266), 938.
 Engs v. Matson (11 Ill. App. 639), 195, 888.
 Ennis v. Lamb (10 Ill. App. 447), 872.
 Enos v. Chestnutt (88 Ill. 590), 1009.
 Epley v. Eubanks (11 Ill. App. 272), 1280.
 Erbin v. Lorillard (19 N. Y. 299), 1078.
 Erich v. White (74 Ill. 481), 1145.
 Erie, etc., v. Cecil (112 Ill. 180), 1026.
 Erie & Pacific Dispatch v. Stanley (123 Ill. 158), 1057.
 Erissman v. Erissman (25 Ill. 136), 1011.
 Erlinger v. People (36 Ill. 458), 612.
 Ernst v. Bartle (1 Johns. (N. Y.) 319), 515.
 Erskine v. Davis (25 Ill. 251), 468.
 Erwin v. Heath (50 Miss. 795), 290.
 Escherick v. Traver (65 Ill. 379), 255.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Eslinger v. East (100 Ind. 344), 967.
 Esmay v. Gorton (18 Ill. 483), 99.
 Ettelson v. Jacobs (40 Ill. App. 427), 381.
 Ettinghauser v. Marx (86 Ill. 475), 19.
 Etz v. Dailey (20 Barb. (N. Y.) 32), 250.
 Eureka Coal Co. v. Powers (11 Ill. App. 81), 1211.
 Eugene Glass Co. v. Martin (54 Ill. App. 288), 1099.
 Evans v. Bouton (85 Ill. 579), 182.
 Evans v. Edwards (26 Ill. 279), 600.
 Evans v. Fisher (5 Gilm. (Ill.) (453) 569), 1217, 1219, 1277.
 Evans v. George (80 Ill. 51), 1099.
 Evans v. Gwyn (5 Ad. & E. n. s. 844), 1319.
 Evans v. Ives (15 Phila. (Pa.) 635), 1391.
 Evans v. Landon (2 Scam. 53), 28.
 Evans v. Lohr (2 Scam. (Ill.) 511), 1144, 1151, 1210.
 Evans v. Mohr (42 Ill. App. 225), 1492.
 Evans v. Marden (154 Ill. 443), 959.
 Evans v. Marden (54 Ill. App. 291), 970, 971, 959.
 Evans v. School Com. of Greene County (1 Gilm. (Ill.) 654), 449.
 Evans v. School Com. of Greene County (2 Gilm. (Ill.) 505), 865.
 Evans v. Single (55 Ill. 455), 809.
 Everett v. Collinsville Zinc Co. (41 Ill. App. 552), 1210.
 Everingham v. Nat. City Bank, etc., (124 Ill. 527), 289, 328.
 Ewbanks v. Town of Ashley (36 Ill. 177), 108, 110, 115.
 Ewing v. Ainsworth (53 Ill. 464), 1180.
 Ewing v. Bailey (4 Scam. (Ill.) 420), 392.
 Ewing v. Burnet (11 Pet. (U. S.) 52), 261.
 Ewing v. Sandoval (110 Ill. 290), 1050.
 Exchange Nat. Bank v. Chicago Nat. Bank (131 Ill. 547), 1276.
 Executors of Schoonmaker v. Elendorf (10 Johns (N. Y.) 49), 812.
 "Ex parte" see "In re," "re," "In the Matter of" and "Matter of."
 Ex parte Bradley (7 Wall. (U. S.) 364), 1465.
 Ex parte Brandlacht (2 Hill (N. Y.) 267), 1317.
 Ex parte Bodenham (8 D. & E. 595), 1462.
 Ex parte Bollman (4 Cranch (Cir. Ct.) 97), 1339.
 Ex parte Byne (1 Sev. & B. (Eng.) 316), 416.
 Ex parte City of Little Rock (25 Ark. 52), 1319.
 Ex parte Cooper (22 N. Y. 81), 1453.
 Ex parte Fay (15 Pick (Mass.) 243), 364.
 Ex parte Frost (1 Chitt. Rep. 558), 1467.
 Ex parte Garland (4 Wall. (U. S.) 378), 1453, 1460.
 Ex parte Green (29 Ala. 52), 1317.
 Ex parte Hamilton (51 Ala. 62), 1317.
 Ex parte Heyfron (7 Cow. (Miss.) 127), 1465.
 Ex parte Hill (3 Cow. (N. Y.) 355), 1112.
 Ex parte Ledwick (8 Vesey (Eng.) 598), 1468.
 Ex parte Marmaduke (91 Mo. 228-251), 1340.
 Ex parte McMeechen (12 Ark. 70), 1319.
 Ex parte Robinson (19 Wall. (U. S.) 505), 1467.
 Ex parte Second (19 How. (U. S.) 9), 1453.
 Ex parte Smith (34 Ala. 456), 1317.
 Ex parte Smith (28 Ind. 47), 1462.
 Ex parte Steinman (95 Pa. St. 220), 1462.
 Ex parte Thompson (93 Ill. 89), 1233, 1235, 1356.
 Ex parte Tobias Watkins (3 Peters (U. S.) 101), 1346.
 Ex parte Tom Ton (108 U. S. 556), 1340.
 Ex parte Tripp (66 Ind. 531), 1455.
 Ex parte Williams (4 Ark. 537), 1318.
 Ex parte Yerger (8 Wall. 95), 1339.
 Eyster v. Eyster (14 Ill. 369), 427.

F.

- Faas v. O'Connor (6 Ill. App. 593), 1223.
 Fabbri v. Cunrio (1 Ill. App. 240), 380.

[References are to pages, Vol. I., pp. 1-900; Vol. II., pp. 901-1406.]

- Fadner v. Filer (27 Ill. App. 506),
873, 1277.
- Fagan v. Fryes (30 Ill. App. 236),
205.
- Fahnstock v. Gilham (77 Ill. 637),
187.
- Fairbanks v. Badger (46 Ill. App.
645), 35.
- Fairbanks v. Campbell (53 Ill.
App. 216), 463.
- Fairbank Canning Co. v. Innes
(24 Ill. App. 33), 235.
- Fairbanks v. Malloy (16 Ill. App.
277), 176.
- Fairbank v. Streeter (41 Ill. App.
434), 378, 383.
- Fairbank v. Streeter (142 Ill. 226),
1431.
- Falls v. City of Cairo (58 Ill. 403),
87, 93.
- Falconer v. Smith (18 Pa. St. 130),
833.
- Fame Ins. Co. v. Thomas (10 Ill.
App. 545), 917.
- Fanning v. First Nat. Bank of
Jacksonville (76 Ill. 53), 340,
347, 355.
- Fanning v. Russell (94 Ill. 386),
1199, 1206.
- Farber v. National Forge and
Iron Co. (50 Ill. App. 503), 766.
- Farley v. Cleveland (4 Cow. (N.
Y.) 432), 540.
- Farne v. Badger (79 Ill. 441),
1097.
- Farmer v. Farmer (72 Ill. 32), 969.
- Farmers' Ins. Co. v. Blair (87 Pa.
St. 124), 1059.
- Farmers' Inst. Co. v. Menz (63 Ill.
116), 907.
- Farmers, etc., Bank v. Troy City
Bank (1 Doug. (Mich.) 457),
1454.
- Farmers' & Merch. Nat. Bank v.
Barton (21 Ill. App. 403), 868.
- Farnan v. Borders (119 Ill. 228),
1259.
- Farnan v. Childs (66 Ill. 544), 879.
- Farnam v. Farnam (13 Gray
(Mass.) 508), 1059.
- Farnham v. Farnham (73 Ill. 497),
1093.
- Farrell v. Pearson (26 Ill. 463),
354.
- Farrell v. Taylor (12 Mich. 113),
1240.
- Farrand v. Aldrich (85 Mich. 594),
1020.
- Farrington v. Commissioners (112
Mass. 206), 364.
- Farres v. People (129 Ill. 521),
1002.
- Farson v. Gorham (117 Ill. 137),
1191.
- Farwell v. Hanchett (120 Ill. 573),
176, 181.
- Farwell v. Hanchett (19 Ill. App.
620), 176, 177.
- Farwell v. Huston (151 Ill. 239),
143, 1170, 1173, 1175, 1176,
1412.
- Farwell v. Metcalf (61 Ill. 372),
242, 773.
- Fast v. Wolf (38 Ill. App. 27), 342.
- Faugh v. Holway (50 Me. 24), 261.
- Faulk v. Kellums (52 Ill. 210),
1117.
- Faulk v. Kellums (54 Ill. 189),
1166.
- Faurot v. Park Nat. Bank (37 Ill.
App. 322), 979.
- Favorite v. Lord & Smith (35 Ill.
142), 888, 892.
- Fawset v. National Life Ins. Co.
(97 Ill. 11), 107.
- Fay v. Swan (44 Mich. 544), 653.
- Fear v. Ebertson (20 Johns. (N.
Y.) 142), 1012.
- Feasler v. Schriever (68 Ill. 322),
806, 815, 819.
- Feazle v. Simpson & Wade (1
Scam. (Ill.) 30), 410.
- Feeter v. Heath (11 Wend. (N. Y.)
477), 97, 482.
- F. H. Hill Co. v. Sommer (53 Ill.
App. 345), 377, 1033.
- Felix v. Scharnweber (119 Ill.
445), 1081.
- Felkins v. O'Sullivan (79 Ill. 524),
415.
- Fellows v. Niver (18 Wend. (N. Y.)
563), 471.
- Felton v. Dickinson (10 Mass. 287),
482.
- Fenalstein v. Whimble (5 Cow. (N.
Y.) 162), 505.
- Fender v. Stiles (31 Ill. 460), 612,
1167.
- Fenn v. Toledo, P. & W. Ry. Co.
(59 Ill. 349), 1089.
- Ferguson v. Rawlings (23 Ill. 68),
324, 820, 941, 983.
- Fergus v. Cleveland Paper Co. (3
Ill. App. 629), 876.
- Fergus v. Garden City Mfg. Co.
(71 Ill. 51), 399, 1442.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Fergus v. Hauft (54 Ill. App. 190), 395.
 Fergus v. Lohman (27 Ill. App. 448), 391, 394.
 Ferguson v. Miles (3 Gilm. (Ill.) 358), 820.
 Ferriss v. Commercial Nat. Bank of Chicago (55 Ill. App. 218), 765, 1148.
 Ferguson v. Milliken (42 Mich. 441), 885.
 Ferriman v. Fields (3 Ill. App. 252), 153, 154.
 Ferriman v. Shepard (14 Ill. App. 515), 1278.
 Ferry v. Williams (8 Taunt 62), 512.
 Fetrow v. Merriweather (53 Ill. 276), 1475.
 Fidler v. McKinley (21 Ill. 313), 226.
 Field v. Anderson (103 Ill. 403), 91.
 Field v. Chicago D. & V. Ry. Co. (68 Ill. 367), 1276.
 Field v. Chicago & R. I. Ry. Co. (71 Ill. 458), 985.
 Field v. Crawford (146 Ill. 136), 1094, 1126.
 Field v. Shoop (6 Ill. App. 445), 294.
 Field v. Zemansky (9 Ill. App. 479), 901, 1044.
 Fielden v. People (128 Ill. 595), 1163.
 Figueira v. Pyatt (88 Ill. 402), 453.
 Filkins v. Byrne (72 Ill. 101), 766, 876.
 Filkins v. O'Sullivan (79 Ill. 524), 425.
 Fitch v. Ross (4 Serg. & R. (Pa.) 557), 238.
 Fink v. Disbrow (69 Ill. 76), 379, 393.
 Finlan v. Clark (118 Ill. 32), 263.
 Finlen v. Howard (126 Ill. 259), 312.
 Finnell v. Walker (48 Ill. App. 331), 737, 772, 1099.
 Finney v. Harding (32 Ill. App. 98), 1436.
 Firebaugh v. Hall (63 Ill. 81), 289, 330.
 Fireman's E. V. Co. v. Con. Rodolph Sholorn (80 Ill. 553), 29.
 Fireman's Ins. Co. v. Peck (126 Ill. 493), 1209.
 Firestone v. Rice (71 Mich. 377), 652.
 First Nat. Bank v. Dunbar (118 Ill. 625), 1070.
 First Nat. Bank v. Garlinghouse (53 Barb (N. Y.) 619), 1168.
 First Nat. Bank v. Hart (55 Ill. 62), 482.
 First Nat. Bank v. Haskell (23 Ill. App. 616), 1221.
 First Nat. Bank v. Mansfield (48 Ill. 494), 1084, 1276.
 First Nat. Bank v. West River R. (46 Vt. 633), 326.
 First Nat. Bank, Chicago v. Beresford (78 Ill. 391), 367.
 First Nat. Bank of Decatur v. Priest (50 Ill. 521), 85.
 First Nat. Bank of Flora v. Burkett (101 Ill. 391), 79.
 First Nat. Bank of Lanark v. Eitenmiller (14 Ill. App. 22), 1092.
 First Nat. Bank of Monmouth v. Strang (28 Ill. App. 325), 168.
 Fischer v. Eslamen (68 Ill. 78), 255.
 Fish v. Farwell (52 Ill. App. 457), 451.
 Fish v. Farwell (160 Ill. 236), 962, 910, 912.
 Fish v. Ferris (5 Duer (N. Y.) 50), 73.
 Fish v. Glass (54 Ill. App. 655), 904, 991.
 Fish v. Wheeler (31 Ill. App. 596), 783.
 Fisher v. Bennehoff (121 Ill. 426), 252, 259, 1107.
 Fisher v. Burt (5 Ill. App. 357), 1007.
 Fisher v. Cook (125 Ill. 280), 820.
 Fisher v. Green (95 Ill. 94), 883, 971, 1042.
 Fisher v. Meek (38 Ill. 92), 840.
 Fisher v. Milmine (94 Ill. 328), 272.
 Fisher v. Nat. Bank of Commerce (73 Ill. 34), 10, 593.
 Fisher v. Niccolls (2 Ill. App. 484), 102.
 Fisher v. Smith (48 Ill. 184), 1415.
 Fisher v. Stevens (16 Ill. 397), 1093.
 Fitch v. Constantine, etc., Co. (44 Mich. 74), 1386.
 Fitch vs. Fitch (18 Wend (N. Y.) 513), 471.
 Fitch v. Johnson (104 Ill. 111), 1126.
 Fitch v. Zimmer (62 Ill. 126), 1147.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Fltz v. Freestone (1 Mod. (Eng.) 210), 833.
 Fitzgerald v. Forrestal (48 Ill. 228), 1379.
 Fitzgerald v. Ferguson (25 Ill. 138) 882.
 Fitzgerald v. Glancy, admr., etc., (49 Ill. 465), 1234.
 Fitzgerald v. Kimball (86 Ill. 396), 367.
 Flx v. Quinn (75 Ill. 232), 379, 1179.
 Fitzpatrick v. City of Joliet (87 Ill. 58), 992.
 Flack v. Aukeny (Breese 187), 154.
 Flagg v. Roberts (67 Ill. 485), 204, 939.
 Flagg v. Walker. (109 Ill. 494), 766, 1198.
 Flaherty v. McCormick (113 Ill. 538), 252.
 Flake v. Carson (33 Ill. 518), 767, 769.
 Flanagan v. Camden, etc., Co. (25 N. J. L. 246), 113.
 Flanagan v. State (25 Ark. 92), 1016.
 Flanders v. Colby (8 Fost. (28 N. H.) 34), 166.
 Flanders v. Whittaker (13 Ill. 707), 820.
 Flanerty v. McCormick (7 Ill. App. 411), 1097.
 Flannigan v. Crull (53 Ill. 352), 31.
 Flaningham v. Hogue (162 Ill. 129 S. C. (59 Ill. App. 315), 1276.
 Fletcher v. Boston & M. Ry. C. (1 Allen (Mass.) 9), 1059.
 Fleming v. Carter (70 Ill. 286), 255.
 Fletcher v. Crosby (2 Moo. & R. 417), 999.
 Flemming v. Jencks (22 Ill. 475), 983.
 Fletcher v. Kalamazoo Ct. Judge (39 Mich 301), 1315.
 Fletcher v. Massey (49 Ill. App. 36), 887, 1494.
 Fletcher v. Patton (21 Ill. App. 228), 1277.
 Fletcher v. Peck (6 Cranch (U. S.) 126), 516.
 Fletcher v. People (52 Ill. 395), 219, 220.
 Fletcher v. Tuttle (151 Ill. 41), 1294.
 Fligueira v. Pyatt (88 Ill. 402), 710.
 Flinn v. Barlow (16 Ill. 39), 155, 1116.
 Flint & P. M. Ry. Co. v. Lull (28 Mich. 510), 235.
 Flint & P. M. Ry. Co. v. Stark (38 Mich. 714), 227, 668.
 Flint & P. M. Ry. Co. v. Wier (37 Mich. 111), 673, 675.
 Florida v. Kirk (12 Fla. 278), 1462.
 Flynn v. Fogarty (106 Ill. 263), 52, 1026.
 Flynn v. Gardner (3 Ill. App. 353), 1031.
 Flynn v. Hathaway (65 Ill. 402), 1084.
 Fordan v. Osgood (109 Ill. 457), 1043.
 Foden v. Sharp (4 Johns (N. Y.) 183), 578.
 Foles v. Montague (53 Ill. 384), 570.
 Folger v. Bishop (48 Ill. App. 526), 1267.
 Follansbee v. Scottish Am. Mortgage Co. (5 Ill. App. 17), 1173.
 Follard v. Wallace (2 Johns (N. Y.) 395), 517.
 Folsom v. Apppleriver Co. (41 Wis. 602), 1031.
 Foltz v. Hardin (38 Ill. App. 542), 827.
 Fondille v. Monroe (74 Ill. 126), 462.
 Fontaine v. Aresta (2 McLean 227), 119.
 Fonville v. Sausser (73 Ill. 451), 1204, 1259.
 Foote v. Smith (34 Kans. 27), 1476.
 Forbes v. Jason (6 Ill. App. 395), 1108.
 Ford v. Beach (11 Ad & El (N. S.) 63), 141.
 Ford v. Niles (1 Hill (N. Y.) 300), 998.
 Foreman v. Johnson (37 Ill. App. 452), 1209.
 Forman Lumber Co. v. Ragsdale (12 Ill. App. 441), 1395.
 Foreshell v. Coles (Peak Ad. Cas. 286), 1491.
 Forsyth v. Baxter (2 Scam. (Ill.) 9), 1026.
 Forsyth v. Vehmeyer (55 Ill. App. 22), 1000.
 Forsyth v. Warren (62 Ill. 68), 297, 322.
 Fort Dearborn Lodge v. Klein (115 Ill. 177), 952.
 Fortenbourg v. Sunstall (5 Pike (Ark.) 263), 119.
 Forth v. Pursley (82 Ill. 152), 160, 161, 167.
 Fortier v. Ballance (5 Gilm. (Ill.) 41), 1425, 1426.

[References are to pages, Vol. I., pp. 1-900; Vol. II., pp. 961-1496.]

- Fortier v. Guerrineau (1 McCord (S. C.) 304), 351.
- Fortin v. U. S. W. E. & P. Co. (48 Ill. 451), 803.
- Forselman v. City of Springfield (139 Ill. 183), 90.
- Foster v. Abbott (1 Mass. 234), 967.
- Foster v. Allanson (2 Term. R. 479), 122.
- Foster v. Dryfuss (16 Ind. 158), 323.
- Foster v. Illinski (3 Ill. App. 345), 296, 309, 323.
- Foster v. Letz (86 Ill. 413), 1186.
- Foster v. Lumberman's M. Co. (68 Mich. 188), 161.
- Foster v. Magill (119 Ill. 75), 996.
- Foster v. Wylie (27 Mich. 244), 1482, 1484.
- Forest & Funkhauser v. Guard, etc., Co. (1 Ill. (Breese) 74), 1123.
- Fournier v. Faggott (3 Scam. (Ill.) 347), 114, 384, 521, 1228.
- Foulk v. Eckert (61 Ill. 318), 1064.
- Fountain v. Young (6 Esp. (Eng.) 113), 1472.
- Foval v. Hallett (10 Ill. App. 265), 202, 205.
- Fowler, Arnold (25 Ill. 284), 815.
- Fowle v. Kirkland (18 Pick. (Mass.) 299), 121.
- Fowler v. Meyers (59 Ill. App. 248), 790.
- Fowler v. Morrill (8 Tex. 153), 1480.
- Fowler v. Peterson (25 Ill. App. 81), 1107.
- Fowler v. Redican (52 Ill. 405), 1049.
- Fox v. Smith (3 Cow. (N. Y.) 23), 1117.
- Fox River Mnfg. Co. v. Reeves (68 Ill. 404), 1112.
- Frame v. Badger (79 Ill. 441), 1099.
- Franchot v. Leach (5 Cow. (N. Y.) 506), 120, 600, 623.
- Franey v. True (26 Ill. 184), 570, 589, 775.
- Frank v. Kaminsky (109 Ill. 26), 1001, 1259.
- Frank v. King (121 Ill. 250), 326.
- Frank v. Moses (118 Ill. 435), 1194.
- Frank v. Thomas (35 Ill. App. 547), 1174.
- Frankenthal v. Camp (55 Ill. 169), 130, 132.
- Franenthal v. Mayer (54 Ill. App. 160), 201.
- Frankfurter v. Bryan (12 Ill. App. 549), 215.
- Frankland v. Johnson (147 Ill. 520 (64 Ill. App.) 530), 807.
- Franklin v. Loan & Invest. Co. (152 Ill. 345), 1197.
- Franklin v. Talmage (5 Johns (N. Y.) 84), 468.
- Franklin Ins. Co. v. Smith (82 Ill. 131), 1003.
- Frans v. People (59 Ill. 427), 1192.
- Frantz v. Rose (69 Ill. 590), 1144.
- Franz v. Winne (6 Ill. App. 82), 982.
- Frasure v. Zimmerly (25 Ill. 202), 409, 1086.
- Fraxier v. Laughlin (1 Gilm. (Ill.) 185), 1224.
- Frazee v. Milk (56 Ill. 435), 69.
- Frazer v. Howe (106 Ill. 563), 99, 1007, 1076, 1077, 1088.
- Frazer v. Jennison (42 Mich. 224), 1018.
- Frazier v. Laughlin (1 Gilm. 347), 116, 185, 1216.
- Frazier v. Resor (23 Ill. 88), 768, 829.
- Freehling v. Ketchum (39 Mich. 299), 489, 791.
- Freeland v. Board of Supervisors of Jasper County (27 Ill. 303), 116, 786, 1252.
- Freeman v. Dempsey (41 Ill. App. 554), 1080.
- Freeman v. Tinsley (50 Ill. 497), 207, 971, 1143.
- French v. Butter (39 Mich. 79), 1400.
- French v. Lowry (19 Ill. 158), 1146.
- French v. Willer (126 Ill. 611), 1169, 1171, 1174, 1411, 1422, 1429.
- Frew v. Taylor (106 Ill. 159), 766.
- Frey v. Michie (68 Mich. 323), 1334.
- Friend v. Dunks (39 Mich. 733), 502, 522.
- Fries v. Fries (34 Ill. App. 516), 1216.
- Frieze v. People (12 Ill. App. 349), 1216.
- Frink v. Flanagan (1 Gilm. (Ill.) 35), 182, 185, 810, 947.
- Frink v. King (3 Scam. (Ill.) 144), 1260.
- Frink v. Phelps (4 Scam. (Ill.) 580), 1246, 1271.
- Frink v. Pratt & Co. (130 Ill. 327), 161, 162, 164, 1436.
- Frink v. Pratt & Co. (26 Ill. App. 222), 1436.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Frink v. Ryan (3 Scam. (4 Ill.) 322),
 31, 1389, 1390.
 Frisbee v. Langworthy (11 Wis.
 375), 166.
 Fritz v. Joiner (54 Ill. 101), 1006.
 Frizell v. Cole (29 Ill. 465), 1100.
 Frollich, Gardt & Co. v. Alexander
 (36 Ill. App. 428), 57.
 Frost v. McCarger (29 Barb. (N.
 Y.), 617), 1066.
 Frost v. Raymond (Caines (N. Y.)
 88), 117.
 Frost v. Stevenson (3 Scam. (Ill.)
 539), 381.
 Frost v. Voigt (37 Mich. 65), 546.
 Fruitt v. Anderson (12 Ill. App.
 430), 25.
 Frye v. Calhoun Co. (14 Ill. 132),
 1481.
 Frye v. Jones (78 Ill. 627), 762,
 1172.
 Frye v. Menkins (15 Ill. 339), 874.
 Full v. Hutchins (Cowp. 422), 1319.
 Fuller v. Bates (96 Ill. 132), 1199.
 Fuller v. Little (61 Ill. 21), 1107.
 Fuller Watchmans El. Det. Co. v.
 Louis (50 Ill. App. 428), 1166.
 Fuller v. Robb, Imp., etc. (26 Ill.
 246), 1183.
 Fuller v. Rumseville (29 N. H.
 554), 838.
 Fuller v. Langford (31 Ill. 248),
 309.
 Fuller v. Voght (13 Ill. 277), 64.
 Fulton County Narrow Gauge Ry.
 Co. v. Butler (48 Ill. App. 301),
 233.
 Funk v. Babbitt (55 Ill. App. 124),
 126.
 Funk v. Eggleston (92 Ill. 515),
 1015.
 Funk v. Ironmunger (76 Ill. 506),
 156, 406, 804.
 Funk v. Hough (29 Ill. 145), 81,
 422, 603.
 Funk v. Howard (52 Ill. App. 405),
 1277.
 Funk v. Mills (50 Ill. App. 404),
 1209.
 Funk v. Piper (50 Ill. App. 163),
 461.
 Funk v. Stubblefield (62 Ill. 405),
 39, 263, 267.
 Furst v. Second Ave. Ry. Co. (72
 N. Y. 542), 1077.
 Furgussen v. Brent (12 Md. 33), 88.
 Furness v. Helm (54 Ill. App. 435),
 876.
 Furness v. Williams (11 Ill. 229),
 904.
 Fyffe v. Fyffe (106 Ill. 646), 257.
- G.**
- Gaar v. Herd (92 Ill. 315), 177.
 Gaddis v. Leeson (55 Ill. 522), 857,
 889.
 Gaddy v. McCleave (59 Ill. 182),
 874, 1206.
 Gaff v. Spellmeyer (13 Ill. App.
 294), 916, 917, 920.
 Gaffner v. People (161 Ill. 21), 1271.
 Gage v. Brown (125 Ill. 522),
 Gage v. Busse (94 Ill. 590), 1195.
 Gage v. City of Chicago (141 Ill.
 642), 1182.
 Gage v. Com. Nat. Bank of Chi-
 cago (86 Ill. 372), 980.
 Gage v. Du Puy (134 Ill. 132),
 1259.
 Gage v. Parker (103 Ill. 528), 1033.
 Gage v. Reid (118 Ill. 35), 1259.
 Galbraith v. Chicago Arch Iron
 Works (50 Ill. App. 249), 898.
 Gale v. Rector (10 Ill. App. 262),
 1216.
 Gale v. Rector (5 Ill. App. 481),
 1006, 1036, 1109.
 Gale v. Village of Kalamazoo (23
 Mich. 344), 457.
 Galena & C. U. Ry. Co. v. Appleby
 (28 Ill. 233), 608.
 Galena, etc., Ry. Co. v. Ennos,
 (116 Ill. 55), 1004.
 Galena, etc., Ry. v. Loomis (13 Ill.
 548), 140.
 Galena, etc., Ry. Co. v. Menzies
 (26 Ill. 121), 355.
 Galena & S. W. Ry. Co. v. Barrett
 (95 Ill. 467), 896, 901.
 Galena & So. Wis. Ry. Co. v. Bir-
 beck (70 Ill. 208), 1070.
 Galena & S. W. Ry. Co. v. Has-
 lam (73 Ill. 494), 991, 1053,
 1067.
 Galerette v. McKinley (27 Hun.
 (N. Y.) 320), 1065.
 Gallagher v. Brandt (52 Ill. 80),
 1208.
 Gallagher v. Frorer (4 Ill. App.
 330), 90.
 Gallagher v. Kern (31 Mich. 138),
 1397.
 Gallagher v. People (91 Ill. 590),
 981.
 Gallagher v. Williamston (23 Cal.
 331), 1017.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Gallimore v. Dazey (12 Ill. 143), 364, 367, 373, 374, 1204.
Galusha v. Butterfield (2 Scam. (Ill.) 227, 841.
Galveston City Ry. Co. v. Hook (40 Ill. App. 547), 832.
Gambart v. Hart (44 Ga. 542), 1487, 1488.
Gammon v. Huse (100 Ill. 234), 1051, 1124, 1279.
Gammon v. Huse (9 Ill. App. 557), 1006, 1072.
Gardner v. Baker (79 Ill. 448), 1211.
Gardner v. Bunn (132 Ill. 403), 1169, 1172, 1176.
Gardner v. Chicago, R. I. & P. Ry. Co. (17 Ill. App. 262), 1208.
Gardner v. Diedrich (40 Ill. 72), 396.
Gardner v. Eberhart (82 Ill. 316), 1421.
Gardiner v. Fargo (58 Mich. 72), 886.
Gardner v. Hall (29 Ill. 277), 768.
Gardner v. Haynie (42 Ill. 291), 786.
Gardiner v. Mays (24 Ill. App. 286), 214, 215, 1005.
Gardner v. Humphrey (10 Johns (N. Y.) 53), 459.
Gardner v. Russell (78 Ill. 292), 904, 1204.
Gardner v. Thomas (14 Johns (N. Y.) 134), 644.
Gardner v. Whitboard (59 Ill. 145), 21.
Garland v. Britton (12 Ill. 232), 424.
Garner v. Crenshaw (1 Scam. (Ill.) 143), 982.
Gardt v. Brown (113 Ill. 475), 1048.
Garretson v. Becker (52 Ill. App. 255), 222, 223, 1277.
Garrett v. Phelps (1 Scam. (Ill.) 331), 979.
Garrick v. Chamberlain (97 Ill. 620), 1071.
Garrison v. Dingman (56 Ill. 150), 98.
Garrison v. McGregor (51 Ill. 430), 88.
Garrity v. Bash (84 Ill. 73), 388.
Garrity v. Hamburger Co. (35 Ill. App. 309), 1208.
Garrity v. Hamburger Co. (136 Ill. 499), 1222, 1261.
Garrity v. Lozano (83 Ill. 597), 594, 1206, 1209, 1222.
Garrity v. Wilcox (83 Ill. 159), 876.
Gartside Coal Co. v. Turk (147 Ill. 120), 1090.
Garvin v. Wiswell (83 Ill. 215), 163.
Gasch v. Niehoff (54 Ill. App. 680), 1277.
Gass v. Howard (43 Ill. 223), 971.
Gates v. Hamilton (12 Va. 50), 624, 966.
Gauche v. Mayer (27 Ill. 134), 137, 138, 144.
Gault v. Babbitt (1 Ill. App. 130), 737, 872.
Gautzert v. Hoge (73 Ill. 30), 27, 1048.
Gavin v. City of Chicago (97 Ill. 66), 236, 1001.
Gay v. De Werff (17 Ill. App. 417), 131, 139, 157.
Gay v. Rainey (89 Ill. 221), 87.
Gaynor v. Pease Furnace Co. (51 Ill. App. 292), 1095.
Gebbie v. Mooney (121 Ill. 255), 846, 1204.
Gebhart v. Adams (23 Ill. 397, 345), 112, 861.
Gecum v. Dean (40 Ill. 92), 1252.
Genrich v. People (34 Ill. 448), 1370.
Gerard's Case, (1 W. Black. 1225), 1468.
Geraty v. Kersten (44 Ill. App. 440), 1268.
Gerber v. Grabel (16 Ill. 217), 734.
Gerdes v. Champion (108 Ill. 137), 365.
Gerlach v. Walsh (41 Ill. App. 83), 1422.
Germania Fire Ins. Co. v. Hick (125 Ill. 361), 1094.
Germania Fire Ins. Co. v. McKee (94 Ill. 494), 1098.
German Ins. Co. v. Frederick (58 Fed. Rep. 144), 1154.
German Ins. Co. v. Johnson (52 Ill. App. 535), 1111.
Germania Life Ins. Co. v. Lieberman (58 Ill. 117), 509.
German Nat. Bank v. Meadowcroft (95 Ill. 124), 162, 163.
George v. Bischoff (68 Ill. 236), 115, 384, 846, 913, 1228.
George v. English (30 Ala. 582), 474.
George H. Hess Co. v. Dawson (51 Ill. App. 146), 789, 791.
Gerrish v. Ayres (3 Scam. (Ill.) 245), 1385, 1390.

[References are to pages, Vol. I., pp. 1-980; Vol. II., pp. 981-1486.]

- Gerrity v. Brady (44 Ill. App. 203), 455.
 Geyer v. Wookey (18 Ill. 536), 267.
 Gible v. Mooney (121 Ill. 225), 18, 1221.
 Gibboney v. Gibboney (2 Ill. App. 322), 1175.
 Gibbons v. Cincinnati Enquirer (2 Flip. 127), 223.
 Gibbons v. Farwell (63 Mich. 344), 167.
 Gibbons v. Goodrich (3 Ill. App. 590), 1359, 1360.
 Gibbons v. Hoag (95 Ill. 45), 1490.
 Gibbons v. People (33 Ill. 445), 151.
 Gibbs v. Blackwell (40 Ill. 51), 1246, 1250, 1253, 1258, 1268.
 Gibbs v. Jones (46 Ill. 319), 83, 156.
 Gibbs Brewing Co. v. City of Virginia (32 Ill. App. 518), 115.
 Gibbs & Sterritt Mfg. Co. v. Kaszezeki (18 Ill. App. 623), 982.
 Gibson v. Bourland (13 Ill. App. 352), 927, 928.
 Gibson v. Burrows (41 Mich. 713), 1397, 1404, 1405.
 Gibson v. Troutman (9 Ill. App. 94), 1000.
 Gibson v. Webster (44 Ill. 483), 1146.
 Gibson, P. & Co. v. Szlepiepienski (37 Ill. App. 601), 228.
 Giddings v. McCumber (51 Ill. App. 373), 481, 1111.
 Giffert v. McGuerner (51 Ill. App. 387), 1015.
 Gifford v. People (148 Ill. 173), 1101, 1103.
 Gilbert v. Bone (79 Ill. 341), 1007, 1058, 1096, 1147.
 Gilbert v. Bone (64 Ill. 518), 846.
 Gilbert v. Emmons (42 Ill. 143), 212, 706.
 Gilbert v. Holmes (64 Ill. 548), 1479.
 Gilbert v. Kennedy (22 Mich. 117), 646.
 Gilbert v. McCoy (68 Ill. 205), 1220.
 Gilbert v. Nantucket Bank (5 Mass. 97), 805.
 Gilchrist v. Gilchrist (76 Ill. 281), 1209.
 Giles v. Shaw (I Ill. (Breese) 125), 1002.
 Gill v. Caldwell (I Ill. (Breese) 53), 10, 1009, 1023.
 Gill v. People (42 Ill. 321), 1204.
 Gillespie v. Smith (29 Ill. 473), 839, 1070.
 Gillett v. Booth (95 Ill. 183), 919, 1070.
 Gillespie v. Rout (40 Ill. 58), 1270.
 Gillett v. Sweat (1 Gilm. (Ill.) 475), 1147.
 Gillham v. State Bank (2 Scam. (Ill.) 245), 1002, 1071, 1089.
 Gilliam v. Coon (10 Ill. App. 43), 889.
 Gillilan v. Gray (14 Ill. 416), 406, 459.
 Gillilan v. Gray (13 Ill. 705), 383.
 Gillilan v. Nixon (26 Ill. 50), 354, 783.
 Gillispie v. Read (3 McLean 377), 248.
 Gillingham v. Christen (55 Ill. App. 17), 234.
 Gilmore v. Pittsburgh etc. Ry. Co. (174 Pa. St.) 275), 1075.
 Gilmer v. Eubank (13 Ill. 271), 204.
 Gilmore v. Nowland (26 Ill. 200), 511, 844, 921.
 Gilson v. Powers (16 Ill. 355), 418, 935.
 Gilson v. Stewart (7 Watts (Pa.) 100), 105.
 Ging v. Robinson & Son (31 Ill. App. 511), 1149.
 Girard Coal Co. v. Wiggins (52 Ill. App. 69), 1032, 1055.
 Girrord v. People (87 Ill. 210), 1062.
 Gittings v. Nelson (86 Ill. 591), 1437.
 Gizler v. Witzel (82 Ill. 322), 133, 1006, 1103.
 Glanville v. Rittlesforf (73 Ill. 475), 660.
 Gleason v. Dodd (4 Metc. (Mass) 333), 1480.
 Gleason v. Edmonds (2 Scam. 448), 144.
 Glenn v. Hodgess (9 Johns. (N. Y.) 66), 467.
 Glenn v. Kays (1 Ill. App. 480), 143, 1108.
 Glennon v. Burton (144 Ill. 551), 365, 366.
 Glickauf v. Hirschhorn (73 Ill. 574), 832.
 Glos v. Randolph (130 Ill. 245), 1253.
 Glover v. Tuck (24 Wend. (N. Y.) 153), 507.
 Glover v. Wells (40 Ill. App. 350), 326.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Glynn v. Hutchinson (3 Dowl. (Eng.) 529), 1454.
- Goddard v. Lieberman (18 Ill. App. 366), 1416.
- Goddard v. Fischer (23 Ill. App. 365), 365.
- Goddard v. Hart (5 Gilm. 95), 69.
- Goddard's Ads. v. Bulow (1 Nott McCord (8 S. Carr 27) 45), 87.
- Godfreidson v. People (888 Ill. 284), 1117.
- Godfrey v. Brown (86 Ill. 454), 311, 852.
- Godfrey v. Buckmaster (1 Scam. (Ill.) 447), 522, 784.
- Godfrey v. Dalton (6 Bing. 468), 1488.
- Gocht v. Koehler (20 Ill. App. 233), 11.
- Goetz v. Joerg (64 Ill. 114), 613, 849.
- Goff v. Aukenbrandt 124 Ill. 51), 729.
- Goff v. Kitts (15 Wend. (N. Y.) 550), 135.
- Goff v. T. St. L. & K. C. R. R. Co. (28 Ill. App. 529), 456.
- Goffner v. People (161 Ill. 21), 1270.
- Goggin v. O'Donnell (62 Ill. 66), 57, 807, 824.
- Gohn v. Doerle (85 Ill. 514), 1100.
- Going v. Outhouse, (95 Ill. 346), 1437.
- Goit v. Joyce (61 Ill. 489), 1167.
- Goldie v. McDonald (78 Ill. 605), 406, 595, 596, 876.
- Golder v. Bresler (105 Ill. 419), 1042.
- Golbsby v. Robertson (1 Black. 247), 97.
- Goldsmith v. Barry (18 Ill. App. 276), 176, 181.
- Golfie v. Werner (151 Ill. 551), 1270.
- Goltra v. Wolcott (14 Ill. 89), 1473.
- Goodburne v. Bowman (9 Bing. 532), 1133.
- Goode v. LeClair (10 Ill. App. 647), 977.
- Goodell v. Woodruff (20 Ill. 191), 1146.
- Goodfellow v. Landis, (36 Mo. 168), 1482.
- Goodhue v. Baker (22 Ill. 262), 274.
- Gooding v. Morgan (70 Ill. 275), 1010.
- Goodman v. Boyd (40 Ill. App. 249), 339.
- Goodman v. Walker (30 Ala. N. S. 482), 1488.
- Goodrich v. City of Minonk (62 Ill. 121), 1078, 1222, 1224.
- Goodrich v. Cook (81 Ill. 41), 1252.
- Goodrich v. Huntington (11 Ill. 646), 767, 978.
- Goodrich v. Reynolds, Wilder & Co. (31 Ill. 491), 846.
- Goodsell v. Boynton (1 Scam. 555), 18.
- Goodtill v. Aiken (1 Burr (Eng.) 133), 250.
- Goodwin v. Durham (56 Ill. 239), 1098, 1208.
- Gordan v. Bancard (37 Ill. 147), 776.
- Gordon v. Crooks (11 Ill. 142), 1146.
- Gordon v. Goodell (34 Ill. 429), 1072, 1175, 1176.
- Gordon v. Gordon (25 Ill. App. 311), 1222, 1252.
- Gordan v. Kennedy (2 Binn. (Pa.) 287), 519.
- Gordon v. Reynolds (114 Ill. 118), 785, 860.
- Gore v. Smith (1 Ill. (Breese) 267), 759.
- Gormey v. Day (114 Ill. 185), 1010.
- Gormley v. Uthe (116 Ill. 643), 1042.
- Gorton v. Brown (27 Ill. 489), 213.
- Gorton v. DeAngelis (6 Wend. (N. Y.) 418), 709.
- Gossett v. Union Mut. Acc. Ass'n (27 Ill. App. 266), 589.
- Gotloff v. Henry (14 Ill. 384), 852.
- Gott v. Brigham (41 Mich. 228), 1486.
- Gottfried v. German Nat. Bank (91 Ill. 75), 595.
- Gottfried v. German Nat. Bank (1 Ill. App. 224), 593, 594.
- Gottschalk v. Hughes (82 Ill. 484), 1142.
- Gottschalk v. Smith (156 Ill. 377), 90.
- Gottschalk v. Smith (54 Ill. App. 341), 90, 480, 481, 487.
- Gothran v. Ellis (125 Ill. 496), 1091.
- Goucher v. Patterson (94 Ill. 525), 919.
- Goudy v. City of Lake View (27 Ill. App. 505), 1271.
- Goudy v. Hall (30 Ill. 116), 151.
- Gould v. Banks (8 Wend. (N. Y.) 562), 507.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Goule v. Chase (1 Robb (N. Y.) 222), 184.
- Gould v. County of Rock Island (3 Ill. App. 423), 481.
- Gould v. Elgin City Banking Co. (36 Ill. App. 390), 967.
- Gould v. Henderson (9 Ill. App. 171), 1418.
- Gould v. Hendrickson (96 Ill. 99), 271.
- Gould v. Howe (127 Ill. 251), 1210.
- Gould v. Spencer (2 Caines (N. Y.) 109), 589.
- Gould v. Sternburg (4 Ill. App. 439), 144.
- Gould v. Vermont Cent. Ry. (19 Vt. 482), 4.
- Governor v. Ridgeway (12 Ill. 14), 777, 778.
- Govett v. Radnidge (3 East 70), 245.
- Gowen v. Kehoe (71 Ill. 66), 96, 1096, 1008.
- Grace v. American Insurance Co. (109 U. S. 283), 8.
- Gradle v. Hoffman (105 Ill. 147), 785, 846, 992.
- Grady v. People (125 Ill. 122), 1141.
- Graff v. Reed (5 Ill. App. 561), 1219.
- Graff v. Kahn (18 Ill. App. 485), 889, 898.
- Graff v. Simmons (58 Ill. 440), 1100.
- Graft v. Harding (48 Ill. 148), 179.
- Graham v. Davis (4 Ohio St. 362), 990.
- Graham v. Dixon (3 Scam. (Ill.) 155), 849.
- Graham v. Eiszner (28 Ill. App. 269), 1049, 1097.
- Graham v. Noble (13 Serg. & R. (Pa.) 233), 646.
- Graham v. People (115 Ill. 566), 1027.
- Graham v. Smith (90 Ga. 676), 1489.
- Gramer v. Mathews (68 Ind. 172), 175.
- Grand Lodge A. O. U. W. v. Belcham (145 Ill. 308), 1081.
- Grand Lodge B. of L. F. v. Cramer (53 Ill. App. 578), 420.
- Grand Rapids & Ind. Ry. Co. v. Heisel (47 Mich. 393), 25.
- Grand Rapids etc., Ry. Co. v. Huntley (38 Mich. 537), 88, 535, 674, 1054.
- Grand Rapids, etc., Ry. Co. v. Martin (41 Mich. 667), 1082.
- Grand Rapids v. Whitlesey (33 Mich. 109), 251.
- Grand Tower Mfg. & Tr. Co. v. Ullman (89 Ill. 244), 1105.
- Grand Trunk M. M. & T. Co. v. Schirmer (64 Ill. 106), 419.
- Grange Mill Co. v. Western Assurance Co. (118 Ill. 396), 1006.
- Granger v. Warrington (3 Gilm. (Ill.) 299), 783, 938, 1017, 1075.
- Grannis v. Clark (8 Cowan (N. Y.) 36), 117, 118.
- Grantz v. Phillips (5 Bin. (Pa.) 568), 122.
- Grassly v. Adams (71 Ill. 550), 918.
- Graves v. Colwell (90 Ill. 612), 1007, 1099, 1100.
- Graves vs. Whitney (49 Ill. App. 435), 769, 1170, 1174, 1176.
- Gravett v. Davis (92 Ill. 190), 1202.
- Gray v. Agnew (95 Ill. 315), 1199.
- Gray v. Emmons (7 Mich. 533), 1486.
- Gray v. Gray (3 Litt. (Ky.) 465), 1078.
- Gray v. Hartman (40 Ill. 522), 69.
- Gray v. Rosson (11 Ill. 527), 1438.
- Gray v. St. John (35 Ill. 222), 97, 156.
- Graybeal v. Gardner (48 Ill. App. 305), 1138.
- Grayville & M. Ry. v. Burns (92 Ill. 302), 91.
- Great house v. Robinson (3 Scam. (Ill.) 7), 771.
- Greathouse v. Smith (4 Ill. (3 Scam.) 541), 112, 1361.
- Great Western Ry. Co. v. Bacon (30 Ill. App. 347), 682, 1006.
- Great Western R. R. Co. v. Hanks (36 Ill. 281), 606.
- Great Western Ry. Co. v. Hanks (25 Ill. 241), 1097.
- Great Western Ry. Co. v. Helm (27 Ill. 198), 683.
- Great Western Ry. Co. v. McDonald (18 Ill. 172), 1042.
- Great Western Tel. Co. v. Mears (54 Ill. App. 667), 917.
- Great Western Ins. Co. v. Reev (29 Ill. 272), 865.
- Greeley v. Smith (13 Ill. App. 43), 1486.
- Green v. Caulk. (16 Md. 556), 1031.
- Green v. Greenbank (2 Marsh (Ky.) 285), 72.

[References are to pages, Vol. I., pp. 1-990; Vol. II., pp. 961-1496.]

- Green v. Litter (8 Cranch (U. S.) 242), 247.
 Green v. McConnell (Breese (Ill.) 236), 388.
 Green v. Mumper (138 Ill. 434), 1146.
 Green v. Phoenix Mut. Life Ins. Co. (134 Ill. 310), 1027.
 Green v. People (14 Ill. 364), 784.
 Greenleaf v. Kellogg (2 Mass. 268), 85.
 Greenlee v. Goldstein (43 Ill. App. 639), 145.
 Greenlee v. McDowell (4 Ired (N. C.) Eq. 481), 1484.
 Greenman v. Harvey (53 Ill. 386), 1259.
 Greenough v. Gastlin (1 Mylne & K. 103), 1472.
 Greenup v. Stoker (3 Gilm. (Ill.) 202), 1026, 1145.
 Greenup vs. Vernor (16 Ill. 25), 102.
 Greenwich Ins. Co. v. Raab (11 Ill. App. 636), 1091.
 Greenwood v. Curtis (6 Mass. 366), 515.
 Greer v. Young (120 Ill. 184), 416, 800, 808.
 Greer v. Youngs (17 Ill. App. 106), 810.
 Gregg v. Savage (51 Ill. App. 251), 334, 339.
 Gregg v. Summer (21 Ill. App. 110), 416, 810, 811, 947.
 Gregory v. King (58 Ill. 169), 92.
 Gregory v. Spencer (3 Ill. App. 80), 1209.
 Gregory v. Stark (3 Scam. (Ill.) 611), 384.
 Gregory v. Wells (62 Ill. 232), 863.
 Gregson v. Allen (85 Ill. 478), 396, 966.
 Grew v. Burdett (9 Pick. (Mass.) 265), 474.
 Gridley v. Capen (72 Ill. 11), 108.
 Gridley v. Watson (53 Ill. 186), 1180.
 Grier v. Puterbaugh (108 Ill. 602), 1107, 1232.
 Grier v. Stout (2 Ill. App. 602), 161.
 Grier v. Taylor (4 McCord (S. C.) 206), 1321.
 Griffin v. City of Belleville (50 Ill. 422), 392.
 Griffin v. Davis (5 Barn & Ad. 502), 1017.
 Griffin v. Griffin (125 Ill. 430), 1017.
 Griffin v. Ketchum (18 Ill. 392), 868.
 Griffin v. Kirk (47 Ill. App. 258), 174, 1417.
 Griffin v. Larned (111 Ill. 432), 1118.
 Griffith v. Furry (30 Ill. 251), 1000.
 Griffith v. Welsh (32 Ill. App. 396), 1209.
 Grimes v. Hilliar (51 Ill. App. 640), 1006.
 Grimes v. Hilliary (150 Ill. 141), 462, 1007, 1076.
 Grimes v. Kimball (3 Allen (Mass.) 518), 1043.
 Grimshaw v. Scoggan (72 Ill. 103), 1194.
 Gristock v. Royal Ins. Co. (84 Ill. 161), 1386.
 Griswold v. Plumb (13 Mass. 298), 168, 515.
 Griswold v. Shaw (79 Ill. 449), 883.
 Grob v. Cushman (45 Ill. 119), 1010, 1037.
 Groff v. Ankenbrandt (124 Ill. 51), 449.
 Grommes v. St. P. Trust Co. (147 Ill. 634), 1068, 1090.
 Gross v. People (95 Ill. 366), 1196.
 Gross v. Sloan (54 Ill. App. 202), 348, 1115, 1116, 1123.
 Gross v. Turner (21 Vt. 437), 997, 999.
 Gross v. Weary (90 Ill. 256), 891.
 Grosvenor v. Doyle (50 Ill. App. 47), 10.
 Grosvenor v. Danforth (16 Mass. 74), 1483.
 Grusing v. Shannon (2 Ill. App. 325), 154.
 Guardian M. L. Ins. Co. v. Hogan (80 Ill. 35), 567, 1096.
 Guertin v. Monbleu (144 Ill. 32), 1224.
 Guerdon v. Corbet (87 Ill. 272), 1105, 1146.
 Gudgell v. Pettigrew (26 Ill. 305), 1388, 1395, 1399.
 Guest vs. Reynolds (68 Ill. 478), 244, 734, 1000.
 Guiterman v. Liverpool, etc., S. S. Co. (83 N. Y. 358), 1055.
 Guinard v. Heysinger (15 Ill. 288), 857.
 Guild v. Hall (91 Ill. 223), 394, 398.
 Gunterman v. People (138 Ill. 518), 1331, 1334.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Gurney v. Collins (64 Mich. 458), 551.
 Guthrie v. Wabash Ry. Co. (40 Ill. 109), 1475.
 Gutsch Brew. Co. v. Fischbeck (41 Ill. App. 400), 846.
 Gutterson v. Morse (58 N. H. 165), 1058.
 Guyer v. Wookey (18 Ill. 536), 60, 247, 248.
 Gullett v. Otey (19 Ill. App. 182), 196.
 Gulliver v. People (82 Ill. 145), 1063.
 Gulliver v. Adams Ex. Co. (38 Ill. 503), 1204.
 Gulliver v. Roelle (100 Ill. 14), 556.
 Guyer v. Cox (1 Overt (Tenn.) 184), 970.
 Guyman v. Burlingame (36 Ill. 201), 415.
 Guyott v. Butts (4 Wend. (N. Y.) 579), 1142.
- H.**
- Haas v. Stenger (75 Ill. 597), 883.
 Hackett v. Jones (34 Ill. App. 562), 841, 1165.
 Hackett v. Pratt (52 Ill. App. 346), 1143, 1144.
 Hackett v. Smelsey (77 Ill. 109), 52.
 Hadaway v. Kelly (78 Ill. 286), 1390.
 Hadden v. Innes (24 Ill. 381), 893.
 Haden v. Middlesex, etc., Co. (10 Mass. 39), 109.
 Hadlock v. Hadlock (22 Ill. 384), 274, 1115.
 Hahn v. Ritter (12 Ill. 80), 839, 872.
 Hahn, etc., v. St. Clair S. & I. Co. (50 Ill. 526), 1210.
 Hahnemannian Life Ins. Co. v. Beebe (48 Ill. 87), 209, 738.
 Hagar v. Randall (62 Me. 439), 168.
 Hagenbaugh v. Crabtree (33 Ill. 226), 1030.
 Haggard v. Smith (71 Ill. 226), 594, 881.
 Haggard Bros. v. W. & T. Smith (76 Ill. 507), 594.
 Hague v. Porter (3 Hill (N. Y.) 141), 95.
 Hague v. Porter (45 Ill. 318), 254.
 Hallard v. Smart (6 Cow. (N. Y.) 385), 1483.
 Hallman v. Buckmaster (3 Gilman. (Ill.) 498), 809, 1247.
 Haines v. O'Connor (5 Ill. App. 213), 20, 340, 350, 354.
 Haines v. People (97 Ill. 161), 1233, 1235.
 Haines v. People (19 Ill. App. 354), 1165, 1295.
 Hair v. Barnes (26 Ill. App. 580), 1000.
 Hair v. North Western Nat. Bank (50 Ill. App. 211), 338.
 Haish v. Munday (12 Ill. App. 539), 1058.
 Halton v. Jeffrys (10 Mod. (Eng.) 280), 771.
 Hake v. Struebel (121 Ill. 321), 1204, 1216.
 Haldeman v. Massachusetts Mut. Life Ins. Co. (120 Ill. 390), 1493.
 Haldeman v. Starrett (23 Ill. 339), 331, 824.
 Haldema v. Sennett (21 Ill. App. 230), 1277.
 Hale v. Gladfelder (52 Ill. 91), 258.
 Haley v. City of Alton (152 Ill. 113), 935.
 Haley v. State (63 Ala. 83), 1066.
 Hall v. Barnes (82 Ill. 228), 987, 997.
 Hall v. Brackett (60 N. C. 215), 1474.
 Hall v. Cox (44 Ill. App. 382), 1209, 1216, 1222.
 Hall v. Davis (44 Ill. 494), 412.
 Hall v. Finch (29 Wis. 278), 100.
 Hall v. First Nat. Bank of Emporia (133 Ill. 234), 981, 1090, 1115.
 Hall v. Glidden (38 Me. 445), 1035.
 Hall v. Hamilton (70 Ill. 437), 19.
 Hall v. Hollander (4 B. & C. 660), 53, 222.
 Hall v. Jackson (5 Ill. App. 609), 1281.
 Hall v. Jones (32 Ill. 38), 763, 858, 1172, 1173, 1175, 1176.
 Hall v. Kimball (58 Ill. 58), 915.
 Hall v. Lincoln (46 Ill. 52), 1147.
 Hall v. Marks (56 Ill. 125), 831, 865.
 Hall v. Marston (17 Mass. 575), 489.
 Hall v. Mills (5 Ill. App. 495), 1224.
 Hall v. Nees (27 Ill. 411), 745, 1151.
 Hall v. People (57 Ill. 307), 1305.
 Hall v. Perkins (4 Scam. (Ill.) 548), 909.
 Hall v. Roger (57 Ill. 307), 1296.
 Hall v. Shutz (4 Johns (N. Y.) 240), 88, 93.
 Hall v. Thode (75 Ill. 173), 1233.

[References are to pages, Vol. I., pp. 1-980; Vol. II., pp. 981-1496.]

- Hallack v. March (25 Ill. 48), 1386.
 Halle v. Nat. Park Bank of New York (140 Ill. 413), 90.
 Halley v. Ball (66 Ill. 250), 40, 61.
 Halligan v. C. & R. I. Ry. Co. (15 Ill. 558), 144, 145, 660.
 Hallock v. Marks (25 Ill. 48), 1387.
 Halsey v. Stewart (1 South (N. J. L.) 430), 416.
 Halsey v. Stillman (48 Ill. App. 413), 203, 205, 1141.
 Halsey v. Watson (1 Caines (N. Y.) Rep. 24), 1142.
 Ham v. Peery (39 Ill. App. 341), 344.
 Hambleton v. People (44 Ill. 458), 1330.
 Hamburg-American Packett Co. v. Gattman (127 Ill. 598), 1090.
 Hamburger Co. v. Levy (27 Ill. App. 570), 1277.
 Hamilton v. Beardsley (51 Ill. 478), 592.
 Hamilton v. County of Cook (4 Scam. (Ill.) 519), 461, 901.
 Hamilton v. Dewey (24 Ill. 490), 406, 407.
 Hamilton v. Hamilton (27 Ill. 158), 1387.
 Hamilton v. Peck (84 Mich. 394), 789, 791, 793.
 Hamilton v. People (173 Ill. 34), 1010.
 Hamilton v. Singer Sewing Machine Co. (54 Ill. 370), 180, 181.
 Hamilton v. Stewart (59 Ill. 330), 136.
 Hamlin v. Race (78 Ill. 425), 404.
 Hamlin v. Mack (33 Mich. 103), 177.
 Hammock v. Loan & Trust Co. (105 U. S. 77), 19.
 Hammond v. Hopping (13 Wend. (N. Y.) 505), 1044, 1045.
 Hammond v. People (32 Ill. 446), 376, 1233, 1315, 1342, 1347, 1356.
 Hammond v. Will (60 Ill. 404), 1434, 1439.
 Hampton v. Bar (3 Dana (Ky.) 578), 598.
 Hance v. Miller (21 Ill. App. 636), 1219.
 Hanchett v. Buckley (27 Ill. App. 159), 195.
 Hanchett v. Gardner (138 Ill. 571), 196.
 Hanchett v. Ives (133 Ill. 332), 30, 309, 1090.
 Hanchett v. Kinibark (118 Ill. 121), 1057, 1097.
 Hancock v. Lubaker (108 Ill. 641), 985.
 Hancock v. March (2 Scam. (Ill.) 491), 395.
 Hancock v. Power (93 Ill. 150), 1201.
 Handy v. People (29 Ill. App. 99), 1326.
 Hanewacker v. Ferman (152 Ill. 321), 1109.
 Hanford v. Hagler (49 Ill. App. 258), 964.
 Hanford v. Obrecht (38 Ill. 493), 841.
 Hanford v. Obrecht (49 Ill. 146), 1070, 1115.
 Hanks v. Baber (53 Ill. 292), 34.
 Hank v. Brownell (120 Ill. 161), 1100.
 Hanna v. Hanna (110 Ill. 53), 1071.
 Hanna v. Yocum (17 Ill. 387), 858.
 Hannebutt v. Cunningham (3 Ill. App. 353), 799.
 Hannibal & St. J. R. R. Co. v. Crane (102 Ill. 249), 288, 341.
 Hannibal, etc., v. Martin (111 Ill. 219), 1098, 1106.
 Hannum v. Thompson (1 Scam. (Ill.) 237), 411.
 Hanover Fire Ins. Co. v. Connor (20 Ill. App. 297), 339.
 Hansell v. Erickson (28 Ill. 257), 1062.
 Hanselman v. Carstens (60 Mich. 188), 449.
 Hansen v. Hale (44 Ill. App. 474), 877.
 Hansen v. Miller (145 Ill. 538), 1057, 1261.
 Hansen v. Schlesinger (125 Ill. 230), 1173.
 Hanson v. Armstrong (22 Ill. 422), 266.
 Hanson v. Denison (7 Ill. App. 73), 1437.
 Harbaugh v. Cycott (33 Mich. 241), 1074.
 Harber Bros. Co. v. Moffatt Cycle Co. (151 Ill. 84), 885, 887, 897.
 Harber Bros. Co. v. Moffatt Cycle Co. (52 Ill. App. 146), 86.
 Harbison v. Shook (41 Ill. 142), 462, 872, 1002, 1003.
 Hardesty v. Glenn (32 Ill. 62), 1417, 1418.
 Hardin v. Forsyth (99 Ill. 313), 1030, 1042, 1072.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1406.]

- Hardin v. Kirk (49 Ill. 153), 753.
 Hardin v. Sisson (36 Ill. App. 383), 313.
 Harding v. Craigie (8 Vt. 501), 505, 506.
 Harding v. Brophy (133 Ill. 39), 1254.
 Harding v. Fuller (40 Ill. App. 643), 1191.
 Harding v. Larkin (41 Ill. 413), 275, 1233.
 Harding v. Purkess (2 Marsh. (Eng.) 233), 1454.
 Harding v. R. S. Peale Co. (44 Ill. App. 344), 911.
 Harding v. Sandy (43 Ill. App. 443), 1261.
 Harding v. Strong (42 Ill. 148), 260, 274.
 Harding v. Town of Hale (83 Ill. 501), 935.
 Hardy v. Adams (48 Ill. 532), 406, 798.
 Hardy v. Keeler (56 Ill. 152), 167, 1476, 1477.
 Hare v. Stegall (60 Ill. 380), 1434.
 Harlan v. Scott (2 Scam. (Ill.) 65), 1429, 1431.
 Harman v. Butler (59 Ill. 225), 369.
 Harmes v. State (57 Ind. 1), 1480.
 Harmison v. Clark (1 Scam. (Ill.) 131), 982.
 Harmison v. Lewiston (46 Ill. App. 164), 692.
 Harmon v. Campbell (30 Ill. 25), 422.
 Harms v. McCormick (132 Ill. 104), 27, 84, 1003.
 Harmon v. Thornton (2 Scam. (Ill.) 351), 786, 1146, 1235.
 Harms v. Solem (79 Ill. 460), 153, 155, 1436, 1440.
 Harms v. Stier (51 Ill. App. 234), 78.
 Harner v. Chicago (110 Ill. 400), 1010.
 Harper v. Ely (70 Ill. 582), 1034.
 Harpham v. Whitney (77 Ill. 32), 213, 215, 216.
 Harsh v. Payson (107 Ill. 368), 1054.
 Harsha v. McHenry (82 Ill. 278), 1234, 1235.
 Hart v. Brockway (57 Mich. 189), 1026.
 Hart v. Hart (41 Mo. 441), 100.
 Hart v. Morgan (49 Ill. App. 516), 1277, 1280.
 Hart v. Tolman (1 Gilm. (Ill.) 1), 612.
 Hart v. Washington Park Club (157 Ill. 9), 227, 671.
 Harter v. Morris (18 Ohio St. 492), 1487.
 Hartford Fire Ins. Co. v. Farrish (73 Ill. 166), 1003.
 Hartford Life Ins. Co. v. Gray (80 Ill. 28), 1005, 1063, 1085.
 Harrigan v. County Comrs. (53 Me. 83), 1320.
 Harrigan v. Turner (53 Ill. App. 292), 10, 967.
 Harrington v. Port Huron (86 Mich. 46), 250.
 Harris v. Bean (46 Va. 118), 1091.
 Harris v. Brain (33 Ill. App. 510), 33.
 Harris v. Connell (80 Ill. 54), 1100.
 Harris v. Insurance Co. (35 Conn. 312), 25.
 Hartford, etc., Ins. Co. v. Vanzuzor, (49 Ill. 489), 883, 1115, 1135, 1139, 1206.
 Hartley v. Lybarger (3 Ill. App. 524), 1030, 1096, 1167.
 Harts v. Wendell (26 Ill. 274), 197, 852.
 Hartshorn v. Byrne (147 Ill. 418), 1050, 1057.
 Hartshorn v. Dawson (79 Ill. 108), 256.
 Hartshorn v. Kinsman (16 Ill. App. 555), 245.
 Harrigan v. C. & I. Ry. Co. (53 Ill. App. 344), 1091.
 Harris v. Jenks (2 Scam. (Ill.) 475), 412, 427.
 Harris v. Lester (80 Ill. 307), 595.
 Harris v. McCasland (29 Ill. App. 430), 1108.
 Harris v. Miner (28 Ill. 135), 839, 1102, 1208.
 Harris v. People (138 Ill. 63), 1253.
 Harris v. Pearce (5 Ill. App. 622), 852, 855, 879, 888.
 Harris v. Rose (26 Ill. App. 237), 1111.
 Harris v. Shebeck (151 Ill. 287), 1003, 1091, 1270.
 Harris v. Shebeck (51 Ill. App. 382), 1220.
 Harris v. Sweetland (48 Mich. 110), 954.
 Harrison v. Chipp (25 Ill. 575), 367, 368.
 Harrison v. Hart (21 Ill. App. 348), 1367.

[References are to pages, Vol. I., pp. 1-900; Vol. II., pp. 961-1406]

- Harrison v. McIntosh (1 Johns. (N. Y.) 385, 778.
- Harrison v. Park (1 J. J. Marsh Ky.), 170, 1079.
- Harrison v. Willett (79 Ill. 482), 878.
- Harvey v. Collins (89 Ill. 155), 1141.
- Harvey v. Drew (82 Ill. 606), 858, 1051.
- Harvey v. Ellithorpe (26 Ill. 418), 868, 1051.
- Harvey v. McAdams (32 Mich. 472), 665.
- Harvey v. Mitchell (2 Mo. & Rob. 366), 1047.
- Harvey v. Mount (8 Beav. 439), 1488.
- Harvey v. Osborne (55 Ind. 535), 1059.
- Harvey v. Van De Mark (71 Ill. 117), 481, 1216.
- Harvey v. City of New York (1 Hun. (N. Y.) 630), 245.
- Harwood v. Tompkins (Zab. (N. J.), 425), 778.
- Harzefeld v. Converse (105 Ill. 534), 1191, 1192.
- Hasinfrast v. Kelly (13 Johns. (N. Y.), 468, 605.
- Hasey v. White Pigeon B. S. Co. (1 Doug. (Mich.) 193), 1012.
- Haskins v. Haskins (67 Ill. 446), 151, 1415, 1426.
- Haskins v. People (14 Ill. App. 198), 935.
- Haskins v. Rawlston (67 Mich. 648), 455.
- Haslett v. Crain (85 Ill. 129), 283, 284.
- Hassett v. Johnson (48 Ill. 68), 1098, 1100, 1416.
- Hastings v. Lusk (22 Wend. (N. Y.) 410), 1470, 1471.
- Hastings v. Palmer (20 Wend. (N. Y.) 225), 998.
- Hatch v. Potter (2 Gilm. (Ill.) 275), 204.
- Hatch v. Wegg (5 Ill. App. 452), 1219.
- Hately v. Pike (162 Ill. 241), 1282.
- Hatfield v. Cheaney (76 Ill. 488), 1087.
- Hathaway v. Hemingway (20 Conn. 195), 997.
- Hatten v. Robinson (4 Blackf. (Ind.) 479), 106.
- Hatten v. Robinson (14 Pick. (Mass.) 416), 1017.
- Havana Press Drill Co. v. Ashurst (148 Ill. 115), 93.
- Havana R. & E. R. R. Co. v. Walsh (85 Ill. 58), 32, 34.
- Havens v. Bush (2 Johns. (N. Y.) 387), 1133.
- Haven v. Green, use (26 Ill. 252), 920.
- Haverstick v. Fergus (71 Ill. 105), 179.
- Havins v. Bickford (9 Humph. (Tenn.) 673), 1417.
- Hawes v. People (124 Ill. 560), 14, 15, 1216, 1297.
- Hawes v. People (129 Ill. 123), 914, 1218, 1219, 1297.
- Hawk v. Ament (28 Ill. App. 390), 1496.
- Hawkins v. Albright (70 Ill. 87), 323, 324.
- Hawkins v. Chicago & N. W. Ry. Co. (100 Ill. 466), 1198.
- Hawkinson v. Oleson (48 Ill. 277), 106.
- Hawk v. Harmon (5 Binn. (Pa.) 47), 71.
- Hawks v. Sands (3 Gilm. (Ill.) 227), 889.
- Hawley v. Burd (6 Ill. App. 454), 124.
- Hawley v. Savage (15 Conn. 52), 489.
- Hawthorn v. Cooper (22 Ill. 255), 966, 974.
- Hawver v. Hawver (78 Ill. 412), 207, 1015.
- Hay v. Hayes (56 Ill. 342), 1204.
- Hay v. People (59 Ill. 94), 1328, 1466.
- Haycraft v. Davis (49 Ill. 455), 1146.
- Hayden v. Alton Nat. Bank (29 Ill. App. 458), 891.
- Hayes v. Bernard (38 Ill. 297), 271.
- Hayes v. Caldwell (5 Gilm. (Ill.) 33), 378.
- Hayes v. Houston (86 Ill. 487), 1142, 1146.
- Hayes v. Massachusetts Life Ins. Co. (125 Ill. 626), 161, 163, 167, 169.
- Hayes v. Parmalee (79 Ill. 503), 1015.
- Hayes v. Shields (2 Yeates (Pa.) 222), 416.
- Haynes v. Lucas (50 Ill. 436), 111, 112, 113, 773, 912.
- Haynes v. Mason (30 Ill. App. 85), 98.

[References are to pages, Vol. I., pp. 1-900; Vol. II., pp. 961-1496.]

- Hays v. Borders (1 Gilm. (Ill.) 46), 523.
 Hays v. Cassell (70 Ill. 669), 1278.
 Hays v. Loomis (84 Ill. 18), 876, 878.
 Hays v. Mathers (15 Ill. App. 30), 1086.
 Hays v. Ottawa, O. & F. B. V. Ry. Co. (61 Ill. 422), 865.
 Hays v. Smith (3 Scam. (Ill.) 427), 859.
 Hayser v. Alexander (108 Ill. 385), 326.
 Hayward v. Catton (1 Ill. App. 577), 1111, 1216.
 Hayward v. Merrill (94 Ill. 349), 231.
 Hayward v. Ramsey (74 Ill. 372), 19, 392.
 Haywood v. Collins (60 Ill. 328), 289, 321, 323, 328.
 Haywood v. Harmon (17 Ill. 477), 531, 1394, 1399.
 Haywood v. McCrory (33 Ill. 459), 297, 309, 322.
 Hazelton Boiler Co. v. Hazelton Tripod Boiler Co. (37 Ill. App. 310), 15.
 Hazen & Lundy vs. Pierson & Co. (83 Ill. 241), 904, 966, 1042.
 Headen v. Rust (39 Ill. 186), 148.
 Headley v. Shaw (39 Ill. 354), 462, 468, 1002.
 Heaffer v. New England Life Ins. Co. (101 Pa. St. 178), 1048.
 Heagle v. Wheeland (69 Ill. 423), 174.
 Heald v. Heald (56 Md. 503), 1049.
 Healey v. Charnley (79 Ill. 592), 594, 596.
 Heaps v. Dunham (95 Ill. 583), 222, 864.
 Hearson v. Grandine (87 Ill. 115), 967, 1134.
 Heath v. Waters (40 Mich. 458), 1058.
 Heaton v. Hubert (4 Ill. (3 Scam.) 489), 108.
 Heckemkemper v. Dingwehrs (32 Ill. 538), 888, 892.
 Hedges v. Bower (83 Ill. 161), 1050.
 Hedstrom v. Baker (13 Ill. App. 104), 890.
 Hedges v. Mace (72 Ill. 472), 1193.
 Hedges v. County of Madison (1 Gilm. (Ill.) 306), 1233, 1237.
 Heeney v. Alcock (9 Ill. App. 431), 983.
 Heffron v. Rice (50 Ill. App. 332), 1252, 1254.
 Heidenbluth v. Rudolph (50 Ill. App. 242), 1265.
 Height v. Holley (3 Wend. (N. Y.) 258), 809.
 Heinmiller v. Hatheway (60 Mich. 391), 262.
 Heinsen v. Lamb (117 Ill. 549), 1069, 1086, 1224.
 Heintz v. Calm (29 Ill. 308), 832.
 Heintz v. Pratt (54 Ill. App. 616), 920.
 Heiser v. Loomis (47 Mich. 16), 650.
 Heffron v. Brown (155 Ill. 322), 101.
 Hekla Ins. Co. v. Schroeder (9 Ill. App. 472), 410.
 Heller v. Howard (11 Ill. App. 554), 207.
 Helmuth v. Bell (49 Ill. App. 629), 1204, 1222.
 Helmuth v. Bell (150 Ill. 263), 461, 1071.
 Hemmens v. Bentley (32 Mich. 89), 999.
 Henck v. Todhunter (4 Har. & J. (Md.), 275, s. c. 16 Am. Dec. 300), 1481.
 Henderson v. Detroit (61 Mich. 378), 104, 264.
 Henderson v. Farrelly (16 Ill. 137), 865.
 Henderson v. Henderson (88 Ill. 248), 1096.
 Henderson v. Stringer (6 Gratt. (Va.) 130), 773.
 Henderson v. Welch (3 Gilm. 340), 36.
 Henderson v. Wheaton (139 Ill. 581), 512, 603.
 Henneberry v. Morse (56 Ill. 394), 1103.
 Henneker v. Turner (10 Eng. C. L. Rep. 299), 625.
 Hennes v. People (70 Ill. 100), 397.
 Hennessy v. Metzger (50 Ill. App. 533), 1209.
 Hennies v. Vogel (87 Ill. 242), 995, 1080, 1081.
 Henniker v. Contocook Ry. Co. (9 Foster (N. H.) 146), 605.
 Henning v. Eldridge (146 Ill. 305), 1280, 1281.
 Henrichsen v. Mudd (33 Ill. 477), 986.
 Henrickson v. Reinbach (33 Ill. 292), 5, 17, 775.

[References are to pages, Vol. I., pp. 1-900; Vol. II., pp. 961-1496.]

- Henshaw v. Bryant (4 Scam. 97), 176.
 Henry v. Centralia & Chester Ry. Co. (121 Ill. 264), 1081.
 Henry v. Gregory (29 Mich. 69), 1452.
 Henry v. Hall (13 Ill. App. 343), 1052, 1072.
 Henry v. Halloway (78 Ill. 356), 1208.
 Henry v. Meriam Paraffine Co. (83 Ill. 461), 877.
 Henry v. Trustees (15 Ill. App. 157), 1252.
 Herald v. Chicago (108 Ill. 467), 251.
 Hereford v. Crow (3 Scam. (Ill.) 423), 843, 881, 911.
 Hergman v. Dettlebach (11 How. (N. Y.) Pr. 46), 293.
 Herhold v. Chicago (106 Ill. 547), 1196.
 Herman v. Glass (52 Ill. App. 625), 1084.
 Hermann v. Partridge (79 Ill. 471), 986, 1160, 1211.
 Herman-Harrison Milling Co. v. Spehr (46 Ill. App. 24), 1209.
 Hernandez v. State (18 Tex. 134), 1473.
 Herrick v. Gary (83 Ill. 85), 1061.
 Herrick v. Lapham (10 Johns. (N. Y.) 281), 738.
 Herrick v. Smith (13 Hun. (N. Y.) 446), 1065.
 Herrick v. Swartout (72 Ill. 340), 777.
 Herrington v. McCollum (73 Ill. 477), 1071.
 Herring v. Quimby (31 Ill. 153), 591.
 Herring v. Poritz (6 Ill. App. 208), 1008.
 Herrington v. Stephens (26 Ill. 298), 786.
 Herron v. Gill (112 Ill. 247), 1434, 1436.
 Herron v. Peoria Marine and Fire Ins. Co. (28 Ill. 238), 118.
 Hersey v. Westover (11 Ill. App. 197), 1076, 1426.
 Hesing v. Attorney General (104 Ill. 221), 1193, 1195.
 Heslep v. Peters (3 Scam. (Ill.) 45), 782, 917.
 Hess v. Lowry (122 Ind. 225), 1067.
 Hess v. People (84 Ill. 247), 378, 1194.
 Hess v. Webb (53 Ill. App. 53), 213, 214.
 Hess Co. v. Dawson (149 Ill. 138), 789, 791.
 Hester v. Chambers (84 Mich. 562), 1137.
 Hester v. Commonwealth (85 Pa. St. 139), 1065.
 Hettinger v. Beiler (54 Ill. App. 320), 994, 996.
 Hewes v. Detroit Ry. Co. (65 Mo. 10), 1016.
 Hewett v. Johnson (72 Ill. 513), 1097, 1099.
 Hewitt v. Clark (91 Ill. 605), 1052.
 Hewitt v. Dement (57 Ill. 500), 1050.
 Hey v. Commonwealth (82 Gratt (Va.) 946), 1011.
 Heyer v. Alexander (108 Ill. 385), 1134.
 Heyman v. Covell (36 Mich. 154), 811.
 Heynes v. Champlin (52 Mich. 25), 504, 519.
 Hibbard v. McKindley (28 Ill. 240), 457, 518.
 Hibbard v. Molloy (63 Ill. 514), 1146.
 Hibbard v. Thrasher (65 Ill. 479), 953.
 Hibbard, Spencer, Bartlett & Co. v. Ryan (46 Ill. App. 313), 212, 296.
 Hichins v. Lyon (35 Ill. 150), 291, 314, 327.
 Hicks v. McDonnell (99 Mass. 459), 1391.
 Hickman v. Haines (5 Gilm. (Ill.) 20), 409.
 Hickox v. Frank (102 Ill. 660), 38.
 Hicks v. Stevens (121 Ill. 186), 1050.
 Higginbotham v. Green (25 Hun. (N. Y.) 214), 791.
 Hill v. Belasco (17 Ill. App. 194), 168.
 Hill v. Blaisdell (1 Scam. (Ill.) 344), 151.
 Hill v. Clark (51 Ga. 122), 967.
 Hill v. Crandall (52 Ill. 70), 11.
 Hill v. Enders (19 Ill. 163), 865.
 Hill v. Goodridge (39 Mich. 439), 1050.
 Hill v. Harding (93 Ill. 77), 290, 316, 882, 1073.
 Hill v. Harding (116 Ill. 92), 1282.
 Hill v. State (17 Wis. 675), 1031.

[References are to pages, Vol. I., pp. 1-900; Vol. II., pp. 931-1490.]

- Hill v. Ward (2 Gilm. (Ill.) 285), 1099, 1110, 1153.
Hilleary v. Hungate (3 Dowl. (Eng.) 62), 1454.
Hiller v. Sharon Springs (28 Hun. (N. Y.) 344), 1067.
Hilliard v. Walker (11 Ill. 644), 888.
Hillistad v. Hostetter (46 Minn. 393), 1078.
Hills v. Moore (40 Mich. 210), 290.
Himrod v. Baugh (85 Ill. 435), 889, 898.
Hime v. Klasey (9 Ill. App. 190), 896, 899, 1285.
Hinckley v. Dean (104 Ill. 630), 10, 981.
Hinckley v. Horazdowsky (133 Ill. 359), 1100.
Hinckley v. Lewis (45 Ill. 327), 163.
Hinckley v. West (4 Gilm. (Ill.) 136), 888.
Hinds v. Hopkins, Young & Earle (28 Ill. 344), 1173, 1177.
Hiner v. People (34 Ill. 297), 1147.
Hiner v. Richter (51 Ill. 299), 456.
Hinman v. Andrews Opera Co. (49 Ill. App. 135), 292, 348, 418.
Hinman v. Kitterman (40 Ill. 253), 391.
Hinman v. Rushmore (27 Ill. 509), 330, 394.
Hinsdale-Doyle Granite Co. v. Armstrong (6 Ill. App. 315), 1099.
Hinsdale v. Miles (5 Conn. 381), 602.
Lanterberger v. Weindler (2 Ill. App. 407), 1420.
Hinton v. Husbands (3 Scam. (Ill.) 187), 838.
Hintz v. Graupner (138 Ill. 158), 209, 1149.
Hintz v. Graupner (37 Ill. App. 510), 215.
Hinze v. People (92 Ill. 406), 1326, 1329.
Hipple v. Depine (54 Ill. 528), 160.
Hirsch v. Hahn (20 Ill. App. 336), 1277.
Hirschi v. Mettleman (7 Ill. App. 112), 215.
Hirth v. Lynch (96 Ill. 409), 1115, 1221.
Hitchins v. Kimmel (31 Mich. 126), 653.
Hitchcock v. Burgett (38 Mich. 501), 1054.
Hitchcock v. Haight (2 Gilm. (Ill.) 604), 1154, 1378.
Hitchcock v. Herzer (90 Ill. 543), 982.
Hitchcock v. Watson (18 Ill. 289), 354.
Hite v. Blandford (45 Ill. 9), 644, 1098.
Hite v. Wells (17 Ill. 38), 524.
Hitt v. Allen (13 Ill. 592), 94, 934, 939.
Hoard v. Little (7 Mich. 168), 483.
Hoare v. Harris (11 Ill. 24), 41.
Hoare v. Harris (14 Ill. 35), 368.
Hoagland v. Creed (81 Ill. 506), 6.
Hobby v. Smith (1 Cow. (N. Y.) 588), 1454.
Hobson v. Emporium Real Estate Co. (42 Ill. 306), 290, 327, 521.
Hobson v. McArthur (3 McLean 241), 773.
Hobson v. Paine (40 Ill. 25), 1194.
Hobson's case (2 Chitt. Rep. 211), 1346.
Hocklander v. Hocklander (73 Ill. 618), 422.
Hodgen v. Kief (63 Ill. 146), 887.
Hodges v. Bearse (129 Ill. 87), 1061, 1090.
Hodges v. Nash (141 Ill. 391), 971.
Hodge v. People (96 Ill. 423), 1196.
Horner v. Giles (53 Ill. App. 540), 896, 898.
Horner v. Koch (84 Ill. 408), 1052.
Hoereth v. Franklin Mill Co. (30 Ill. 151), 99, 802.
Hofferbert v. Klinkhardt (58 Ill. 450), 924.
Hoffman v. Harrington (44 Mich. 183), 1036.
Hoffman v. Reichart (147 Ill. 274), 1413.
Hoffman v. Reichert (31 Ill. App. 558), 558, 1420.
Hoffman v. World's Columbian Exposition (55 Ill. App. 290), 856.
Hogate v. Edwards (65 Mich. 372), 1492.
Hoggett v. Emerson (8 Kans. 292), 300.
Hogner v. People (117 Ill. 291), 1098.
Hohman v. Elterman (83 Ill. 92), 767, 769.
Holbrook v. Coney (25 Ill. 543), 1071.
Holbrook v. Nichol (36 Ill. 161), 1140.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Holcomb v. Commissioners (2 Scam. (Ill.) 389), 837.
 Holcomb v. Davis (56 Ill. 413), 1098.
 Holcomb v. People (79 Ill. 409), 1007, 1194.
 Holden v. Herkimer (53 Ill. 258), 1192.
 Holden v. Hulburt (61 Ill. 280), 1098.
 Holden v. People (90 Ill. 434), 1331.
 Holdom v. James (50 Ill. App. 376), 63.
 Holland v. Kibbe & Lathrop (10 Ill. 133), 903.
 Holland v. Rea (48 Mich. 218), 549.
 Hollenbeck v. Todd (119 Ill. 543), 343, 1005, 1017, 1057.
 Holler v. Coleson (23 Ill. App. 324), 175, 196.
 Holly v. Metcalf (12 Ill. App. 141), 1434.
 Holliday v. Gamble (18 Ill. 35), 223.
 Holliday & Ball v. Hunt (70 Ill. 109), 1049.
 Hollister v. Brown (19 Mich. 163), 998.
 Hollowbush v. McConnell (12 Ill. 203), 1254, 1289.
 Higgins v. Bullock (66 Ill. 37), 424.
 Higgins v. Curtiss (82 Ill. 28), 1204.
 Higgins v. Halligan (46 Ill. 173), 468, 542, 574.
 Higgins v. Hayward (5 Vt. 73), 644.
 Higgins v. Lee (16 Ill. 495), 989, 1107, 1146.
 Higgin v. Lessig (49 Ill. App. 459), 1005.
 Higgins v. Mulvey (136 Ill. 636), 1236.
 Higgins v. Parker (48 Ill. 445), 1228.
 Hildreth v. Heath (1 Ill. App. 83), 1302.
 Holloway v. Freeman (22 Ill. 197), 20, 324, 769, 802, 810, 816, 820, 947.
 Holloway v. Johnson (129 Ill. 367), 1081, 1101.
 Holly v. Augustin (2 Ill. App. 108), 1096.
 Holly v. Huggefurd (8 Pick. (Mass.) 73), 166.
 Hollywood v. Reed (57 Mich. 235), 1065, 1066.
 Holms v. Bemis (124 Ill. 453), 1174.
 Holmes v. Chicago & A. Ry. (94 Ill. 439), 775, 975.
 Holmes v. Dobbins (19 Ga. 630), 968.
 Holmes v. Hale (71 Ill. 552), 1099.
 Holmes v. Parker (125 Ill. 478), 1175.
 Holmes v. Parker (25 Ill. App. 225), 1174.
 Holmes v. Parker (1 Scam. (Ill.) 567), 1241.
 Holmes v. Stateler (57 Ill. 209), 985.
 Holmes v. Stummel (24 Ill. 370), 86.
 Holmes' case (94 Ill. 439), 1089.
 Holner v. Koch (84 Ill. 408), 1007.
 Holthausen v. Pondir (23 Jones & S. (N. Y. Super. Ct.) 73), 1473.
 Holton v. Daly (106 Ill. 131), 680, 977.
 Holtz v. Bollman Bros. Co. (47 Ill. App. 378), 187, 195.
 Homes v. Hogan (1 Phila. (Pa.) 217), 416.
 Home Flax Co. v. Beebe (48 Ill. 138), 874.
 Home Ins. Co. v. Bethel (142 Ill. 537), 1127.
 Home Mut. Fire Ins. Co. v. Roonan (51 Ill. 517), 965.
 Honeyman v. Jarvis (64 Ill. 366), 864, 865.
 Honore v. Home Nat. Bank (80 Ill. 489), 594, 596, 876.
 Honore v. Wilshire (109 Ill. 103), 915, 1071, 1378.
 Hoopston v. Eads (32 Ill. App. 75), 1001.
 Hoots v. Graham (23 Ill. 81), 145.
 Hope Ins. Co. v. Lonergan (48 Ill. 49), 1146.
 Hopkins v. Jones (28 Ill. App. 410), 971, 1494, 1495.
 Hopkins v. Ladd (35 Ill. 178), 114.
 Hopkins v. O'Neil (46 Mich. 403), 697.
 Hopkins v. Smith (3 Moore & P. 341), 1488.
 Hopkins v. Woodward (75 Ill. 62), 782, 867, 966.
 Hopkinson v. Smith (7 Moore (Eng.) 237), 1452.
 Hoppers v. National Bank (10 Ill. App. 531), 392.
 Horan v. People (10 Ill. App. 211), 907.

[References are to pages, Vol. I, pp. 1-940; Vol. II, pp. 961-1496.]

- Horat v. Jackel (59 Ill. 139), 336,
 353.
 Horan v. Booth (22 Ill. App. 385),
 339.
 Horn v. Eckert (63 Ill. 522), 1209.
 Horne v. Mandlebaum (13 Ill.
 App. 607), 156, 227.
 Horne v. Sullivan (83 Ill. 30), 216.
 Horner v. Boyden (27 Ill. App.
 573), 114.
 Horner v. Goe (54 Ill. App. 285),
 1192.
 Horner v. Horner (37 Ill. App.
 199), 199, 918, 919.
 Horner v. Spellman (78 Ill. 206),
 1161.
 Horner v. Watton (117 Ill. 130),
 1069.
 Horr v. People (95 Ill. 169), 190.
 Horrell v. Horrell (52 Ill. App.
 477), 367.
 Horton v. Auchmoody (7 Wend.
 (N. Y.) 200), 151, 154.
 Horton v. Critchfield (18 Ill. 133),
 1160.
 Horton v. Smith (46 Ill. App. 241),
 1224.
 Horwitt v. Estell (92 Ill. 218), 167.
 Hoshier v. Hesterman (51 Ill. App.
 75), 1268, 1430.
 Hosley v. Brooks (20 Ill. 115), 215,
 458.
 Hosmer v. Hunt Drainage Dist.
 (134 Ill. 360), 1164, 1178.
 Hosmer v. People (96 Ill. 58), 1253.
 Hosmer v. Wilson (7 Mich. 294),
 897.
 Hotchkiss v. Mosher (48 N. Y.
 479), 1045.
 Hough v. Baldwin (16 Ill. 293),
 367.
 Hough v. Gage (74 Ill. 257), 865.
 Hough v. Harvey (84 Ill. 308),
 1194.
 House v. Beak (141 Ill. 290), 1033.
 House v. House (61 Mich. 69),
 1473.
 House v. House (6 Ind. 60), 100.
 House v. Hamilton (43 Ill. 185),
 289, 312.
 House v. Wilder (47 Ill. 510), 1096.
 Housel v. Conant (12 Ill. App.
 259), 455.
 Housh v. People (75 Ill. 487), 151.
 Hovey v. Middleton (56 Ill. 468),
 982.
 Hovey v. Thompson & Co. (37 Ill.
 538), 1035, 1099.
 Hoover v. Gehr (62 Pa. St. 136),
 1035.
 How v. Clark (23 Ill. App. 145),
 1436.
 How v. Hall (3 East 421), 1045.
 How v. Rosson (17 Ill. 588), 512.
 How v. Thayer (24 Ill. 246), 799,
 815.
 How v. Wooley (1 Belt. (Eng.) 1),
 1468.
 Howard v. Austin (12 Ill. App.
 655), 1222.
 Howard v. Bennett (72 Ill. 297),
 1006.
 Howard v. Costello (31 Ill. App.
 611), 380.
 Howard v. Crawford (21 Tex.
 399), 952.
 Howard v. Dakin (88 Ill. 36), 346.
 Howard v. Howard (15 Mass. 196),
 112.
 Howard v. McDonough (77 N. Y.
 592), 1031.
 Howard v. Patrick 38 Mich. 795),
 1064.
 Howard v. Sexton (4 N. Y. 157),
 1392.
 Howe v. Frazer (117 Ill. 191), 792.
 Howe v. Frazer (18 Ill. App. 219),
 881.
 Howe v. South Park Com'rs. (119
 Ill. 101), 1259, 1263.
 Howe v. Warren (46 Ill. App.
 325), 1254.
 Howe S. M. Co. v. Layman (88 Ill.
 39), 1098.
 Howe, etc., Co. v. Rosine (87 Ill.
 105), 1078.
 Howell v. Albany City Ins. Co.
 (62 Ill. 50), 427, 590.
 Howell v. Howell (26 Ill. 460),
 1399, 1400.
 Howell v. Morlan (78 Ill. 162),
 1178, 1222.
 Howes v. Austin (35 Ill. 396),
 1051.
 Howelt v. Miles (22 Ill. 341), 881.
 Howitt v. Estelle (92 Ill. 218),
 1146.
 Howland v. Davis (40 Mich. 545),
 458, 509, 513.
 Howland v. Hewitt (19 Ill. App.
 450), 1438.
 Howdyshell v. Gary (21 Ill. App.
 288), 1438.
 Hoxey v. Co. of Macoupin (2
 Scam. (Ill.) 36), 116.
 Hoy v. Hoy (44 Ill. 469), 112, 113,
 119, 603.

[References are to pages, Vol. I., pp. 1-990; Vol. II., pp. 961-1496.]

- Hoyer v. Town of Mascoutah (59 Ill. 137), 110, 391.
- Hoyke v. Warfield (28 Ill. App. 628), 61.
- Hubbard v. Freer (1 Scam. (Ill.) 467), 391.
- Hubbard v. Kiddo (87 Ill. 578), 259.
- Hubbard v. McCormick (33 Ill. App. 486), 832.
- Hubbard v. Rankin (71 Ill. 129), 1008.
- Hubbard v. Rogers (64 Ill. 434), 897.
- Hubboter v. State (32 Tex. 484), 492.
- Hubner v. Feige (90 Ill. 208), 393, 1098, 1104, 1120, 1413, 1418.
- Huddle v. Martin (54 Ill. 258), 994.
- Hudson v. Hanson (75 Ill. 198), 935.
- Hudson v. Maze (3 Scam. 579), 180.
- Hudson v. Minneapolis, etc., Ry. Co. (44 Minn. 52), 1489.
- Hudson v. Judge of Superior Court (42 Mich. 239, 248), 1317.
- Huff v. Bennett (6 N. Y. 339), 1031.
- Huff v. Huff (56 Mich. 456), 1041.
- Huftalin v. Misner (70 Ill. 205), 40, 1412, 1413, 1420, 1425, 1426, 1427.
- Hughes v. Bell (55 Ill. App. 379), 1217.
- Hughes v. City of Cairo (92 Ill. 339), 990, 992.
- Hughes v. People (116 Ill. 330), 1136, 1137.
- Hughes v. Smith (5 Johns (N. Y.), 168), 517.
- Hughes v. Stevens (9 Ill. 391), 270.
- Hughes v. Trahern, Adm'r (64 Ill. 48), 888.
- Hughes v. Zeigler (70 Ill. 38), 1492.
- Huggins v. People (39 Ill. 241), 1370, 1381.
- Hull v. Johnston (90 Ill. 604), 775, 786.
- Hulett v. Ames (74 Ill. 253), 1194, 1206, 1297.
- Hullick v. Scovil (4 Gilm. (Ill.) 159), 142.
- Hull v. Blaisdell (1 Scam. (Ill.) 332), 152, 154, 511.
- Hull v. Marks (34 Ill. 360), 4.
- Hulladay v. Bartholomae (1 Ill. App. 206), 1438.
- Hulme v. Renwick (16 Ill. 271), 600.
- Huls v. Buntin (47 Ill. 396), 256, 1061, 1042.
- Humboldt Ins. Co. v. Johnson (1 Ill. App. 309), 862.
- Humphreys v. Colliers & Powell (1 Scam. (Ill.) 47), 106, 1000.
- Humphreys v. Collier & Powell (1 Ill. (Breeze) 297), 1096.
- Humphrey v. Douglass (11 Vt. 22), 149.
- Humphrey v. Taggart (38 Ill. 228), 30, 187.
- Humphreys v. Matthews (11 Ill. 471), 124, 291, 329.
- Humphreys v. Phillips (57 Ill. 132), 33, 406, 799, 805, 814, 815.
- Humphreville v. Davis (27 Ill. App. 142), 1429.
- Humphreyville v. Culver, Page, etc., (73 Ill. 485), 964, 1182, 1204.
- Humphries v. Cottleyou (4 Cow. (N. Y.) 54), 790.
- Hundley v. Park Comrs. (67 Ill. 559), 12.
- Hunneman v. Grafton (10 Metc. (Mass.) 455), 482.
- Hunt v. Baldwin (27 Ill. App. 446), 397.
- Hunter v. Bilven (39 Ill. 367), 908.
- Hunt v. Chicago, etc., Ry. Co. (121 Ill. 638), 1327.
- Hunt v. Fest (8 Ala. 713), 833.
- Hunt v. Maybee (27 N. Y. 266), 1092.
- Hunt v. Sinkham (21 Ill. 639), 935.
- Hunt v. Sucklett (31 Mich. 118), 700.
- Hunt v. Weir (29 Ill. 83), 874, 1078.
- Hunter v. Bilyue (39 Ill. 367), 912.
- Hunter v. Harris (29 Ill. App. 200), 1097.
- Hunter v. Ladd (1 Scam. (Ill.) 551), 305.
- Hunter v. LeConte (6 Cow. (N. Y.) 728), 1439.
- Hunter v. Middleton (13 Ill. 50), 251.
- Hunter v. Stineburner (92 Ill. 75), 426.
- Hunter v. Watson (12 Cal. 363), 1018.
- Hunting v. Baldwin (6 Ill. App. 547), 1005.
- Huntington v. Chamber (15 Ill. App. 426), 832.
- Huntoon v. Russell (41 Mich. 316), 887.

[References are to pages, Vol. I., pp. 1-900; Vol. II., pp. 961-1496.]

- Hurbut v. Meeker (104 Ill. 541), 1057.
 Hurd v. Ascherman (117 Ill. 501), 1263.
 Hurd v. Burr (22 Ill. 29), 877.
 Hurd v. Shaw (20 Ill. 354), 213.
 Hurlbert v. Ellenberg (65 Ill. 398), 808.
 Hurley v. Marsh (1 Scam. (Ill.) 329), 156, 1001.
 Hursen v. Lehman (35 Ill. App. 489), 1217.
 Hurst v. Carlisle (3 Penn. St. 167), 133.
 Hurst v. Cook (19 Wend. (N. Y.) 463), 1840.
 Huschle v. Morris (131 Ill. 587), 1090.
 Huston v. Atkins (74 Ill. 474), 985.
 Hutchins v. Kimmell (31 Mich. 126), 703.
 Hutchinson v. Ayres (117 Ill. 558), 35.
 Hutchinson v. Howe (100 Ill. 11), 1201.
 Hutchinson v. Peck (5 Johns. (N. Y.) 196), 224.
 Hutchling v. Engle (17 Wis. 230), 72.
 Hutt v. Bruckman (55 Ill. 441), 1086.
 Hutton v. Arnett (51 Ill. 198), 162, 1028.
 Huyler v. People (116 Ill. 330), 1025.
 Hyatt v. Adams (16 Mich. 180), 65.
 Hyde v. Howes (2 Ill. App. 140), 1160.
 Hyde v. Moffat (16 Vt. 271), 772.
 Hyde v. State (16 Tex. 445), 968.
 Hyland v. Milner (90 Ind. 308), 1056.
 Hyman v. Bayne (83 Ill. 256), 454, 606, 861.
- I.
- Iglehart v. Chicago Marine, etc. Co. (35 Ill. 514), 1171, 1172, 1173.
 Iglehart v. Morris (34 Ill. 501), 1177.
 Illinois Anglo-American Storage Battery Co. v. Long (41 Ill. App. 333), 294.
 Ilett v. Collins (102 Ill. 402), 94.
 Ilse v. Jewett (2 Metc. (Mass.) 168), 459.
 Illinois Agricult. Co. v. Cranston (21 Ill. App. 174), 1103, 1277.
 Illinois L. & L. Co. v. Bum (2 Ill. App. 390), 404.
 Illinois Land and Loan Co. v. McCormick (61 Ill. 322), 415.
 Illinois Live Stock Ins. Co. v. Baker (49 Ill. App. 92), 862.
 Illinois Cent. Ry. Co. v. Able (59 Ill. 131), 1113.
 Illinois Cent. Ry. v. Baker (47 Ill. 295), 141.
 Illinois Central R. R. Co. v. B. & O. and C. R. R. Co. (23 Ill. App. 531), 1428.
 Illinois Cent. Ry. Co. v. Benton (69 Ill. 174), 1098.
 Illinois Cent. Ry. Co. v. Chambers (71 Ill. 519), 1145.
 Illinois Central R. R. Co. v. Cobb (48 Ill. 402), 338, 344, 348, 349.
 Illinois Cent. Ry. v. Cobb (72 Ill. 149), 141, 489.
 Illinois Cent. Ry. Co. v. Cobb, Christy & Co. (64 Ill. 128), 916.
 Illinois Cent. Ry. Co. v. Cragin (71 Ill. 177), 466.
 Illinois Cent. Ry. Co. v. Creighton (53 Ill. App. 45), 1266.
 Illinois Cent. Ry. Co. v. Gilbert, Admr. (157 Ill. 354), 230, 231, 235.
 Illinois Cent. Ry. Co. v. Gilbert (51 Ill. App. 404), 1109.
 Illinois Cent. Ry. Co. v. Gilchrist (9 Ill. App. 135), 1216.
 Illinois Cent. Ry. Co. v. Gillis (68 Ill. 318), 1147.
 Illinois Cent. Ry. Co. v. Goddard, Admr. (72 Ill. 568), 1103.
 Illinois Cent. Ry. Co. v. Finnigan (21 Ill. 646), 683.
 Illinois Cent. Ry. Co. v. Garish (39 Ill. 370), 1110, 1222, 1254.
 Illinois Cent. R. R. Co. v. Hall (72 Ill. 222), 234.
 Illinois Central R. R. Co. v. Hammer (72 Ill. 348), 218.
 Illinois Cent. Ry. Co. v. Hammer (85 Ill. 526), 1100.
 I. C. R. R. Co. v. Haskins (115 Ill. 300), 10.
 Illinois Cent. Ry. Co. v. Johnson (34 Ill. 389), 834, 843.
 Illinois Cent. Ry. Co. v. Johnson (40 Ill. 35), 381, 1226, 1230.
 Illinois Cent. Ry. Co. v. Larson (152 Ill. 326), 1088, 1089, 1094.
 Illinois Cent. Ry. Co. v. Larson (42 Ill. App. 264), 847.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Illinois Cent. Ry. Co. v. McKee (43 Ill. 119), 451, 647, 1097.
- Illinois Cent. Ry. Co. v. Middlesworth (43 Ill. 64), 462, 1000.
- Illinois Cent. Ry. Co. v. Latimer (128 Ill. 163), 522, 1054, 1259, 1260.
- Illinois Cent. Ry. Co. v. Modglin (85 Ill. 481), 230, 1110.
- Illinois Cent. Ry. Co. v. Nowicki (148 Ill. 29), 1001, 1091.
- Illinois Cent. Ry. Co. v. O'Keefe (49 Ill. App. 320), 1093, 1263, 1266.
- Illinois Cent. Ry. Co. v. Parks (83 Ill. 373), 910.
- Illinois Cent. Ry. Co. v. Parks (54 Ill. 294), 163.
- Illinois Cent. Ry. Co. v. Patterson (69 Ill. 650), 782.
- Illinois Cent. Ry. Co. v. Patterson (93 Ill. 290), 234, 1151.
- Illinois Cent. R. R. Co. v. Phelps (29 Ill. 447), 140.
- Illinois Cent. R. R. Co. v. Phelps (4 Ill. App. 238), 673, 916.
- Illinois Cent. Ry. Co. v. Phillips (55 Ill. 194), 1005.
- Illinois Cent. Ry. Co. v. People (143 Ill. 434), 1052, 1303, 1304, 1310.
- Illinois Cent. Ry. Co. v. Reedy (17 Ill. 580), 132, 1005.
- Illinois Central Ry. Co. v. Rend. (43 Ill. 77), 141.
- Illinois Central Ry. Co. v. Ross (31 Ill. App. 170), 238.
- Illinois Cent. Ry. Co. v. Rucker (14 Ill. 353), 1300.
- Illinois C. R. R. Co. v. Sheehan (29 Ill. App. 90), 222.
- Illinois Cent. R. R. Co. v. Siddons (53 Ill. App. 607), 217.
- Illinois Cent. R. R. Co. v. Simmons (38 Ill. 242), 461.
- Illinois Central R. R. Co. v. Slater (28 Ill. App. 73), 233.
- Illinois Cent. Ry. Co. v. Sutton (53 Ill. 397), 1002.
- Illinois Cent. R. R. Co. v. Swearingen (33 Ill. 289), 466, 467.
- Illinois Cent. Ry. Co. v. Swearingen, (47 Ill. 206), 1096, 1109, 1144.
- Illinois Cent. Ry. Co. v. Swisher (53 Ill. App. 411), 1055.
- Illinois Cent. Ry. Co. v. Taylor (24 Ill. 323), 1015.
- Illinois Central Ry. Co. v. Thompson (116 Ill. 159), 104.
- Illinois Cent. Ry. Co. v. United States (16 Ct. Cl. 333),
- Illinois Cent. Ry. Co. v. Wade (46 Ill. 115), 683.
- Illinois Cent. Ry. Co. v. Welch (52 Ill. 184), 1143.
- Illinois Cent. Ry. Co. v. Weldon (52 Ill. 290), 1098.
- Illinois Cent. Ry. Co. v. Wheeler (149 Ill. 525), 1095, 1115, 1117.
- Illinois Cent. Ry. Co. v. Wheeler (50 Ill. App. 205), 1092.
- Illinois Cent. Ins. Co. v. Wolf (37 Ill. 354), 1050.
- Illinois Cent. Ry. Co. v. Wren (43 Ill. 77), 1037.
- Illinois Furnace Co. v. Vinnedge (106 Ill. 650), 1197.
- Illinois Mid. Ry. Co. v. People (84 Ill. 426), 1331.
- Illinois Mid. Ry. Co. v. Town of Barnett (85 Ill. 313), 1000, 1308.
- Illinois & Mississippi Telegraph Co. v. Kennedy (24 Ill. 319), 419.
- Illinois R. Packett Co. v. Peoria Bridge Ass'n (38 Ill. 467), 731.
- Illinois & St. L. Ry. Co. v. Cobb (94 Ill. 55), 858.
- Illinois & St. L. R. R. & Coal Co. v. Ogle (92 Ill. 353), 217.
- Illinois & St. L. Ry. & Coal Co. v. Cobb (82 Ill. 183), 659.
- Illinois State Hospital v. Higgins (15 Ill. 185), 55, 56, 1299.
- Illinois Watch Case Co. v. Pearson (140 Ill. 423), 1295, 1313.
- Illinois & W. Ry. Co. v. Gay (5 Ill. App. 393), 1257.
- Illman v. Wm. Eggart & Co. (30 Ill. App. 310), 351.
- Imperial Fire Ins. Co. v. Shirmer (96 Ill. 580), 338, 348, 1075.
- Imperial Hotel Co. v. H. B. Clafflin Co. (53 Ill. App. 337), 1209.
- Independent Order of M. A. v. Paine (122 Ill. 625, s. c. 23 Ill. App. 171), 462, 1153.
- Independent Order of M. A. v. Paine (23 Ill. App. 171), 478, 524.
- Indiana & St. N. Ry. Co. v. Hackethal (72 Ill. 612), 1000.
- Indiana & St. L. Ry. Co. v. Miller (71 Ill. 463), 1081, 1098.
- Indianapolis B. & W. Ry. Co. v. Hartley (67 Ill. 439), 251.
- Indianapolis B. & W. Co. v. McLaughlin (77 Ill. 275), 49.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Indianapolis B. & W. Ry. Co. v. Rhodes (76 Ill. 285), 505, 1000.
 Indianapolis & St. L. Ry. Co. v. Estes (96 Ill. 470), 235, 1069, 1084.
 Indianapolis & St. L. Ry. Co. v. Link (10 Ill. App. 292), 1089.
 Indianapolis, St. L. R. R. Co. v. McClintock (63 Ill. 514), 1146.
 Indianapolis & St. L. Ry. Co. v. Cobb (94 Ill. 55), 144.
 Indianapolis & St. L. Ry. Co. v. Cobb (68 Ill. 53), 144.
 Ingalls v. Allen (144 Ill. 535), 1123, 1126.
 Ingalls v. Allen (43 Ill. App. 624), 1124.
 Ingalls v. Bulkley (13 Ill. 315), 180, 841.
 Ingersoll v. Banister (41 Ill. 388), 1033.
 Ingersoll v. Moss (44 Ill. App. 72), 83.
 Ingersoll v. Morse (33 Miss. 667), 1492.
 Ingraham v. Luther (65 Ill. 446), 1002.
 Ingraham v. Richardson (3 La. Ann. 839), 1452.
 Ingraham v. Whitmore (75 Ill. 24), 1387.
 Inman v. Allport (65 Ill. 540), 289, 766.
 In matter of Noble (124 Ill. 266), 1062.
"In re" see "Ex parte," "re," "In the Matter of" and "Matter of."
 In re Aitken (4 Barn. & Ald. 47), 1462.
 In re Annie Barnes (27 Ill. App. 151), 911.
 In re Ferrier (103 Ill. 367), 1342.
 In re Gail (74 N. Y. 526), 1463.
 In re Goodrich (79 Ill. 148), 1462.
 In re Graves (1 Crompt. & J. 364), 1461.
 In re Heath's Will (83 Va. 215), 973.
 In re Hilliard (2 Dowl. & L. (Eng.) 921), 1461.
 In re Knott (71 Cal. 584), 1464.
 In re Reynolds (L. R. 20 Ch. D. 294), 1019.
 In re Smith (117 Ill. 63), 1342.
 In re Smith (9 Wend. (N. Y.) 115), 953.
 In re Story (120 Ill. 244), 1257.
 Insurance Co. of N. A. v. McDowell (50 Ill. 120), 510.
 International Bank v. Bartalatt, (11 Ill. App. 620), 91, 902.
 International Bank of Chicago v. Jenkins (104 Ill. 143), 1196.
 International Bank v. Ferris (118 Ill. 465), 1047, 1097.
 International, etc., v. Jenkins (104 Ill. 143), 1192.
 Ireland v. Johns (1 Bing. New Cases 162), 642.
 Iron Clad Dryer Co. v. Chicago T. & S. Bk. (50 Ill. App. 461), 775, 903.
 Irvin v. Wright (1 Scam. (Ill.) 135), 889.
 Isett v. Stuart (80 Ill. 404), 17, 417.
 Isley v. Dewey (71 N. C. 14), 1066.
 Israel v. Reynolds (11 Ill. 219), 600, 784.
 Israel v. Town of Jacksonville (1 Scam. 290), 112.
 Israel v. Town of Whitehall (2 Ill. App. 509), 1266.
 Ives v. Hulce (17 Ill. App. 30), 918, 919.
 Ives v. McHard (103 Ill. 97), 1276.
 Ives v. Van Epps (22 Wend. (N. Y.) 156), 895.
- J.**
- Jackson v. Barrett (8 Johns. (N. Y.) 361), 1485.
 Jackson v. Berner (48 Ill. 203, 270).
 Jackson v. Bry (3 Ill. App. 586), 194, 197.
 Jackson v. Burke (4 Heisk (Tenn.) 610), 301.
 Jackson v. Crofton (66 Ala. 29), 1494.
 Jackson v. Caldwell (4 Wend. (N. Y.) 207), 618.
 Jackson v. Evans (8 Mich. 476), 1032.
 Jackson v. French (3 Wend. (N. Y.) 337), 1017, 1472.
 Jackson v. Haskell (2 Scam. (Ill.) 565), 116.
 Jackson v. Hathaway (15 Johns (N. Y.) 447), 250.
 Jackson v. Hobson (4 Scam. (Ill.) 411), 152, 843.
 Jackson v. Hoffman (31 La. Ann. 97), 1397.
 Jackson v. Porter (1 Paine (U. S. Cir. Ct.), 459), 253.
 Jackson v. Ramsey (3 Cow. (N. Y.) 75), 927.

[References are to pages, Vol. I., pp. 1-990; Vol. II., pp. 991-1496.]

- Jackson v. Rich (7 Johns (N. Y.) 194), 927.
 Jackson v. Schoonmaker (4 Johns (N. Y.) 171), 258.
 Jackson v. Sill (11 Johns (N. Y.) 201), 1049.
 Jackson v. State (21 Tex. 668), 1463.
 Jackson v. Virgil (3 Johns (N. Y.) 540), 184.
 Jackson v. Wakeman (2 Cow. (N. Y.) 574), 967.
 Jackson v. Warford (7 Wend. (N. Y.) 62), 261, 1140.
 Jackson v. Warren (32 Ill. 331), 1258, 1417.
 Jacksonville, etc., Coke Co. v. Barber (16 Ill. App. 206), 244.
 Jacksonville v. Jacksonville Ry. Co. (67 Ill. 540), 251.
 Jacksonville v. Walsh (106 Ill. 253), 1098.
 Jacobson v. Gunzenberg (150 Ill. 135), 1141.
 Jacobus v. Smith (14 Ill. 349), 321.
 Jacquelin v. Davidson (49 Ill. 82), 1276.
 Jaeger v. Dieden (73 Ill. 612), 1119.
 James v. Dunlap (2 Scam. (Ill.) 481), 852.
 James v. Hughill (2 Scam. (Ill.) 361), 1240.
 James v. Morey (44 Ill. 352), 1115, 1144.
 Jameson v. Isaacs (12 Vt. 611), 468.
 Jamison v. Drinkald (12 Moore 148), 1055.
 Jamison v. Graham (57 Ill. 94), 1416, 1418, 1425.
 Jamison v. People (145 Ill. 257), 971, 1075.
 Janey v. Birch (58 Ill. 87), 1147.
 Jansen v. Fricke (133 Ill. 171), 10, 974, 975.
 Jansen v. Siddall (51 Ill. App. 74), 1284.
 Jansen v. Varnum (89 Ill. 100), 1000, 1147, 1281.
 Jared v. Van Vleet (13 Ill. App. 334), 1164.
 Jarrard v. Harper (42 Ill. 457), 1109, 1116.
 Jarrett v. Phillips (90 Ill. 237), 397.
 Jarrot v. Jarrot (2 Gilman. 1), 85.
 Jarrot v. Vaughn (2 Gilman. (Ill.) 132), 146.
 Jassoy & Co. v. Horn (64 Ill. 379), 94.
 Jaycox v. Wing (66 Ill. 182), 321.
 Jefferson v. Jefferson (96 Ill. 551), 1259.
 Jell v. Douglas (4 Bar. & Ald. 374), 508.
 Jenkins v. Cohen (138 Ill. 634), 1146.
 Jenkins v. International Bank (9 Ill. App. 451), 1232.
 Jenkins v. Parkhill (25 Ind. 473), 1132.
 Jenkins v. Pope (93 Ill. 127), 934.
 Jenks v. Vandolah (29 Ill. App. 163), 917.
 Jennings v. McConnell (17 Ill. 148), 1486, 1495.
 Jennings v. Prentiss (39 Mich. 421), 1019.
 Jennings v. Runsell (8 Term. Rep. 336), 72.
 Jerome v. Whitney (7 Johns. (N. Y.) 321), 576.
 Jewell v. Schroepel (4 Cow. (N. Y.) 569), 482.
 Jewsbury v. Sperry (85 Ill. 56), 1138.
 Jochen v. Tibbells (50 Mich. 36), 263.
 Jockisch v. Hardtke (50 Ill. App. 202), 892, 1002.
 Johannes v. Kielgast (27 Ill. App. 576), 1428.
 Johns v. Boyd (117 Ill. 339), 1197.
 Johnson v. Barber (5 Gill. 425), 64.
 Johnston v. Brannan (5 Johns (N. Y.) 268), 85.
 Johnson v. Breaton (1 Ill. App. 293), 859.
 Johnston v. Brown (51 Ill. App. 549), 958, 1071, 1478.
 Johnson v. Buell (26 Ill. 66), 289, 323, 569, 1364.
 Johnson v. Chicago, etc., (105 Ill. 462), 776.
 Johnson v. Disbro (47 Mich. 49), 653, 654, 703.
 Johnson v. Disbrow (47 Mich. 60), 224, 225.
 Johnson v. Donnell (15 Ill. 97), 427.
 Johnson v. Eliel (9 Ill. App. 520), 15, 1196.
 Johnson v. Ewing Female University (35 Ill. 518), 843.
 Johnson v. Foreman & Sellers (16 Ill. App. 632), 1002.
 Johnson v. Freeport (111 Ill. 413), 881, 1055.
 Johnson v. F. & M. Ry. Co. (111 Ill. 413), 1053.

[References are to pages, Vol. I., pp. 1-900; Vol. II. pp. 961-1490.]

- Johnson v. Gillett (52 Ill. 358), 769.
1165, 1207.
Johnson v. Glover (19 Ill. 585), 920, 921, 971, 1222.
Johnson v. Glover (121 Ill. 283), 1050.
Johnson v. Johnson (114 Ill. 611), 1009.
Johnson v. Johnson (72 Ill. 490), 40.
Johnson v. Jones (44 Ill. 142), 155.
Johnson v. Kibbe (36 Mich. 269), 929.
Johnson v. Von Kettler (84 Ill. 315), 705.
Johnson v. Von Kettler (66 Ill. 63), 939.
Johnson v. Logan (68 Ill. 313), 857.
Johnson v. Lyon (75 Mich. 477), 458.
Johnson v. McKee (27 Mich. 471), 135, 648, 650.
Johnson v. Miller (50 Ill. App. 60), 9, 448.
Johnson v. Moulton (1 Scam. (Ill.) 532), 1085.
Johnson v. Noble (37 Ill. App. 314), 591, 759.
Johnson v. Pace (78 Ill. 143), 341.
Johnson v. Paterson (14 Conn. 1), 136.
Johnson v. People (31 Ill. 469), 837.
Johnson v. People (8 Ill. App. 395), 1295.
Johnson v. Prussing (4 Ill. App. 575), 174.
Johnston v. Salisbury (61 Ill. 317), 156.
Johnson v. Shinkle (50 Ill. 137), 255.
Jones v. Sprague (2 Scam. (Ill.) 155), 1216, 1240.
Johnson v. State (2 Humph. (Tenn.) 283), 220.
Johnson v. Watson (87 Ill. 536), 255, 278.
Johnson v. Wing (3 Mich. 162), 177.
Joliet v. Seward (99 Ill. 263), 237.
Joliet, A. & N. Ry. Co. v. Velle (140 Ill. 59), 1090.
Joliet Street Ry. Co. v. Call (143 Ill. 177), 1081, 1202.
Jones v. Albee (70 Ill. 34), 808.
Jones v. Baker (6 Cowan (N. Y.), 445), 118.
Jones v. Bank of Northern Liberties (44 Pa. St. 254), 351.
Jones v. Bird (74 Ill. 115), 289, 323.
Jones v. Byrd (74 Ill. 115), 769.
Jones v. Chicago & Ia. Ry. Co. (68 Ill. 380), 1107.
Jones v. Graham (51 Mich. 539), 547.
Jones v. Jones (71 Ill. 562), 132, 133, 217, 1103.
Jones v. Jones (16 Ill. 117), 310, 328.
Jones v. Hennicott (83 Ill. 485), 922.
Jones v. Lee (77 Mich. 35), 250.
Jones v. McQuirk (51 Ill. 382), 1070.
Jones v. Owen (5 Adol. & C. 222), 508.
Jones v. People (53 Ill. 366), 1151.
Jones v. Smith (64 N. Y. 180), 999.
Jones v. Wright (4 Scam. (Ill.) 338), 979, 1236.
Jones Admrs. v. Francis (1 Ill. (Breese) 153), 905.
Jordan v. Vehon (44 Ill. App. 177), 1208, 1221.
Joslyn v. Dickerson (71 Ill. 25), 21.
Joslyn v. Wheeler (62 N. H. 169), 969.
Joy v. Morgan (35 Minn. 184), 1488.
Judge v. Stone (44 N. H. 593), 1075.
Judson v. Eslava (Minor (Ala.) 3), 519.
Julliard v. May (130 Ill. 87), 313, 326.
Julian v. Burgett (11 Johns (N. Y.) 6), 576.
Jumpertz v. People (21 Ill. 375), 1041.
Junker v. Rush (136 Ill. 179), 108.
- K.**
- Kadish v. Bullen (10 Ill. App. 566), 1030, 1101.
Kagay v. Trustees (68 Ill. 75), 411, 968, 1003.
Kahn v. Cook (22 Ill. App. 539), 1005.
Kalenbach v. Railroad Co. (87 Mich. 509), 672, 678, 715, 725.
Kaler v. Builders, etc., Ins. Co. (120 Mass. 333), 1059.
Kalkaska Mfg. Co. v. Thomas (17 Ill. App. 235), 760, 948, 982, 983.
Kane v. Footh (70 Ill. 587), 1123.
Kane v. People (13 Ill. App. 382), 1220.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Kankakee Coal Co. v. Crane Bros. Mfg. Co. (28 Ill. App. 371), 1259.
- Kankakee Drainage Dist. v. Comrs., etc. (29 Ill. App. 86), 814.
- Kankakee & Seneca Ry. Co. v. Strant (101 Ill. 653), 1194.
- Kankakee & S. F. Ry. Co. v. Alfred (3 Ill. App. 511), 1392, 1393, 1398, 1399.
- Kanouse v. Kanouse (36 Ill. 439), 1391.
- Karnes v. B. & E. Ry. Co. (89 Ill. 269), 1084.
- Kartas v. Kentucky Liquor Co. (46 Ill. App. 366), 1226.
- Kassing v. Griffith (86 Ill. 265), 594, 595, 876, 986.
- Kassing v. Keohane (4 Ill. App. 460), 1412, 1436.
- Kasting v. Kasting (47 Ill. 438), 398.
- Katz v. Buck (111 Ill. 40), 1416.
- Kawkins v. Albright (70 Ill. 87), 824.
- Kayne v. Donegan (9 Ill. App. 566), 775.
- Kayser v. Hall. Admr. (85 Ill. 511), 1163.
- Keaggy v. Hite (12 Ill. 99), 1146.
- Kean v. Mitchell (13 Mich. 206), 505.
- Keating v. Springer (146 Ill. 481), 896, 1428.
- Keating v. Springer (44 Ill. App. 547), 985.
- Keedy v. Howe (72 Ill. 133), 52.
- Keegan v. Kinnare (123 Ill. 280), 895, 924, 1165.
- Keegan v. O'Callaghan (35 Ill. App. 142), 38.
- Keeler v. Campbell (24 Ill. 287), 777.
- Keeler v. Herr (54 Ill. App. 468), 1108.
- Keeley v. O'Brien (66 Ill. 358), 1140.
- Kelley v. People (123 Ill. 439), 1259.
- Keiser v. Cox (116 Ill. 670), 1198.
- Kelser v. Topping (72 Ill. 226), 1002.
- Keith v. Fink (47 Ill. 272), 1147.
- Keith v. Kellogg (97 Ill. 147), 18, 1169, 1170.
- Keith v. Knoche (43 Ill. App. 161), 941, 1148.
- Keith v. Mafit (38 Ill. 303), 865, 1043.
- Keith v. Sturges (51 Ill. 142), 1002.
- Keith v. Wilson (6 Mo. 435), 1011.
- Keith & Co. v. McDonald (31 Ill. App. 17), 302, 311.
- Kelleher v. Tisdale (23 Ill. 405), 1266.
- Keller v. Brickley (63 Ill. 496), 1251.
- Keller v. Fournier (74 Ill. 489), 1211.
- Kellerman v. Arnold (71 Ill. 632), 239.
- Kelley v. Richardson (69 Mich. 430), 1495.
- Kelley v. Third Nat. Bank of Chicago (64 Ill. 541), 521.
- Kellogg v. Boyden (126 Ill. 378), 1002, 1098.
- Kellogg v. Nilbet (10 Johns. (N. Y.) 220), 1485.
- Kellogg v. Paine (8 How. 329), 792.
- Kellogg v. Riggs (2 Root (Conn.) 126), 602.
- Kellogg v. Turple (2 Ill. App. 55), 83.
- Kelly v. Cecil Bank of Md. (29 Ill. 74), 935.
- Kelly v. City of Chicago (148 Ill. 90), 1071, 1182, 1222.
- Kelly v. Dandurand (28 Ill. App. 25), 1277.
- Kelly v. Downs (29 Ill. 74), 935.
- Kelly v. Garrett (1 Gilm. (Ill.) 649), 887, 888, 890, 927.
- Kelly v. Kelly (3 Barb. (N. Y.) 419), 121.
- Kelly v. Richardson (69 Mich. 430), 1472, 1475.
- Kelsea v. Fletcher (48 N. H. 232), 1031.
- Kelsey v. Berry (40 Ill. 69), 1254.
- Kelsey v. Henry (49 Ill. 488), 1144.
- Kelsey v. Lamb (21 Ill. 559), 448, 901, 980.
- Kelsey v. Snyder (118 Ill. 544), 1072.
- Kemball v. Wallis (10 Wend. (N. Y.) 379), 513.
- Kemper v. Town of Waverly (81 Ill. 278), 390.
- Kendall v. Brown (86 Ill. 387), 1109.
- Kendall v. Limberg (69 Ill. 353), 1142.
- Kendall v. Weaver (1 Allen (Mass.) 267), 999.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496]

- Kennebeck Co. v. Augusta Ins. Co.
(6 Gray (Mass.) 204), 1051.
- Kennedy v. Gibbs (15 Ill. 406), 490.
- Kennedy v. Greer (13 Ill. 434), 7.
17, 406, 815.
- Kennedy v. Pennick (21 Ill. 597),
113.
- Kennedy v. Strong (10 Johns. (N.
Y.) 291), 840.
- Kennedy Bros. v. Sullivan (136 Ill.
94), 1081.
- Kenny v. Jones (37 Ill. App. 615),
379.
- Kennon v. Woodward (16 Mich.
320), 521.
- Kenosha, etc., R. R. Co. v. Sperry
(3 Biss. (U. S.) 309), 1378.
- Kent v. Lincoln (32 Vt. 591), 998.
- Kent v. Mason (1 Ill. App. 466),
1031.
- Kent v. Welch (7 Johns. (N. Y.)
258), 117.
- Kenton v. Spencer (6 Ind. 321),
968.
- Kenyon v. Schreck (52 Ill. 382),
765, 1487.
- Kenyon v. Southerland (3 Gilm.
(Ill.) 99), 856.
- Keppler v. Elser (23 Ill. App. 643),
52.
- Kepley v. Luke (106 Ill. 395), 1196.
- Kergin v. Dawson (1 Gilm. (Ill.)
86), 349, 350.
- Kern v. Chicago Brewery Ass'n
(140 Ill. 371), 1202.
- Kern v. Co-operative Brewing
Ass'n (140 Ill. 371), 354.
- Kern v. Davis (7 Ill. App. 406),
369.
- Kern v. Potter (71 Ill. 19), 852.
- Kern v. Strasberger (71 Ill. 303),
593, 594, 596, 1194, 1208.
- Kernin v. Hill (37 Ill. 209), 1041.
- Kerr v. Barstow (24 Ill. 583), 142.
- Kerr v. Hilt (75 Ill. 51), 252.
- Kerr v. Hodge (30 Ill. App. 546),
1063.
- Kerr v. McGuire (28 N. Y. 446),
1045.
- Kerr v. Sharp (83 Ill. 199), 90.
- Kerr v. Swallow (33 Ill. 379), 327.
- Kerr & Bell v. Whiteside (1 Ill.
(Breese) 390), 426, 982.
- Kessler v. Penninger (59 Ill. 134),
41.
- Ketchum v. Ketchum (4 Cow. (N.
Y.) 85), 954.
- Keyes v. Fuller (9 Ill. App. 528),
1097.
- Keyser v. Shaffer (5 Cow. (N. Y.)
437), 578.
- Kibbe v. Bancroft (77 Ill. 18), 1034.
- Kiernan v. Chicago, S. E. & C. Ry.
Co. (123 Ill. 188), 1087.
- Kihlholz v. Wolf (103 Ill. 362),
1004.
- Kilgore v. Ferguson (77 Ill. 213),
846.
- Kilgour v. Drainage Comrs. (111
Ill. 342), 835, 849, 1195.
- Killian v. Clark (9 Ill. App. 426),
964.
- Kimball v. Citizens' Savings
Bank (3 Ill. App. 320), 663.
- Kimball v. Custer (73 Ill. 389), 143.
- Kimball v. Kent (2 Scam. (Ill.)
218), 966.
- Kimball v. Ritter (25 Ill. 276), 377,
378, 1443.
- Kimball & Ward v. Tanner (63 Ill.
519), 1281.
- Kimball & Co. v. Vrooman (35
Mich. 310), 558.
- Kimmel v. Henry (64 Ill. 505),
216.
- Kimmel v. Shultz (1 Ill. (Breese)
169), 1161, 1204.
- King (7 Vesey (Eng.) 312), 416.
- King v. Bradley (44 Ill. 342), 889,
892.
- King v. Carpenter (37 Mich. 363),
248.
- King v. D'Eon (1 W. Black 510),
964.
- King v. Faber (51 Pa. St. 387),
1031.
- King v. Haines (23 Ill. 340), 816.
- King v. Haley (86 Ill. 106), 691.
- King v. Herrington (14 Mich. 532),
972.
- King v. Mason (42 Ill. 223), 103.
- King v. Phillips (6 East 473), 645.
- King v. Ramsey (13 Ill. 619), 193,
196, 835, 836.
- King v. Sea (6 Ill. App. 189), 837,
1120.
- King v. Thompson (3 Scam. (Ill.)
184), 408.
- King v. Watson (5 East 487), 143.
- King v. Worthington (73 Ill. 16),
1039.
- Kingman v. Draper (14 Ill. App.
577), 245.
- Kingman & Co. v. Decker (43 Ill.
App. 303), 796.
- Kingman & Co. v. Glover (53 Ill.
App. 139), 1061.

[References are to pages, Vol. I., pp. 1-990; Vol. II., pp. 991-1496.]

- Kinkel v. Domestic S. M. Co. (86 Ill. 277), 981.
 Kingsbury v. Perkins (15 Ill. App. 240), 1416.
 Kingsbury v. Sperry (119 Ill. 279), 1232, 1233.
 Kingsland v. Koeppe (137 Ill. 344), 1167.
 Kingsley v. Bill (9 Mass. 198), 513, 516, 1398.
 Kingsley v. Kingsley (20 Ill. 203), 870.
 Kinney v. Harrett (46 Mich. 87), 264.
 Kinney v. People (98 Ill. 519), 1141.
 Kinney v. Turner (15 Ill. 182), 507, 865.
 Kinzie v. Penrose (2 Scam. (Ill.) 515), 1050.
 Kiple v. Schmidt (21 Ill. App. 402), 864.
 Kipp v. Bell (86 Ill. 577), 452, 881, 908, 916.
 Kirby v. Wabash & St. L. P. Ry. Co. (109 Ill. 412), 753.
 Kirby v. Wilson (98 Ill. 240), 1100, 1102, 1107.
 Kirkham v. Boston (67 Ill. 599), 1051.
 Kirkland v. Cox (94 Ill. 400), 255.
 Kirkpatrick v. Clark (132 Ill. 342), 253, 268.
 Kirkpatrick v. Cooper (89 Ill. 210), 185, 384, 390, 391.
 Kirkpatrick v. Taylor (43 Ill. 207), 865.
 Kissinger v. Whittaker (82 Ill. 22), 1415.
 Kitner v. Whitlock (88 Ill. 514), 1004.
 Kitson v. Farwell (132 Ill. 327), 449, 523.
 Kittridge v. Toledo, etc., Ry. Co. (53 Mich. 354), 973.
 Kitzlinger v. Sanborn (70 Ill. 146), 1087.
 Klein v. Dewes (28 Ill. 316), 1168.
 Klein v. People (31 Ill. App. 302), 1302.
 Klein v. Wells (82 Ill. 201), 786.
 Kleinschmidt v. McAndrews (117 U. S. 282), 1072, 1205.
 Klinger v. People (28 Ill. App. 575), 1329.
 Klokke v. Stanley (109 Ill. 192), 1295.
 Knapp v. Lichenstein (79 Ill. 358), 773.
 Knebelcamp v. Smith (3 Ill. App. 243), 760.
 Knebelkamp v. Fogg (55 Ill. App. 563), 338.
 Knickerbocker v. Knickerbocker (58 Ill. 399), 963.
 Knickerbocker Life Ins. Co. v. Baker (55 Ill. 241), 835.
 Knickerbocker Ins. Co. v. Gould (80 Ill. 388), 1141.
 Knickerbocker Ins. Co. v. Tolman (80 Ill. 106), 565, 606, 936.
 Knight v. Knight (3 Ill. App. 206), 1412.
 Knight v. Rusk (77 Cal. 410), 1491.
 Knight v. Sherman (105 Ill. 49), 1070.
 Knightlinger v. Egan (75 Ill. 141), 1147.
 Knights T. & M. Life Indemnity Co. v. Gravitt (49 Ill. App. 252), 33, 35.
 Knisely v. Parker (34 Ill. 48), 174.
 Knoebel v. Kircher (33 Ill. 380), 456, 843, 847.
 Knok v. Sterling (73 Ill. 214), 37.
 Knott v. Skinner (63 Ill. 239), 1146.
 Knott v. Swannell (91 Ill. 25), 1002.
 Knowles v. Knowles (86 Ill. 1), 1050.
 Knowles v. Knowles (128 Ill. 110), 1127.
 Knowlton v. Fritz (5 Ill. App. 217), 1098, 1118.
 Knowlton v. Johnson (37 Mich. 47), 165.
 Knox v. Light (12 Ill. 86), 863.
 Knox v. Metropolitan El. Ry. Co. (58 Hun. (N. Y.) 517), 474.
 Knox & Sterling (73 Ill. 214), 70, 71, 166.
 Knox v. Winsted Sav. Bank (57 Ill. 330), 1175.
 Koch & Co. v. Merk (48 Ill. App. 26), 835, 898, 1002.
 Kolb v. Klages (27 Ill. App. 531), 66.
 Kolb v. O'Brien (86 Ill. 210), 1259.
 Koob v. Ammann (6 Ill. App. 160), 1437.
 Koon v. Hollingsworth (97 Ill. 52), 1387.
 Koon v. Nichols (85 Ill. 155), 1139, 1284.
 Krankum v. Earl of Falmouth (4 Nev. & M. 330), 505.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Kreigh v. Sherman (105 Ill. 49), 1095.
 Kreuchi v. Dehler (50 Ill. 177), 987.
 Kripner v. Lincoln (54 Ill. App. 675), 881.
 Krueger v. La Blanc (62 Mich. 70), 649.
 Krug v. Ward (77 Ill. 603), 211, 215, 220, 523, 1141.
 Kruse v. Wilson (79 Ill. 233), 295, 304.
 Kuehne v. Golt (54 Ill. App. 596), 1182.
 Kuhlman v. Medlinka (29 Tex. 385), 1025.
 Kuhn v. Blitz (56 Ill. 171), 1103.
 Kuhner v. Griesbaum (59 Ill. 48), 1146.
 Kurkett v. Gregory (2 Scam. (Ill.) 44), 865.
 Kurr v. Hitt (75 Ill. 51), 259.
 Kurtz v. Hibler (55 Ill. 514), 1049.
 Kyle v. Thompson (2 Scam. 432), 28.
- L.
- Labor v. Koplin (4 N. Y. 547), 1116, 1117.
 Laclede Bank v. Keeler (109 Ill. 385), 291, 1064.
 La Cross v. Wadsworth (56 Mich. 421), 249.
 Ladd v. Piggott (114 Ill. 647), 1069, 1120.
 Ladd v. Hill (4 Vt. 164), 293.
 Lady Ensley Coal, Non, & R. R. Co. v. Shaw (46 Ill. App. 604), 173.
 La Farge v. Rickert (5 Wend. (N. Y.) 187), 576.
 Lafayette, B. & M. Ry. Co. v. Winslow (66 Ill. 219), 1276.
 Laffin v. Central Publishing House (52 Ill. 432), 292.
 Laffin v. Howe (112 Ill. 253), 90.
 Lafollette v. McCarthy (18 Ill. App. 87), 203, 1108.
 La Framboise v. Graw (56 Ill. 197), 1496.
 Lagwood v. Patterson (1 Blackf. (Ind.) 327), (s. c. 89 Ame. Dec. 520), 1480.
 Laing v. Bartley (3 Starkey's Rep. 342), 1471.
 Laird v. Warren (92 Ill. 204), 1106, 1141, 1202.
 Lake v. Brown (116 Ill. 83), 1069.
 Lake v. Campbell (18 Ill. 106), 99.
 Lake v. Cook (15 Ill. 353), 1175.
 Lake v. Lower (30 Ill. App. 500), 1268.
 Lake Erie & St. L. Ry. Co. v. Hawthorne (147 Ill. 226), 1202.
 Lake Erie & W. Ry. Co. v. Christison (39 Ill. App. 495), 644.
 Lake Erie & W. Ry. Co. v. Middleton (142 Ill. 550), 1081, 1103.
 Lake Erie & W. Ry. Co. v. Morain (140 Ill. 117), 1063.
 Lake Erie & W. Ry. Co. v. Oakes (11 Ill. App. 489), 1005.
 Lake Erie & W. Ry. Co. v. Sellman (51 Ill. 617), 858.
 Lake Erie & W. Ry. Co. v. Willis (140 Ill. 614), 521, 1120.
 Lake Shore & M. S. Ry. Co. v. B. & O. and C. Ry. Co. (149 Ill. 272), 1052.
 Lake Shore & M. S. Ry. Co. v. Bodemer (139 Ill. 596), 1090, 1099.
 Lake Shore & M. S. Ry. Co. v. Brown (123 Ill. 162), 1009, 1027, 1091, 1099, 1100.
 Lake Shore, etc., Ry. Co. v. Hessions (150 Ill. 346), 680, 824, 1000, 1253.
 Lake Shore & M. S. Ry. Co. v. Johnson (135 Ill. 641), 1104, 1125.
 Lake Shore & M. S. Ry. Co. v. Kuhlman (18 Ill. App. 22), 1278.
 Lake Shore & M. S. Ry. Co. v. O'Connor (115 Ill. 254), 771, 924.
 Lake Shore & M. S. Ry. Co. v. Richards (152 Ill. 59), 995.
 Lake Shore & M. S. Ry. Co. v. Ward (135 Ill. 511), 462, 1003.
 Lake Superior Devel. Co. v. Clapp (50 Ill. App. 301), 865, 889.
 Lalor v. Scanlon (49 Ill. 152), 1146.
 Lamar Ins. Co. v. Gullick (96 Ill. 619), 1199.
 Lamar Ins. Co. v. Moore (84 Ill. 576), 556.
 Lamb v. Henderson (63 Mich. 302), 669.
 Lambert v. Borden (10 Ill. App. 648), 1118.
 Lammers v. Meyer (59 Ill. 214), 192, 847.
 Lamping Bros. v. Payne (83 Ill. 463), 852.
 Lamport v. Abbott (12 How. (N. Y.) Pr. 340), 47.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Lampsett v. Whitney (3 Scam. (Ill.) 170), 1135.
- Lancaster v. Lane (19 Ill. 242), 151.
- Lancaster v. Waukegan & S. W. Ry. Co. (132 Ill. 492), 13, 1258, 1267.
- Land Company v. Bonner (75 Ill. 315), 1043.
- Land Co. v. Peck (112 Ill. 434), 1261.
- Landis v. People (39 Ill. 79), 846, 1370.
- Landon v. Sage (11 Conn. 302), 739, 791.
- Landsburger v. Gorman (5 Cal. 450), 1018.
- Lane v. Ironmonger (13 Mees. & W. 368), 98.
- Lane v. Sharpe (3 Scam. (Ill.) 566), 1048.
- Lang v. Max (50 Ill. App. 465), 1259.
- Langdell v. Harney (36 Ill. App. 406), 35.
- Langdoc, use, etc., v. Parkinson (2 Ill. App. 136), 195.
- Langdon v. People (133 Ill. 382), 1097, 1099, 1141.
- Langenham v. Stickney (90 Ill. 361), 395.
- Lansing v. Birge (2 Scam. (Ill.) 375), 909.
- Lanyon v. Lanz & Co. (43 Ill. App. 654), 1175.
- LaPointe v. O'Toole (44 Ill. App. 43), 1100.
- LaPointe v. Stewart (16 Ill. 291), 1435.
- Lapp v. Pinover (27 Ill. App. 169), 161, 1099.
- Larcen v. Ginsen (53 Mich. 427), 97.
- Larman v. Huey (12 B. Mon. (Ky.) 436), 1092.
- Larminie v. Carley (114 Ill. 196), 1009.
- Larmon v. Carpenter (70 Ill. 549), 111.
- Larned v. Carpenter, etc. (65 Ill. 543), 26.
- Larson v. Laird (36 Ill. App. 402), 197.
- La Salle Pressed Brick Co. v. Coe (53 Ill. App. 506), 177, 1031.
- Laschear v. White (88 Ill. 43), 350.
- Lassen v. Mitchell (41 Ill. 101), 462, 1000.
- Latham v. McGinnis (29 Ill. App. 542), 1434.
- Latham v. Sumner (89 Ill. 234), 397, 896.
- Lathrop v. Amherst Bank (9 Metc. (Mass.) 489), 1479.
- Laughlinwell v. White (1 Johns (N. Y.) Cas. 99), 512.
- Launtz v. Heller (41 Ill. App. 528), 1163.
- Launtz v. People (113 Ill. 137), 1309, 1312, 1331.
- Lavalle v. People (68 Ill. 252), 1328, 1329, 1330.
- Lavalle v. Strobel (89 Ill. 370), 252, 259, 263, 270.
- Laville v. Soucy (96 Ill. 467), 1306.
- Law v. Bently (25 Ill. 52), 1438.
- Law v. Fletcher (84 Ill. 45), 1209.
- Law v. Gromms (158 Ill. 492), 417, 422.
- Law v. Grommes (55 Ill. App. 312), 414.
- Lawler v. Gordon (91 Ill. 602), 1194.
- Lawrence v. Hagerman (56 Ill. 68), 109, 431, 1107.
- Lawrence v. Mutual Life Ins. Co. of N. Y. (5 Ill. App. 280), 1076.
- Lawrence v. Steadman (49 Ill. 270), 292, 303.
- Lawrence v. Yeatman (2 Scam. (Ill.) 15), 305.
- Lawson v. Glass (6 Col. 134), 1031.
- Lawver v. Langhans (85 Ill. 138), 299, 305, 309, 321, 322, 461, 756.
- Lea v. Vail (2 Scam. (Ill.) 473), 304, 305.
- Leach v. Nichols (55 Ill. 273), 1099.
- Leach v. People (118 Ill. 157), 1257.
- Leadbeater v. Roth (25 Ill. 587), 409.
- Leake v. Brown (43 Ill. 372), 33, 881.
- Leame v. Bray (3 East. 602), 131.
- Leary v. Pattison (66 Ill. 203), 1005, 1423.
- Leaves v. Barnard (5 Mod. (Eng.) 32), 770.
- Leavitt v. Kennicott (54 Ill. App. 633), 969.
- Leavitt v. Randolph County (85 Ill. 507), 1210.
- Lechleiter v. Broehl (17 Ill. App. 490), 1120.
- Leddo v. Hughes (15 Ill. 41), 112.
- Lee v. Abrams (12 Ill. 111), 121, 124, 850, 859.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Lee v. Bates (1 Scam. (Ill.) 528), 864.
 Lee v. Burk (15 Ill. App. 651), 601, 656.
 Lee v. Fox (89 Ill. 226), 415.
 Lee v. Mendel (40 Ill. 359), 589.
 Lee v. Pennington (7 Ill. App. 247), 27.
 Lee v. Quirk (20 Ill. 392), 971, 972.
 Lee v. Town of Mound Station (118 Ill. 304), 145, 1208, 1260.
 Lee v. Woolsey (19 Johns (N. Y.) 319), 134.
 Lee v. Yanaway (52 Ill. App. 23), 1162, 1192.
 Leeper v. Hersman (58 Ill. 218), 316.
 Leeper v. Terre Haute & I. Ry. Co. (162 Ill. 215), 1202.
 Lees v. Drainage Comrs. (125 Ill. 47), 365, 1240.
 Leetch v. Atlantic Ins. Co. (4 Daly (N. Y.) 518), 1024.
 Leftwich v. Day (32 Ill. 512), 1118.
 Legg v. Robinson (7 Wend. (N. Y.) 194), 836.
 Legnard v. Crane (55 Ill. App. 496), 1159.
 Legnard v. Rhodes (51 Ill. App. 477), 1209.
 Lehman v. Freeman (86 Ill. 208), 381, 392, 966.
 Lehman v. Rothbarth (111 Ill. 185), 1033, 1195.
 Lehman v. Sigiman (40 Ill. App. 276), 921.
 Lehman v. Whittington (8 Ill. App. 374), 1416.
 Lehr v. Vandevier (48 Ill. App. 511), 980.
 Leldig v. Rawson (1 Scam. (Ill.) 272), 213, 511.
 Leigh v. Hodges (3 Scam. (Ill.) 15), 882, 1146, 1210.
 Leighton v. Hall (31 Ill. 108), 411.
 Leindecker v. Waldron (52 Ill. 283), 1018, 1414, 1418, 1419.
 Leitch v. Campbell (27 Ill. 138), 1398.
 Leland v. Douglas (1 Wend. (N. Y.) 492), 506.
 Leland v. Tousey (6 Hill (N. Y.) 333), 279.
 Leman v. Best (30 Ill. App. 323), 1104.
 Leman v. Sherman (117 Ill. 637), 6.
 Lemon v. Stephenson (40 Ill. 45), 383.
 Lemon v. Stevenson (36 Ill. 49), 846, 888, 889.
 Linder v. Monroe (33 Ill. 388), 1281, 1282.
 Lennon v. Goodspeed (89 Ill. 938), 1004.
 Lenox v. Faller (39 Mich. 268), 243, 1065.
 Lent v. Padelford (10 Mass. 230), 508, 509, 513, 515.
 Lenz v. Harrison (148 Ill. 598), 1202.
 Loeminster v. Fitchburg Ry. Co. (7 Allen (Mass.) 38), 1391.
 Leonard v. Denton (51 Ill. 482), 1028.
 Leonard v. Patton (106 Ill. 99), 764, 882.
 Leonard v. The Times (51 Ill. App. 427), 1222.
 Lequatte v. Drury (6 Ill. App. 389), 15.
 Leshar v. Sherwin (86 Ill. 420), 1415, 1416, 1426.
 Leslie v. Fischer (62 Ill. 118), 11, 765.
 Lessee v. Astor (2 Howell 319, 338), 6.
 Lesser v. Banks (46 Ark. 482), 1205.
 Lester v. People (150 Ill. 408), 588, 602, 1287.
 Lester v. Stevens (29 Ill. 155), 799.
 Lewis v. Barber (21 Ill. App. 638), 1099, 1172.
 Lewis v. Few (6 Johns. 32), 69.
 Lewis v. Flowree (32 Ill. App. 314), 1194.
 Lewis v. Goquette (3 Stew. & Port. (Ala.) 184), 257.
 Lewis v. Harsh (54 Ill. 383), 91.
 Lewis v. Hoboken (42 N. J. L. 377), 4.
 Lewis v. Lewis (92 Ill. 237), 1146.
 Lewis v. Littlefield (15 Me. 235), 73.
 Lewis v. People (79 Ill. 409), 1194.
 Lewis v. Shear (93 Ill. 121), 1192.
 Lewis v. Wisconsin Cent. Ry. Co. (54 Ill. App. 636), 686.
 Lewis v. Woodruff (15 How. (N. Y.) Pr. 539), 1485.
 Leyenberger v. Paul (12 Ill. App. 635), 213, 214.
 Leyenberger v. Rebanks (55 Ill. App. 441), 1258, 1277.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496]

- Libby, McNeill & Libby v. Scherman (146 Ill. 540), 461, 1276.
 Libby, McNeill & Libby v. Scherman (50 Ill. App. 123), 648, 1120, 1164.
 Lichenstadt v. Rose (98 Ill. 643), 1261, 1262.
 Life Association v. Fasset (102 Ill. 315), 310, 802, 804, 816.
 Lighthall v. Colwell (56 Ill. 108), 86, 1048.
 Lill v. Stookey (72 Ill. 495), 919.
 Lillard v. Noble (109 Ill. 311), (s. c. 57 Ill. App. 27), 1435.
 Lilly v. Hoyt (5 Hill (N. Y.) 309), 1489.
 Limington v. Strong (8 Ill. App. 384), 1139.
 Linck v. City of Litchfield (141 Ill. 469), 1476.
 Lincoln v. Cook (2 Scam. (Ill.) 61), 826.
 Lincoln v. McLaughlin (74 Ill. 11), 884, 903.
 Lincoln v. Schwartz (70 Ill. 134), 964.
 Lincoln v. Stowell (62 Ill. 84), 1002, 1147.
 Linder v. Monroe (33 Ill. 388), 1165.
 Lindgren v. Swartz (49 Ill. App. 488), 1216, 1222, 1266.
 Lindley v. Miller (67 Ill. 244), 773, 896, 1443.
 Lindsay v. Chicago (115 Ill. 120), 1037.
 Lindsay v. Stout (59 Ill. 491), 826.
 Lindsay v. Edmiston (25 Ill. 317), 57.
 Ling v. Keith & Co. (91 Ill. 571), 1170.
 Linn v. Buckingham (1 Scam. (Ill.) 451), 409, 508, 874.
 Linn v. Sigsbee (67 Ill. 76), 1052.
 Linnington v. Strong (111 Ill. 152), 16.
 Linton v. Anglin (12 Ill. 284), 407, 459.
 Lipe v. Eisenhard (32 N. Y. 229), 100.
 Lipman v. Link (20 Ill. App. 360), 339.
 Litch v. Clinch (35 Ill. App. 654), 760, 887.
 Litch v. Colson (8 Ill. App. 458), 425.
 Littlech v. Mitchell (73 Ill. 603), 1071.
 Little v. Allington (93 Ill. 253), 933, 937, 983.
 Little v. Carlisle (2 Scam. (Ill.) 375), 979.
 Little v. Mercer (9 Mo. 218), 113.
 Little v. Munson (54 Ill. App. 437), 132, 1094, 1103.
 Little v. Smith (4 Scam. (Ill.) 400), 388, 392.
 Littleton v. Moses, a man of color (1 Ill. (Breese) 393), 1108.
 Liverpool, London & G. Ins. Co. v. Sanders (26 Ill. App. 569), 1111, 1277.
 Livingston v. Rogers (1 Caines (N. Y.) 583), 507.
 Lloyd v. Thompson (5 Ill. App. 90), 1057.
 Lloyd v. Wayne Circuit Judge (56 Mich. 236), 1298.
 Lobdell v. Hopkins (5 Cow. (N. Y.) 516), 515, 576, 578.
 Lobstein v. Lehn (120 Ill. 459), 1198.
 Locey Mines v. Chicago, W. etc. Co. (28 Ill. App. 485), 1235.
 Locnutt v. Stockton (31 Ill. App. 217), 174, 192.
 Lockbridge v. Nickolls (25 Ill. 178), 28.
 Locke v. Duncan (53 Ill. App. 373), 328.
 Lockhart v. Wolf (82 Ill. 37), 965, 970, 971.
 Lockwood v. Black Hawk, etc., Co. (34 Ia. 235), 1483.
 Lockwood v. Doane (107 Ill. 235), 35, 925, 1107.
 Lockwood v. Onion (48 Ill. 325), 1146.
 Loehr v. People (132 Ill. 504), 1062.
 Loewe v. Reismann (8 Ill. App. 525), 1042.
 Logan v. Burr (3 Ill. App. 458), 1167.
 Logan v. Houlditch (1 Esp. 22), 168.
 Logg v. People (92 Ill. 598), 1100.
 Logsdon v. Spivey (54 Ill. 104), 311.
 Lohman v. Cass County Bank (87 Ill. 616), 28.
 Lomax v. Mitchell (93 Ill. 579), 1204.
 Lombard v. Hayner (5 Ill. App. 560), 533.
 Long v. Conklin (75 Ill. 32), 1034, 1050.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Long v. Linn (71 Ill. 152), 1117,
1118.
Long v. Little (119 Ill. 600), 1028,
1085.
Long v. Lynn (71 Ill. 152), 274.
Long v. Sutter (67 Ill. 185), 412.
Long v. Traben (8 Ill. App. 132),
414.
Longley v. Norvall (1 Scam. (Ill.)
389), 837.
Longwith v. Butler (3 Gilm. (Ill.)
74), 1248.
Looksbury v. Bucklin (7 N. H.
518),
Loomis v. Francis (17 Ill. 206),
1178.
Loomis v. Newhall (15 Pick
(Mass.) 159), 505, 506.
Lord v. Babel (16 Ill. App. 434),
289, 309.
Loring v. Whitmore (13 Gray
(Mass.) 228), 1039, 1041.
Lothrop v. Southworth (5 Mich.
535), 509.
Louisville, Evansville & St. L.
Con. Ry. Co. v. McCullom (54
Ill. App. 69), 1117.
Louisville, Evansville & St. L. Ry.
Co. v. Surwald (150 Ill. 394),
56, 1193.
Louisville, N. A. & C. Ry. Co. v.
Carson (51 Ill. App. 552), 838,
875.
Louisville, etc., v. Shires (108 Ill.
617), 884, 1000, 1038, 1069,
1071, 1096.
Louisville N. A. & C. Ry. Co. v.
Wallace (136 Ill. 87), 955.
Love v. Fairchild (5 Gilm. (Ill.)
303), 298, 306.
Lovell v. Divine (12 Ill. App. 50),
21, 1194.
Low v. Graff (80 Ill. 360), 1050.
Low v. Greenwood (30 Ill. App.
184), 211.
Low v. Martin (18 Ill. 286), 179.
Low v. Nolte (15 Ill. 368), 1397,
1398.
Lowe v. Bliss (24 Ill. 168), 510.
Lowe v. Foulke (103 Ill. 58), 1133.
Lowe v. Massey (62 Ill. 47), 1098.
Lowe v. Moss (12 Ill. 477), 1204.
Lowe v. Ravens (21 Ill. App. 630),
1277.
Lowenthal v. McCormick (101 Ill.
143), 1033.
Lowenthal's Case (61 Cal. 122),
1467.
Lowry v. Bryant (2 Scam. (Ill.) 2),
1246.
Lowry v. Coster (91 Ill. 182), 239,
936.
Lowry v. Orr (1 Gilm. (Ill.) 70),
1085, 1147.
Loy v. Steamboat F. X. Aubury
(28 Ill. 412), 134.
Loyd v. Kelly (48 Ill. App. 554),
1259.
Lozier v. New York Ry. (42 Barb.
(N. Y.) 465), 250.
Lucas v. Beebe (88 Ill. 427), 379,
1048.
Lucas v. Campbell (88 Ill. 447),
353, 1496.
Lucas v. Casady (12 Ia. 567), 969.
Lucas v. Denington (86 Ill. 88),
1194.
Lucas v. Farrington (21 Ill. 31),
579, 902.
Lucas v. Spencer (27 Ill. 15), 981.
Ludden v. Buffalo Bathing Co. (22
Ill. App. 415), 169.
Ludeke v. Sutherland (87 Ill. 481),
1048.
Ludlow v. McCrea (1 Wend. (N.
Y.) 228), 930.
Ludwig v. Sager (84 Ill. 99), 1096,
1097.
Lundy v. Lundy (131 Ill. 138), 270.
Lunn v. Gage (37 Ill. 19), 896.
Lusk v. Cook (1 Ill. (Breese) 84),
524, 777, 778.
Lusk v. Parsons (39 Ill. App. 380),
1207.
Lusk v. Cassell (25 Ill. 191), 1120.
Luton v. Hoehn (72 Ill. 81),
341.
L. Wolf Mfg. Co. v. Wilson (152
Ill. 9), 227, 232, 233, 1123.
Lycan v. People (107 Ill. 423), 1062.
Lycoming Fire Ins. Co. v. Ward
(90 Ill. 545), 990, 992.
Lyke v. Van Leuven (4 Denio 127),
66.
Lynch v. Baldwin (69 Ill. 210),
1443.
Lynch v. People (16 Mich. 472),
512.
Lynde v. Noble (20 Johns (N. Y.)
80), 364.
Lynn v. Lynn (160 Ill. 307), 1194.
Lyon v. Barney (1 Scam. (Ill.)
387), 979, 1165.
Lyon v. Bryant (54 Ill. App. 331),
896, 897.
Lyon v. Worcester (49 Ill. App.
639), 907.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Lyons v. Williams (15 Ill. App. 27), 1051.
 Lytle v. People (47 Ill. 422), 458, 1249, 1371.
- M.**
- Mabley v. Judge (71 Mich. 31), 987.
 Mace v. Woodward (38 Me. 426), 352.
 MacFarland v. Ray (14 Mich. 405), 660.
 Mackin v. People (115 Ill. 312), 1019.
 Mackintire v. People (103 Ill. 142), 115.
 Maclean v. Wayne Ct. Judge (53 Mich. 242), 1320.
 MacLeod v. Wakely (2 Car. & P. 311), 1484.
 Macomber v. Nicholas (34 Mich. 212), 200.
 Macvey v. McQuality (97 Ill. 93), 1043.
 Madden v. Farmer (7 La. Ann. 480), 1475.
 Madison County v. Bartlett (1 Scam. (Ill.) 67), 489.
 Madison Co. v. Smith (95 Ill. 328), 981.
 Magee v. Beirne (39 Pa. St. 50), 290.
 Mager v. Hutchinson (2 Gilm. (Ill.) 266), 116.
 Maghee v. Kellogg (24 Wend. (N. Y.) 32), 489.
 Magill v. Brown (98 Ill. 235), 1218, 1222.
 Maguire v. Town of Xenia (54 Ill. 299), 1165.
 Maguire v. Woods 33 Ill. App. 638), 786.
 Mahan v. Brown (13 Wend. (N. Y.) 261), 734.
 Maher v. Bull (26 Ill. 348), 418, 423.
 Mahoney v. Davis (44 Ill. 288), 407, 1134.
 Mains v. Cosner (67 Ill. 536), 1258.
 Maloney v. Shattuck (15 Ill. App. 44), 258, 1421, 1422, 1425.
 Maltman v. Williamson (69 Ill. 423), 1005.
 Mainer v. Lussem (65 Ill. 484), 143.
 Manistee Lumber Co. v. Union Nat. Bank (143 Ill. 490), 1276.
 Manlove v. Bruner (1 Scam. (Ill.) 390), 839.
 Mann v. Brady (67 Ill. 95), 1416.
 Mann v. Fairchild (3 Abb. (N. Y.) App. Dec. 152), 1475.
 Mann v. Oberne (15 Ill. App. 35), 852.
 Mann v. Russell (11 Ill. 586), 1146, 1206.
 Manning v. Pierce (2 Scam. (Ill.) 4), 114, 617.
 Manny v. Rixford (44 Ill. 129), 843.
 Manrose v. Parker (90 Ill. 581), 1108.
 Manowsky v. Conroy (33 Ill. App. 141), 349, 350.
 Mansfield v. Wheeler (23 Wend. (N. Y.) 79), 1145.
 Mantovna v. Huerter (35 Ill. App. 27), 966.
 Maple v. Havenhill (37 Ill. App. 311), 414, 591, 983, 1179.
 Maples v. Scott (94 Ill. 379), 937.
 Marathon v. Oregon (8 Mich. 372), 1300.
 March v. Wright (14 Ill. 248), 116.
 Marcy v. Shultz (29 N. Y. 346), 1031.
 Marder, Luce & Co. v. Leary (137 Ill. 319), 994, 1081.
 Marcey v. Taylor (19 Ill. 634), 1003.
 Marine Bank of Chicago v. Rushmore (28 Ill. 463), 1212, 1222.
 Mariner v. Saunders (5 Gilm. (Ill.) 113), 1042.
 Mark v. Merz (53 Ill. App. 458), 214.
 Markley v. Amis (8 Rich. (S. C.) 468), 1483.
 Marlow v. Marlow (77 Ill. 633), 1042.
 Marquette Co. v. Marcott (71 Mich. 433), 668.
 Marquette, etc., Ry. Co. v. Probate Judge (53 Mich. 218), 1400.
 Marquette Mfg. Co. v. Jeffrey (49 Mich. 285), 176.
 Marschall v. Laughran (47 Ill. App. 29), 1057.
 Marsh v. Astoria Lodge No. 112, I. O. F. (27 Ill. 421), 28, 29.
 Marsh v. Colby (39 Mich. 626), 137.
 Marsh v. Elsworth (36 How. 532), (s. c. 50 N. Y. 309), 1471.
 Marsh v. Hueburt (4 McLean (U. S. C. C.) 364), 968.
 Marsh v. Prentiss (48 Ill. App. 74), 91.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Marshall v. Barr (35 Ill. 106), 254.
 Marshall v. Brown (50 Mich. 148), 1037.
 Marshall v. Bussard (1 Gilm. Jur's Rep. 9), 646.
 Marshall v. Comr's (120 Ill. 620), 985.
 Marshall v. Davis (78 N. Y. 414), 998.
 Marshall v. Duke (3 Scam. (Ill.) 67), 784, 824.
 Marshall v. Gridley (46 Ill. 247), 1049, 1051.
 Marshall v. McPherson (8 Gilm. J. (Md.) 333), 85.
 Marshall v. Meech (51 N. Y. 140), 1402.
 Marshall v. Moore (36 Ill. 321), 1486.
 Marshall v. Moses (40 Ill. 127), 1249.
 Marston v. Carr (16 Ala. 395), 351.
 Marriman v. Moore (90 Pa. St. 78), 58.
 Martin v. Barnhardt (39 Ill. 9), 993, 1166, 1282.
 Martin v. Beckwith (4 Wis. 219), 105.
 Martin v. Boyce (64 Mich. 221), 507.
 Martin v. Brewster (49 Ill. 306), 406.
 Martin v. Chambers (84 Ill. 579), 90, 1077, 1088.
 Martin v. Comrs. of Highways (52 Ill. App. 116), 1195.
 Martin v. Culliver (87 Ill. 49), 1070.
 Martin v. Dufalla (50 Ill. App. 371), 44.
 Martin v. Dryden (1 Gilm. (Ill.) 187), 290, 310.
 Martin v. Ehrenfels (24 Ill. 187), 1141.
 Martin v. Good (14 Md. 398), 1032.
 Martin v. Harrison (50 Ill. 270), 952.
 Martin v. Johnson (89 Ill. 7), 1099, 1100.
 Martin v. Judd (60 Ill. 78), 765.
 Martin v. Morelock (32 Ill. 485), 1085, 1112, 1114, 1116, 1117, 1118.
 Martin v. Robson (165 Ill. 129), 72.
 Martin v. Russell (3 Scam. (Ill.) 342), 917, 1258.
 Martin v. Sexton (55 Ill. App. 221), 758.
 Martin v. Stubbings (20 Ill. App. 381), 1175.
 Martin v. Swift (120 Ill. 488), 1259, 1280.
 Marx v. Hilsendeggen (46 Mich. 333), 1058.
 Mascull v. Wall (6 Gray (Mass.) 507), 997.
 Mason v. Abbott (83 Ill. 445), 768, 846.
 Mason v. Buckmaster (Breese 9), 602.
 Mason v. Burton (54 Ill. 349), 106.
 Mason v. Ditchbourne (1 Moo. & R. 422), 999.
 Mason v. Dousay (35 Ill. 424), 606.
 Mason v. Finch (2 Scam. (Ill.) 223), 787.
 Mason v. Finch (1 Scam. (Ill.) 495), 1417, 1418.
 Mason v. Jones (36 Ill. 212), 1103.
 Mason v. Libby (90 N. Y. 683), 1043.
 Mason v. McNamara (57 Ill. 274), 982.
 Mason v. Park (3 Scam. (Ill.) 532), 1030.
 Mason v. Showalter (85 Ill. 133), 90.
 Mason v. Strong (51 Ill. App. 482), 883, 1220.
 Mason v. Wash (1 Ill. (Breese) 39), 884.
 Mason v. Woerner (18 Mo. 570), 4.
 Massachusetts Mut. Life Ins. Co. v. Kellogg (82 Ill. 614), 456, 510, 567, 569, 981.
 Massachusetts Mut., etc., Co. v. Robinson (98 Ill. 324), 38.
 Martin v. Robson (65 Ill. 129), 72, 1110.
 Massey v. Farmers', etc. (104 Ill. 327), 1085.
 Massey v. Farmers' Nat. Bank (113 Ill. 334), 1042.
 Massey v. Robertson (5 Ill. App. 476), 864, 865.
 Masters v. Masters (13 Ill. App. 611), 38, 1166, 1222.
 Masterson v. Cheek (23 Ill. 72), 254, 271.
 Masterson v. LeClaire (4 Minn. 163), 1480.
 Mastin v. Toncray (2 Scam. (Ill.) 216), 510, 641.
 Mather v. People (12 Ill. 9), 1380.
 Mathers v. Pearson (13 Serg. & R. (Pa.) 259), 87.
 Mathews v. Cowan (59 Ill. 341), 73, 161.

[References are to pages, Vol. I., pp. 1-980; Vol. II., pp. 981-1496.]

- Mathewson v. Hoffman (77 Mich. 420), 250.
 Matthias v. Cook (31 Ill. 83), 80.
 "Matter of" see In re, "Re," "ex parte" and "In the matter of."
 Matter of Blakely (5 Paige (N. Y.) 311), 1493.
 Matter of Hynes (105 N. Y. 560), 1492.
 Matter of Mt. Morris Square (2 Hill (N. Y.) 14), 364.
 Matter of Sturms (25 Ill. 390), 1236.
 Matteson v. Noyes (25 Ill. 591), 1039, 1042.
 Matteson v. Thomas (41 Ill. 110), 1379.
 Mathews v. Hamilton (23 Ill. 470), 1073.
 Mathlessen & Hegeler Zinc Co. v. City of La Salle (117 Ill. 411), 1197.
 Mathison v. Stevens (12 Ill. App. 474), 1182.
 Matson v. Swanson (131 Ill. 255), 774, 777, 1340, 1353.
 Matthews v. Storms (72 Ill. 312), 187, 602.
 Mattingly v. Crowley (42 Ill. 300), 192.
 Mattingly v. Daswin (23 Ill. 618), 18, 521.
 Mattson v. Hanisch (5 Ill. App. 102), 193, 841.
 Maurice v. Warden (54 Md. 233), 1074.
 Mauzy v. Kinzel (19 Ill. App. 571), 1078.
 Maxey v. Padfield (1 Scam. (Ill.) 590), 391.
 Maxey v. Williamson County (72 Ill. 207), 1042.
 Maxwell v. City Bridge Co. (46 Mich. 278), 1060.
 Maxwell v. Longenecker (82 Ill. 308), 91.
 May v. Baker (15 Ill. 89), 289, 338, 339.
 May v. Hanson (5 Cal. 360), 1092.
 Mayberry v. Van Horn (83 Ill. 289), 894.
 Maynard v. People (135 Ill. 416), 1057.
 Maynz v. Zeigler (49 Ill. 303), 1146.
 Mayo v. Mayo (119 Mass. 290), 1020.
 Mayo v. Wright (63 Mich. 32), 1080, 1082.
 Mayor, etc., of New York v. Butler (1 Barb. (N. Y.) 325), 82.
 McAllister v. Ball (28 Ill. 210), 843, 846, 921.
 McAllister v. Detroit Free Press (85 Mich. 453), 1078.
 McAllister v. Hammond (6 Cow. (N. Y.) 342), 240.
 McAmore v. Wiley (49 Ill. App. 615), 1022, 1033, 1035, 1058.
 McArthur v. Honett (72 Ill. 358), 194.
 McArthur v. Oliver (53 Mich. 299), 1397.
 McBain v. Enloe (13 Ill. 76), 933, 971, 1027.
 McBane v. People (50 Ill. 503), 932.
 McBean v. Ritchie (18 Ill. 114), 212, 215.
 McBride v. Lynd (55 Ill. 41), 148.
 McCabe v. Board (46 Ind. 330), 1478.
 McCall v. Leshner (2 Gilh. (Ill.) 46), 1264, 1281.
 McCann v. People (88 Ill. 103), 973.
 McCann v. Wherton (106 Ill. 31), 257.
 McCart v. Wakefield (72 Ill. 101), 1042.
 McCarthy v. City of Chicago (53 Ill. 39), 1002.
 McCarthy v. Mo. Ry. Co. (15 Mo. App. 385), 987.
 McCarthy v. Mooney (41 Ill. 300), 790, 792, 1146.
 McCarthy v. Mooney (49 Ill. 247), 1147.
 McCarthy v. Navasche (89 Ill. 270), 1325.
 McCarthy v. Nue (91 Ill. 127), 882.
 McCartney v. McMullen (38 Ill. 237), 1425.
 McCartney v. Osborn (118 Ill. 403), 857.
 McCauley v. People (88 Ill. 578), 934.
 McCannan v. McDermid (62 Ill. 468), 1079.
 McChesney v. City of Chicago (151 Ill. 307), 1204.
 McClaughry v. Cratzenberg (39 Ill. 117), 182, 183, 185.
 McClelland v. Kellogg (17 Ill. 498), 270.
 McClelland v. Mitchell (82 Ill. 35), 1145.
 McClure v. Otrich (118 Ill. 320), 860.
 McClure v. Schroyer (13 Mo. 104), 1396.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- McClure v. Thorp (68 Mich. 33), 139.
 McClure v. Williams (65 Ill. 390), 881.
 McClurkin v. Ewing (42 Ill. 283), 1207.
 McCollum v. I. & St. L. Ry. Co. (94 Ill. 534), 1141, 1148.
 McConnell v. Brillhart (17 Ill. 354), 99.
 McConnell v. Johnson (2 Scam. (Ill.) 522), 256.
 McConnell v. Kibbe (33 Ill. 175), 658, 718, 1107.
 McConnell v. Kibbe (29 Ill. 483), 861.
 McConnell v. Stettinius (2 Gilm. (Ill.) 707), 809.
 McConnell v. Swailes (2 Scam. 572), 395.
 McCord v. Crooker (83 Ill. 556), 480, 883, 890.
 McCord v. Mechanics Nat. Bank (84 Ill. 49), 834, 843.
 McCormac v. Hancock (2 Pa. St. 310), 351.
 McCormick v. Boer (122 Ill. 573), 1379.
 McCormick v. Burt (95 Ill. 263), 710.
 McCormick v. Elston (16 Ill. 204), 57, 1035.
 McCormick v. Frelton (19 Ill. 570), 380.
 McCormick v. Gray (16 Ill. 138), 1208.
 McCormick v. Huse (78 Ill. 363), 1002.
 McCormick v. Huse (66 Ill. 315), 145.
 McCormick v. Littler (85 Ill. 62), 63.
 McCormick v. McKee (51 Mich. 427), 521.
 McCormick v. West Chicago Park Comrs. (118 Ill. 655), 1191.
 McCormick v. Tate (20 Ill. 334), 148, 514, 693, 910.
 McCormick Machine Co. v. Burandt (136 Ill. 170), 463, 1069.
 McCormick Harvesting Machine Co. v. Adele (47 Ill. App. 542), 1001, 1206.
 McCoy v. Babcock (1 Ill. App. 414), 953, 1069.
 McCoy v. Babcock (90 Ill. 416), 1070.
 McCoy v. Brennan (61 Mich. 362), 664.
 McCoy v. Williams (1 Gilm. (Ill.) 584), 99, 344, 350, 351.
 McCoutrie v. Davis (7 Ill. 298), 1377.
 McCreary v. Newberry (25 Ill. 496), 971.
 McDaniel v. Logl (143 Ill. 487), 997.
 McDaniels v. Adams (Tenn.) (113 W. Rep. 939), 164.
 McDavid v. Blevins (85 Ill. 238), 213, 1147.
 McDeed v. McDeed (67 Ill. 545), 1038.
 McDermaid v. Russell (41 Ill. 489), 183.
 McDermott v. Gubbing (25 Ill. App. 541), 1277.
 McDole v. McDole (106 Ill. 452), 80, 518.
 McDonald v. Arnout (14 Ill. 58), 1206, 1388, 1395.
 McDonald v. Brown (16 Ill. 32), 156, 650.
 McDonald v. Chisholm (131 Ill. 273), 1170.
 McDonald v. Logl (143 Ill. 487), 1272.
 McDonald v. Lord & Thomas (27 Ill. App. 111), 203.
 McDonald v. People (126 Ill. 150), 1080, 1471.
 McDonald v. Watson (51 Ill. App. 203), 1119.
 McDonald v. Wilkie (13 Ill. 22), 911.
 McDonald v. Williams (41 Ill. App. 378), 367.
 McDonnell v. Murphy (20 Ill. 346), 877.
 McDonnell v. Olwell (17 Ill. 375), 878.
 McDowell v. Milroy (69 Ill. 498), 806, 1490.
 McDowell v. Town (90 Ill. 359), 915, 1185.
 McElhannon v. McElhannon (63 Ill. 457), 30.
 McEwen v. Kerfoot (37 Ill. 530), 827.
 McFadden v. Fortier (20 Ill. 509), 1377, 1379.
 McFadon v. McEwen (22 Ill. App. 563), 1194.
 McFall v. Smith (32 Ill. App. 463), 1054.
 McFarlan v. McClellan (3 Ill. App. 295), 851.

[References are to pages, Vol. I., pp. 1-990; Vol. II., pp. 961-1496.]

- McFarland v. Claypool (128 Ill. 397), 909, 921.
 McFarland v. Erwin (8 Johns. (N. Y.) 61), 837.
 McFarland v. McFarland (4 Ill. App. 157), 21.
 McFarlane v. Williams (107 Ill. 33), 1004.
 McFerren v. Chambers (64 Ill. 118), 85, 1147.
 McGanahan v. East St. L. & C. Ry. Co. (72 Ill. 557), 678.
 McGavock v. Chamberlain (20 Ill. 219), 168.
 McGehee v. Childress (2 Stew. (Ala.) 506), 517.
 McGiffin v. Stout (Cox (N. J.) 91), 471.
 McGill v. Brown (98 Ill. 235), 1220.
 McGillis v. Bishop (27 Ill. App. 53), 153, 655.
 McGinnis v. Fernandes (126 Ill. 228), 264, 1098.
 McGinnity v. Laquerene (10 Ill. 101), 508.
 McGlynn v. Moore (25 Cal. 348), 1424.
 McGoon v. Little (2 Gilm. (Ill.) 42), 933.
 McGouldrick v. Traphagan (88 N. Y. 334), 1035.
 McGowan v. Duff (41 Ill. App. 57), 1192.
 McGrath v. People (100 Ill. 464), 1336.
 McGraw v. Fletcher (35 Mich. 104), 697.
 McGregor v. Eakin (3 Ill. App. 340), 203.
 McGregor v. McDevitt (64 Ill. 261), 1146.
 McGregor v. Village of Lovington (48 Ill. App. 202), 1073.
 McGregor v. Wait (10 Gray (Mass.) 75), 1045.
 McGuff v. State (88 Ala. 147), 1016.
 McHardy v. Wadsworth (8 Mich. 364), 896.
 McHugh v. Curtis (48 Mich. 262), 1409.
 McIntyre v. Clark (7 Wend (N. Y.) 330), 511.
 McIntire v. Preston (5 Gilm. (Ill.) 48), 832.
 McIntyre v. Sholty (139 Ill. 171), 1236.
 McIntyre v. Thompson (14 Ill. App. 554), 83.
 McJilton v. Love (13 Ill. 486), 808, 809.
 McKay v. Ross (40 Mich. 548), 623.
 McKee v. Ingalls (4 Scam. (Ill.) 30), 204, 207, 1221.
 McKee v. Ludwig (30 Ill. 28), 977.
 McKeller v. Detroit (57 Mich. 163), 32.
 McKenzie v. Penfield (87 Ill. 38), 593, 595, 1069.
 McKenzie v. Remington (78 Ill. 388), 1094, 1107, 1141.
 McKenzie v. Stretch (48 Ill. App. 410), 1005.
 McKeown v. Harvey (40 Mich. 226), 1409.
 McKibben v. Newell (41 Ill. 461), 256, 272.
 McKichan v. Follett (87 Ill. 103), 877, 878.
 McKichan v. McBean (46 Ill. 228), 1103, 1146.
 McKindley v. Buck (43 Ill. 480), 1179.
 McKinney v. Farmers' Bank (104 Ill. 180), 313.
 McKinney v. May (1 Scam. (Ill.) 534), 979.
 McKinney v. Peck (28 Ill. 174), 834.
 McKinstry v. Pennoyer (1 Scam. (Ill.) 319), 823.
 McKinzie v. Stretch (53 Ill. App. 184), 1118.
 McKoy v. Allen (36 Ill. 429), 1431.
 McLain v. Watkins (43 Ill. 24), 1486.
 McLaren v. Indianapolis, etc., Ry. Co. (83 Ind. 319), 1116.
 McLaughlin v. Fisher (136 Ill. 111), 737, 745, 749.
 McLaughlin v. Gilmore (1 Ill. App. 563), 1017.
 McLaughlin v. Hinds (151 Ill. 403), 1071, 1137.
 McLaughlin v. Hinds (47 Ill. App. 598), 1113, 1114.
 McLaughlan v. McLaughlan (126 Ill. 426), 11, 1232.
 McLaughlin v. People (17 Ill. App. 306), 788.
 McLaughlin v. Salley (46 Mich. 219), 1065.
 McLaughlin v. Walsh (3 Scam. (Ill.) 185), 1208.
 McLead v. Sharp (53 Ill. App. 403), 1096.
 McLean Coal Co. v. Long (91 Ill. 617), 777, 1120.

[References are to pages, Vol. I., pp. 1-980; Vol. II., pp. 981-1496.]

- McLean County Bank v. Mitchell (88 Ill. 52), 1033.
 McLean County Coal Co. v. Lamprecht (51 Ill. App. 649), 1146.
 McLean County Coal Co. v. Lemon (91 Ill. 561), 169.
 McLeran v. McNamara (55 Cal. 508), 1483.
 McMahon v. Sankey (35 Ill. App. 342), 1003, 1122.
 McManus v. McDonough (107 Ill. 95), 765, 987, 1241.
 McManus v. McDonough (4 Ill. App. 180), 372, 374.
 McMillan v. Bethold (40 Ill. 34), 1226.
 McMillan v. Bethold, Smith & Co. (35 Ill. 250), 600, 1042.
 McMillen v. See (78 Ill. 443), 62.
 McMillan v. Michigan S. & N. I. Ry. Co. (16 Mich. 79), 534.
 McMullen v. Graham (6 Ill. App. 239), 392, 393.
 McNab v. Bennett (66 Ill. 157), 417, 422, 433, 436, 709, 767, 977.
 McNail v. Ziegler (68 Ill. 224), 175, 1015.
 McNair v. Platt (46 Ill. 211), 888.
 McNair v. Schwartz (16 Ill. 24), 102, 103, 104.
 McNail v. Vehon (22 Ill. 499), 851.
 McNamara v. King (2 Gilm. 432), 134.
 McNaulton's Case (10 Clark & Finn 200), 1055.
 McNay v. Stratton (9 Ill. App. 216), 217, 219, 1099.
 McNeal v. Calkins (50 Ill. App. 17), 865, 1009.
 McNeer v. Boone (52 Ill. App. 181), 148, 149.
 McNeill v. Donohue (44 Ill. App. 42), 347.
 McNevine v. Lowe (40 Ill. 209), 102.
 McNulta v. Ensich (134 Ill. 46), 1282.
 McPhail v. People (160 Ill. 77), 773.
 McPherson v. Hall (44 Ill. 264), 1111.
 McReynolds v. Burlington, etc., (106 Ill. 152), 1082, 1135.
 McCulloch v. Ellis (28 Ill. App. 439), 407.
 McCully v. Silverburgh (18 Ill. 306), 890, 904.
 McCumber v. Gilman (13 Ill. 542), 1378.
 McWilliam v. Morgan (75 Ill. 473), 659.
 McWilliams v. Richland (16 Ill. App. 333), 1069.
 Meacham v. Steel (94 Ill. 593), 1255.
 Mead v. Thompson (78 Ill. 62), 141.
 Meadowcroft v. Agnew (89 Ill. 469), 343.
 Mearsons v. Lee (1 Scam. (Ill.) 193), 589.
 Mechanics Sav. Inst. v. Givens (82 Ill. 157), 307, 328, 413.
 M. E. Church v. Ladd (22 Mich. 280), 897.
 Meer v. Stevens (106 Ill. 549), 452, 510, 1002.
 Meeth v. Rankin Brick Co. (48 Ill. App. 602), 1034, 1044.
 Meller v. Walker (2 Saund. Rep. 2), 828.
 Melville v. Brown (15 Mass. 82), 293.
 Mendel v. Fink (8 Ill. App. 378), 899.
 Mendell v. Kimball (85 Ill. 562), 982, 983.
 Mendotta v. Thompson (20 Ill. 197), 1367.
 Ments v. Reynolds (62 Ill. App. 17), 1315.
 Merchants Desp. Trans. Co. v. Joesting (89 Ill. 152), 945, 952, 1068.
 Merchants D. T. Co. v. Kahn (76 Ill. 520), 88.
 Merchants Dispatch Co. v. Smith (76 Ill. 542), 88.
 Merchants D. T. Co. v. Thielbar (86 Ill. 71), 88.
 Merchants Sav. L. & T. Co. v. Goodrich (75 Ill. 554), 194, 663, 853.
 Meredith v. Hinsdale (3 Caines (N. Y.) 362), 598.
 Meredith v. People (84 Ill. 479), 1019, 1080.
 Merkle v. Bennington (58 Mich. 157), 1025.
 Merkle v. Bennington (68 Mich. 133), 551, 477.
 Merricks v. Davis (65 Ill. 319), 1076.
 Merrimac Paper Co. v. Savings Bank (129 Ill. 296), 633, 1126, 1202, 1127.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Merriweather v. Gregory (2 Scam. (Ill.) 50), 836, 865.
 Merriweather v. Smith (2 Scam. (Ill.) 30), 881.
 Merrill v. Ithaca, etc., Ry. Co. (16 Wend. (N. Y.) 586), 487.
 Merrills v. Shaw (9 Cow. (N. Y.) 67), 1112.
 Merritt v. Thompson (13 Ill. 716), 266.
 Merwin v. City of Chicago (45 Ill. 133), 341.
 Meserve v. Beckwith (41 Ill. 452), 982.
 Messmore v. Larson (86 Ill. 268), 891, 1006.
 Mester v. Hauser (94 Ill. 433), 254.
 Mestling v. Hughes (89 Ill. 389), 876.
 Metcalf v. Edmiston (25 Ill. 392), 1073.
 Metcalf v. Robinson (2 McLean 363), 84, 479, 483, 599.
 Metropolitan Life Ins. Co. v. Broach (31 Ill. App. 496), 766, 977, 1193.
 Metropolitan W. S. El. Ry. Co. v. Siegel (161 Ill. 638), 1195.
 Metz v. Albrecht (52 Ill. 492), 512, 1002.
 Metzger v. Huntington (51 Ill. App. 377), 417, 1097, 1116.
 Meullers v. Rebhan (94 Ill. 142), 990.
 Meyer v. Butterbrodt (43 Ill. App. 312), 239.
 Meyer v. Krohon (114 Ill. 574), 1026.
 Meyer v. Mead (83 Ill. 19), 1108, 1141.
 Meyer & Stratman v. Stookey (3 Ill. App. 336), 897, 898.
 Meyer v. Temme, Guardian, etc., (72 Ill. 574), 1107.
 Meyer v. Village of Teutopolis (131 Ill. 552), 1282.
 Meyer v. Wiltshire (92 Ill. 395), 916.
 Meyers v. Andrews (87 Ill. 433), 971, 1258.
 Meyers v. Meyers (32 Ill. App. 189), 1194.
 Meyers v. Phillips (72 Ill. 460), 452, 603.
 Meyers v. Schemp (67 Ill. 469), 480.
 Michels v. Olmstead (14 Fed. Rep. 219), 1051.
 Micheltree v. Sparks (1 Scam. (Ill.) 198), 381.
 Micheltree v. Sparks (1 Scam. (Ill.) 122), 918.
 Michigan Air Line Ry. Co. v. Barnes (40 Mich. 383), 992.
 Michigan Central R. R. Co. v. Chicago & M. L. S. Ry. Co. (1 Ill. App. 399), 344, 349.
 Michigan Central R. R. Co. v. Keohane (31 Ill. 144), 345.
 Michigan Central R. R. Co. v. Leighton (31 Ill. 144), 336.
 Michigan Cent. Ry. Co. v. Northern Indiana Ry. Co. (3 Ind. 245), 4.
 Michigan Mut. L. Ins. Co. v. Hull, Admr. (160 Ill. 488), 1276.
 Michigan Stat. Ins. Co. v. Abens (3 Ill. App. 488), 419.
 Middleport v. Aetna Life Ins. Co. (82 Ill. 562), 1005.
 Middleton v. White (35 Ill. 114), 1170.
 Midland Pac. Ry. Co. v. McDermid (91 Ill. 170), 342, 420, 798, 801.
 Miere v. Brush (3 Scam. Ill.) 21), 206, 327.
 Miles v. Boyton (3 Pick. (Mass.) 213), 471.
 Miles v. Danforth (32 Ill. 59), 971.
 Miles v. Danforth (37 Ill. 156), 882, 909, 953, 954.
 Miles v. Goodwin (35 Ill. 53), 390, 767.
 Miles v. O'Hara (4 Binn. (Pa.) 180), 514.
 Miles v. Sheward (8 East, 7), 508.
 Millard v. Cooper (10 Ill. App. 47), 918, 919.
 Millard v. St. Francis Xavier Academy (8 Ill. App. 341), 1182.
 Miller v. Baker (1 Met. (Mass.) 27), 141.
 Miller v. Ballard (46 Ill. 377), 1048.
 Miller v. Balthasser (78 Ill. 302), 1007, 1097, 1145.
 Miller v. Bay Circuit Judge (41 Mich. 236), 1298.
 Miller v. Beal (26 Ind. 234), 1492.
 Miller v. Bledsoe (1 Scam. 530), 36.
 Miller v. Blow (68 Ill. 340), 624, 816, 820, 828, 854, 902, 1003.
 Miller v. Bruns (41 Ill. 293), 1029.
 Miller v. Drake (1 Caines (N. Y.) 45), 509.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Miller v. Dyas (32 Ill. App. 385), 1251.
 Miller v. Gable (30 Ill. App. 578), 841, 863.
 Miller v. Glass (118 Ill. 443), 1222.
 Miller v. Glass (14 Ill. App. 177), 1234.
 Miller v. Goodwin (70 Ill. 659), 1037.
 Miller v. Graves (44 Ill. 50), 255.
 Miller v. Handy (40 Ill. 448), 424.
 Miller v. Jenkins (44 Ill. 443), 1216.
 Miller v. Johnson (79 Ill. 58), 203, 207.
 Miller v. Kingsbury (28 Ill. App. 532), 84, 114.
 Miller v. Lane (13 Ill. App. 648), 1485.
 Miller v. McCulloch (1 Blnn. (Pa.) 77), 416.
 Miller v. McGraw (20 Ill. App. 203), 1139.
 Miller v. McManis (57 Ill. 126), 857.
 Miller v. Metzger (16 Ill. 390), 941, 946, 1084, 1223.
 Miller v. Miller (16 Ill. 296), 100, 892.
 Miller v. Pence (132 Ill. 149), 935, 1105.
 Miller v. Ridgely (19 Ill. App. 306), 1149.
 Miller v. Scoville (35 Ill. App. 385), 338.
 Miller v. Superior Machine Co. (79 Ill. 450), 382, 383.
 Miller v. Trustees of Schools (88 Ill. 26), 1241.
 Miller v. Wells (46 Ill. 46), 856.
 Miller v. White (80 Ill. 580), 1418.
 Miller v. Wildcat, etc., Co. (52 Ind. 51), 992.
 Miller Brewing Co. v. Beckington (54 Ill. App. 191), 1221.
 Millers' Nat. Ins. Co. v. Kinneard (136 Ill. 199), 100.
 Milliken v. Jones (77 Ill. 372), 917.
 Milliken v. Martin (66 Ill. 13), 39, 253, 259, 263, 267, 1061.
 Millison v. Fisk (43 Ill. 112), 339, 342.
 Mills v. Duryee (2 Am. Lead. Cas.), 1480.
 Mills v. Executors, etc. (76 Ill. 381), 802, 968.
 Mills v. Lockwood (40 Ill. 130), 1135, 1287.
 Mills v. McCoy (4 Cow. (N. Y.) 406), 706.
 Mills v. Parkhurst (126 N. Y. 89), 141.
 Mills v. Parlin (106 Ill. 60), 1197.
 Milton v. Show (103 Ill. 277), 1042.
 Milwaukee & St. P. Ry. Co. v. Smith (74 Ill. 197), 1038.
 Minard v. Lawler (26 Ill. 301), 397, 398.
 Minaugh v. Partlin (67 Mich. 391), 887.
 Miner v. O'Hara (60, Mich. 91), 485.
 Miner v. Phillips (42 Ill. 123), 1031, 1063, 1073, 1222.
 Mineral Point R. R. Co. v. Barron (83 Ill. 365), 87, 346.
 Mineral Point Co. v. Keep (22 Ill. 9), 426, 769, 799.
 Minkhart v. Hankler (19 Ill. 47), 274.
 Misen v. Pick (3 Mees. & W. 481), 98.
 Missouri Pac. Ry. Co. v. Flannigan (43 Ill. App. 322), 291.
 Missouri Furnace Co. v. Abend (107 Ill. 44), 1085, 1098.
 Mississippi & O. R. R. Co. v. Harnes (52 Ill. App. 649), 461, 1085.
 Mississippi & O. Ry. Co. v. People (132 Ill. 559), 1295.
 Misch v. McAlpine (78 Ill. 507), 917, 882.
 Mitchell v. Bannon (10 Ill. App. 340), 1089.
 Mitchell v. Deeds (49 Ill. 416), 803, 864.
 Mitchell v. Hindman (150 Ill. 538), 1007.
 Mitchell v. Jacobs (17 Ill. 235), 21, 390, 1043.
 Mitchell v. Milholland (106 Ill. 175), 204, 206, 1098.
 Mitchell v. N. W. Mfg. & Car Co. (26 Ill. App. 295), 343.
 Mitchell v. Scott (41 Mich. 108), 487, 503, 524.
 Mitchell v. Smale (140 U. S. 406), 265.
 Mitchell v. Wells (54 Mich. 127), 887.
 Mitchell Admr. v. Town of Fond du Lac (61 Ill. 174), 1096, 1097.
 Mitcheltree v. Stewart (2 Scam. (Ill.) 17), 1375, 1376, 1377.
 Mitchison v. Cross (58 Ill. 366), 213, 1100.
 Mittel v. City of Chicago (9 Ill. App. 534), 1093.

[References are to pages, Vol. I., pp. 1-900; Vol. II., pp. 961-1496.]

- Mix v. Chandler (44 Ill. 174), 10, 782.
 Mix v. Nettleton (29 Ill. App. 245), 113, 119, 1153.
 Mix v. Oosby (62 Ill. 193), 997, 999, 1107.
 Mix v. People (26 Ill. 481), 1380.
 Mix v. People (29 Ill. 196), 1370.
 Mix v. People, use, etc., (86 Ill. 329), 115, 382, 383, 846, 849, 912, 1229.
 Mix v. People (92 Ill. 550), 834, 835.
 Mix v. People (106 Ill. 425), 466.
 Mix v. People (122 Ill. 641), 1283.
 Mixee v. Supervisors (26 Mich. 423), 1300.
 Mobile & O. Ry. Co. v. Davis (130 Ill. 146), 1137.
 Mobile, etc., Ry. Co. v. Yeats (67 Ala. 164), 1017.
 Moeller v. Quarrier (14 Ill. 280), 300, 339.
 Moil v. Maxwell (107 Ill. 554), 9.
 Moir v. Hopkins (16 Ill. 313), 64.
 Moline Plow Co. v. Anderson (24 Ill. App. 364), 461.
 Moline Water Power & Mfg. Co. v. Nichols (26 Ill. 90), 480.
 Monmouth Mining & Mfg. Co. v. Erling (148 Ill. 521), 924, 1080, 1081.
 Monroe v. Allaire (2 Caines. (N. Y.) 323), 518.
 Monroe v. Chaldeck (78 Ill. 429), 863.
 Monroe v. Snow (131 Ill. 126), 1035, 1104, 1141.
 Monroe v. Snow (33 Ill. App. 230), 1221, 1260.
 Montag v. Linn (23 Ill. 551), 1061.
 Montag v. Linn (27 Ill. 238), 284.
 Montague v. Self (106 Ill. 49), 1071.
 Montague v. Wallahan (84 Ill. 355), 1287.
 Montana Club v. Ketchum, etc., Co., (54 Ill. App. 354), 808.
 Montfort v. Rowland (38 N. J. Eq. 181), 1074.
 Montgomery v. Brush (121 Ill. 513), 161.
 Moutray v. People (162 Ill. 194), 1461, 1465, 1466.
 Montrose v. R. W. Ins. Co. (49 Mich. 477), 507.
 Montrose v. Bradsky (68 Ill. 185), 214, 215.
 Moody v. Nelson (60 Ill. 229), 1389.
 Moody v. Peterson (11 Ill. App. 180), 231.
 Moody v. Thomas (79 Ill. 274), 591, 821.
 Moon v. Harder (38 Mich. 566), 479, 929.
 Mooney v. Davis (75 Mich. 188), 1020.
 Mooney v. People (81 Ill. 134), 1380.
 Moore v. Bolin (5 Ill. App. 556), 14.
 Moore v. Earl of Plymouth (3 Barn. & Ald. 66), 510.
 Moore v. Goelitz (27 Ill. 18), 971.
 Moore v. Graham (58 Mich. 25), 468.
 Moore v. Hamilton (2 Gilm. (Ill.) 429), 289.
 Moore v. House (64 Ill. 162), 84.
 Moore v. Mauck (79 Ill. 391), 295.
 Moore v. Mauk (3 Ill. App. 114), 1278.
 Moore v. Moore (67 Tex. 293), 1113.
 Moore v. Moss (14 Ill. 106), 1259.
 Moore v. People (108 Ill. 484), 1098, 1202.
 Moore v. People (148 Ill. 48), 1252.
 Moore v. Sager (4 Ill. App. 248), 1002.
 Moore v. State (79 Ga. 998), 1016.
 Moore v. White (45 Mo. 207), 100.
 Moore v. Wright (90 Ill. 470), 1030, 1042, 1070, 1097, 1099.
 Moore v. Wright (96 Ill. 584), 1097.
 Moots v. State (21 Ohio St. 653), 1032.
 Morehead v. Yeazel (10 Ill. App. 263), 907.
 Moreton v. Hardern (6 Dowl. & Ryl. 275), 240.
 Morey v. Warrior Mower Co. (90 Ill. 307), 1403, 1404, 1405.
 Morgan v. Adams (37 Vt. 233), 122.
 Morgan v. Burrows (45 Wis. 211), 1049.
 Morgan v. Dyer (9 Johns (N. Y.) 255), 926, 930.
 Morgan v. Dyer (10 Johns (N. Y.) 161), 926, 930.
 Morgan v. Fallestein (27 Ill. 31), 1050.
 Morgan v. Hays (1 Ill. (Breese) 126), 1182.
 Morgan v. People (59 Ill. 58), 1039.

[References are to pages, Vol. I., pp. 1-980; Vol. II., pp. 981-1496.]

- Morgan v. Raymond (38 Ill. 448), 970.
 Morgan v. Roberts (38 Ill. 65), 1475.
 Morgan v. Ryerson (20 Ill. 343), 1147.
 Morgan v. Smith (11 Ill. 184), 1002.
 Moriarity v. Stofferan (89 Ill. 528), 174, 175.
 Morley v. Dunbar (24 Wis. 183), 134.
 Morrill v. Baggott (157 Ill. 240), 856.
 Morris v. Cook (19 Wend. (N. Y.) 699), 929.
 Morris v. Indianapolis St. L. R. Co. (10 Ill. App. 389), 1089.
 Morris v. Rexford (18 N. Y. 556), 78, 142.
 Morris v. Trustees (15 Ill. 266), 305, 309, 321.
 Morris v. Watson (61 Ill. App. 536), 1218.
 Morris v. Wilbaur (47 Ill. App. 630), 1006.
 Morrison v. Berkey (7 Serg. & R. (Pa.) 246), 489.
 Morrison v. Chapin (79 Mass. 72), 1031.
 Morrison v. City of Chicago (139 Ill. 210), 964.
 Morrison v. Hidenberg (138 Ill. 22), 974.
 Morrison v. People (52 Ill. App. 482), 1063, 1223.
 Morrison v. Stewart (24 Ill. 24), 1141.
 Morrison v. Stewart (21 Ill. App. 113), 919.
 Morrow v. People (25 Ill. 330), (s. c. 16 Ill. App. 505), 1167.
 Morse v. Goetz (51 Ill. App. 485), 30, 384.
 Morse v. Hewitt (28 Mich. 481), 998, 999.
 Morse v. Horse Nail Co. (76 Ill. 606), 487.
 Morse v. Iman (42 Ill. 150), 144.
 Morse v. Palmer (15 Pa. St. 51), 1065.
 Morse v. Sherman (106 Mass. 432), 508.
 Mortimore v. McCallum (6 Mees. & W. 67), 1042.
 Morton v. Bailey (1 Scam. (Ill.) 213), 887, 981.
 Morton v. McClure (22 Ill. 257), 793, 893.
 Moses v. Loomis (55 Ill. App. 342), 1235.
 Mosheimer v. Usseman (36 Ill. 232), 271.
 Mosher v. Rogers (117 Ill. 446), 1078, 1098.
 Mosher v. Scofield (55 Ill. App. 271), 1212.
 Moshier v. Shear (100 Ill. 469), 1198, 1398.
 Moss v. Flint (13 Ill. 571), 391, 1204.
 Moss v. Johnson (22 Ill. 633), 935.
 Moss v. Pardridge (9 Ill. App. 490), 150, 714.
 Moss v. Village of Oakland (88 Ill. 109), 1118.
 Mothrell v. Beaver (2 Gilm. (Ill.) 69), 1165.
 Moulder v. Kempff (115 Ind. 459), 969.
 Moulding v. Prussing (70 Ill. 151), 1049.
 Mount v. Hunter (58 Ill. 246), 244, 461, 607, 912.
 Mount v. Scholes (120 Ill. 394), 859, 927, 1073, 1160, 1171.
 Mowatt v. Wright (1 Wend. 355), 87.
 Mt. Carbon Co. and Ry. Co. v. Andrews (53 Ill. 177), 183, 910.
 Mueller v. Grant (26 Ill. App. 585), 1209.
 Mueller v. Newell (20 Ill. App. 192), 1111, 1416.
 Mueller v. U. S. Mut. Acc. Ass'n. (51 Ill. App. 40), 1005.
 Mulford v. Shepard (1 Scam. (Ill.) 583), 1135.
 Mulhado v. Brooklyn City Ry. Co. (30 N. Y. 370), 1067.
 Mulheizen v. Lane (82 Ill. 117), 164, 167.
 Muller v. Benner (69 Ill. 108), 41.
 Muller v. Rebhan (94 Ill. 142), 1015.
 Muller v. Renhan (94 Ill. 222), 997.
 Mullen v. People (138 Ill. 606), 1204, 1221.
 Mullin v. Spangenberg (112 Ill. 140), 134.
 Mumford v. Tolman (54 Ill. App. 471), 881, 1175.
 Mumins v. Wood (44 Ill. 416), 1005.
 Munford v. Miller (7 Ill. App. 62), 1078.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Munn v. Goldbold (3 Bing. 292), 1041.
- Munson v. Adams (89 Ill. 450), 975.
- Murdock v. Walker (43 Ill. App. 590), 1004.
- Murphy v. Consolidated Tank Line Co. (32 Ill. App. 612), 340, 383.
- Murphy v. Dwyer (11 Ill. App. 246), 1426.
- Murphy v. Larson (77 Ill. 172), 216, 1098.
- Murphy v. Orr (32 Ill. App. 489), 35, 48, 274.
- Murphy v. Summerville (2 Gilm. (Ill.) 360), 115, 440, 460.
- Murphy v. Williamson (85 Ill. 149), 264.
- Murr v. Glover (34 Ill. App. 373), 1435, 1438.
- Murray v. McLean (57 Ill. 378), 228.
- Murray v. Carlin (67 Ill. 286), 105.
- Murray v. East India Co. (5 B. & Ald. 204), 109.
- Murray v. Gibson (21 Ill. App. 488), 1110.
- Murray v. Haverty (70 Ill. 75), 1003.
- Murray v. Murphy (16 Ill. 275), 367.
- Murray v. Whittaker (17 Ill. 230), 1284.
- Musselman v. Baker (26 Neb. 737), 1474.
- Mutual Acc. Ass'n v. Tuggle (138 Ill. 428), 452, 567, 774, 775.
- Mutual Benefit L. Ins. Co. v. Robertson (59 Ill. 123), 1274.
- Mutual Building & L. Ass'n v. Tascott (144 Ill. 305), 1252.
- Myer v. Wiltshire (92 Ill. 395), 409.
- Myers v. Antrim (14 Ill. App. 437), 1224, 1225.
- Myers v. Baker (31 Ill. 353), 936.
- Myers v. Farrell (47 Miss. 281), 301.
- Myers v. Ladd (26 Ill. 415), 1028.
- Myers v. Phillips (72 Ill. 460), 759.
- Myers v. Phillips (68 Ill. 269), 124, 276.
- Myers v. Parks (95 Ill. 408), 1062.
- Myers v. Queen (85 Mich. 156), 792.
- Myers v. Schnelder (21 Mo. 77), 969.
- Myers v. Walker (31 Ill. 353), 1096.
- N.
- Napier v. People (9 Ill. App. 523), 1235.
- Narney v. Insurance Co. (63 Mich. 633), 1390.
- Nash v. Brown (13 Jur. 126), 458.
- Nash v. Burns (35 Ill. App. 296), 1081.
- Nash v. Nash (16 Ill. 79), 112, 778, 784.
- Nash v. Sullivan (32 Minn. 190), 279.
- Nason v. Letz (73 Ill. 371), 1209.
- Nathan v. City of Bloomington (46 Ill. 347), 1209.
- National Bank v. Le Moyne (127 Ill. 253, 1127, 1207, 1210, 1223, 1275).
- National Bank v. National Bank (90 Ill. 56), 800, 810.
- National Bank v. Titsworth (73 Ill. 591), 347.
- National Furnace Co. v. Moline Iron Works (18 Fed. Rep. 863), 769.
- Nat. Ins. Co. v. Chamber of Commerce (69 Ill. 22), 456, 759, 922, 1182, 1227.
- National Safe & Lock Co. v. People (50 Ill. App. 336), 1230.
- Neagle v. Kelly (146 Ill. 460), 386.
- Necker v. Harvey (49 Mich. 517), 477.
- Nedig v. Cole (13 Neb. 39), 1079.
- Niece v. Haley (23 Ill. 416), 1217.
- Needles v. Hanifan (11 Ill. App. 303), 1048.
- Neely v. Wright (72 Ill. 292), 1204.
- Neer v. Illinois Cent. Ry. Co. (138 Ill. 29), 1279, 1282.
- Neill v. Morgan (28 Ill. 524), 435.
- Neill v. Spencer (5 Ill. App. 461).
- Neillins v. Shafer (3 Denio (N. Y.) 60), 184.
- Nelson v. Akeson (1 Ill. App. 165), 921.
- Nelson v. Borchemius (52 Ill. 236), 203, 1152.
- Nelson v. Bowen (15 Ill. App. 477), 1113.
- Nelson v. Cook (19 Ill. 440), 310, 320, 415, 426, 1484.
- Nelson v. Dubois (13 Johns (N. Y.) 175), 509, 539.
- Nelson v. Humes (12 Ill. App. 52), 1221.
- Nelson v. McIntyre (1 Ill. App. 603), 851.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Nelson v. Oren (41 Ill. 18), 763.
 Nelson v. Smith (28 Ill. 494), 302.
 Nelson v. Smith (26 Ill. App. 57), 173.
 Nelson v. Smith (54 Ill. App. 345), 35, 1069.
 Nelson v. Triplett (81 Va. 237), 249.
 Nesbitt v. Dallam (7 Gill. & J. (Md.) 494), 1022.
 Neteler v. Culles (18 Ill. 188), 508.
 Netter v. Chicago Board of Trade (12 Ill. App. 607), 334, 338.
 Neuburger v. Rountree (18 Ill. App. 610), 95.
 Neuerberg v. Gaultier (4 Ill. App. 348), 1101.
 Neufeld v. Rodeminski (144 Ill. 83), 216.
 Neustadt v. Hall (58 Ill. 172), 92, 1147.
 Nevins v. Peoria (41 Ill. 502), 242, 730.
 Newberry v. Blatchford (106 Ill. 584), 13, 1195.
 Newberry v. Furnival (46 How. (N. Y.) Pr. 139), 1059.
 Newberg v. Heineman (59 Mich. 210), 1480.
 Newcome v. Backett (16 Mass. 161), 512.
 Newell v. Buckingham (14 Ill. 405), 293.
 Newell v. Clodfelter (3 Ill. App. 259), 973.
 Newell v. Woodruff (30 Conn. 497), 261.
 New England F. & M. Ins. Co. v. Wetmore (32 Ill. 221), 882.
 Newfield v. Copperman (15 Abb. (N. Y.) Pr. n. s. 360), 1471.
 Newfield v. Rodeminski (144 Ill. 83), 1235.
 Newhall v. Buckingham (14 Ill. 405), 291.
 Newkirk v. Cone (18 Ill. 449), 1475, 1479.
 Newkirk v. Dalton (17 Ill. 413), 163.
 Newlan v. Lombard University (62 Ill. 195), 1390.
 Newland v. Schaffer (38 Ill. 379), 94.
 Newman v. Bennett (23 Ill. 427), 180.
 Newman v. Cincinnati (18 Ohio 323), 258.
 Newman v. Dick (23 Ill. 338), 1211, 1259.
 Newman v. Rosencroft (67 Ill. 496), 27, 1209, 1224.
 Newton v. Lochlin (77 Ill. 103), 154, 219.
 Newton v. Pope (1 Cow. (N. Y.) 109), 672.
 New York Dry Dock Co. v. McIntosh (5 Hill (N. Y.) 505), 930.
 Niagara Fire Ins. Co. v. Bishop (154 Ill. 9), 1390.
 Nicholas v. Lewis (5 Conn. 137), 249.
 Nichols v. Cowles (3 Cow. (N. Y.) 345), 370.
 Nichols v. Mason (21 Wend. (N. Y.) 333), 809.
 Nichols v. People (40 Ill. 395), 1153.
 Nichols v. Pool (89 Ill. 491), 1496.
 Nichols v. Scott (12 Vt. 47), 1493.
 Nicholson v. Walker (4 Ill. App. 404), 1426.
 Nickerson v. Rockwell (90 Ill. 460), 80, 953.
 Nickerson v. Sheldon (33 Ill. 372), 775.
 Nieman v. Wintker (85 Ill. 468), 904, 977.
 Nimmo v. Kuykendall (85 Ill. 476), 1222.
 Nispel v. Laparle (74 Ill. 306), 772, 910, 1161.
 Nispel v. Wolff (74 Ill. 303), 396.
 Nispel v. W. U. Ry. Co. (64 Ill. 311), 881.
 Nixon v. Halley (78 Ill. 611), 1280.
 Nixon v. Noble (70 Ill. 32), 1420.
 Nixon, Ellison & Co. v. S. W. Ins. Co. (47 Ill. 444), 814.
 Noeting v. Wright (72 Ill. 390), 522.
 Nolan v. Jackson (16 Ill. 272), 1483.
 Nolan v. New York, etc., R. R. Co. (53 Conn. 471), 227.
 Nolan v. Vosburg (3 Ill. App. 596), 890.
 Noleman v. Well (72 Ill. 502), 417, 427.
 Nolte v. Low (18 Ill. 437), 1397.
 Nolte v. Von Gassy (15 Ill. App. 230), 341.
 Nomaque v. People (Breese, 145, 2 ed.), 151.
 Norburg v. Heinmann (59 Mich. 210), 1455.

[References are to pages, Vol. I., pp. 1-900; Vol. II., pp. 961-1496.]

- Norris v. Brown (13 Ill. App. 606), 1278.
 Norris v. Merchants' Nat. Bank of Deadwood (30 Ill. App. 54), 827.
 Norris v. Pierce (47 Ill. App. 463), 1417.
 North v. Alles (50 Ill. App. 266), 1256.
 North v. Kiser (72 Ill. 172), 479, 510, 786.
 North v. McDonald (1 Biss. (U. S.) 57), 300.
 North v. Nichols (37 Conn. 375), 81.
 Northbrookfield v. Warren (18 Gray (Mass.) 171), 1042.
 North Chicago City Ry. Co. v. Castha (128 Ill. 613), 971.
 North Chicago St. Ry. Co. v. Cotton (140 Ill. 486), 1081.
 North Chicago St. R. R. Co. v. Fitzgibbons (54 Ill. App. 385), 1146.
 North Chicago City Ry. Co. v. Gastka (27 Ill. App. 518), 1140.
 North Chicago St. Ry. Co. v. Louis (138 Ill. 9), 1007, 1095.
 North Chicago, etc., v. Monka (107 Ill. 340), 1036.
 North Chicago St. Ry. Co. v. Wrixon (150 Ill. 532), 1280.
 Northern L. Packet Co. v. Benninger (70 Ill. 572), 1062, 1103, 1106.
 Northern Transportation Co. of Ohio v. Sellick (52 Ill. 254), 160, 168.
 Northrop v. McGee (20 Ill. App. 108), 30.
 Northrop v. Phillips (99 Ill. 449), 1280.
 Northup v. Jackson (3 Wend (N. Y.) 85), 538.
 North Western Ben. and Mut. Aid Ass'n. v. Prim (19 Ill. App. 224), 971.
 Northwestern Aid Ass'n. v. Prim (124 Ill. 100), 965, 967, 971.
 Northwestern Brew. Co. v. Mansion (145 Ill. 182), 1279.
 Northwestern Life Ins. Ass'n. v. Stout (32 Ill. App. 31), 799, 901.
 Northwestern Ry. Co. v. Hock (60 Ill. 238), 1062, 1063.
 Norton v. Allen (69 Ill. 306), 1175.
 Norton v. Allen (12 Ill. App. 592), 768.
 Norton v. Colby (52 Ill. 198), 907.
 Norton v. Crane (39 Mich. 526), 154.
 Norton v. Dow (5 Gilm. (Ill.) 459), 304, 411.
 Norton v. Heyworth (20 Mich. 359), 1043.
 Norton v. Merchants L. & T. Co. (28 Ill. 313), 868.
 Norton v. Mosher (114 Ill. 146), 1285.
 Norton v. Rockey (46 Mich. 460), 25, 177.
 Norton v. Volzke (158 Ill. 402), 233, 235.
 Norton v. Volzke (54 Ill. App. 545), 1100, 1107.
 Nostrand v. Moore (52 N. Y. 12), 1049.
 Nott v. People (83 Ill. 532), 191.
 Noy v. Creed (1 Ill. App. 557), 1208.
 Noyes v. Gould (57 N. H. 20), 1391.
 Noyes v. Kenr (94 Ill. 521), 939.
 Nudnutt v. Comstock (50 Mich. 596), 1031.
 Nugent v. Nugent (48 Mich. 362), 1406.
 Nugent v. Teachout (67 Mich. 571), 451, 482, 487, 791.
 Nutting v. Burked (48 Mich. 241), 1409.
 Nuxon v. Cobleigh (52 Ill. 387), 1042.
 Nye v. Wright (2 Scam. (Ill.) 222), 786.
- O.
- Oakes v. Phillips (107 Ill. 154), 313.
 O'Bannon v. Vigus (48 Ill. App. 84), 1277.
 Oberman Brew. Co. v. Adams (35 Ill. 146), 1204.
 Obermark v. People (24 Ill. App. 259), 1210.
 Oberne v. Bunn (39 Ill. App. 12), 1285.
 Oberne v. Gaylord (13 Ill. App. 30), 837.
 Oberne v. O'Donnell (35 Ill. App. 180), 296.
 O'Berne v. Robbins (44 Ill. App. 76), 1221.
 O'Brien v. Haynes (61 Ill. 494), 186, 413, 415, 765.
 O'Brien v. Palmer (49 Ill. 72), 1048, 1051, 1097, 1115, 1147.
 Ochs v. People (124 Ill. 399), 1081.

[References are to pages, Vol. I., pp. 1-900; Vol. II., pp. 961-1496.]

- O'Connor v. Beckwith (41 Mich. 657), 1409.
 O'Connor v. Muller (11 Ill. 57), 116, 440.
 Odd Fellows v. Morrison (42 Mich. 521), 1406.
 O. F. Benevolent Society v. Alt (12 Ill. App. 570), 394.
 Oder v. Putman (22 Ill. 38), 12.
 O'Donnell v. Colby (153 Ill. 324), 196.
 O'Donnoll v. Colby (55 Ill. App. 112), 179, 184.
 Oehler v. Schroeder (46 Ill. App. 209), 1216.
 Oehmen v. Thurnes (51 Ill. App. 435), 1208.
 Oetgen v. Ross (36 Ill. 335), 1178.
 Oetgen v. Ross (47 Ill. 142), 266, 278.
 Oetgen v. Ross (54 Ill. 79), 272, 275.
 Oettinger v. Specht (162 Ill. 179), 1194.
 Offield v. Siler (15 Ill. App. 308), 1204.
 O'Flynn v. Eagle (7 Mich. 306), 952.
 Ogden v. Kirby (79 Ill. 556), 1085, 1099.
 Ogden v. Lucas (48 Ill. 492), 141, 834, 843.
 Ogden v. Stock (34 Ill. 523), 173, 183.
 Ogilvie v. Copeland (145 Ill. 98), 275, 752.
 O'Hara v. Chicago M. & St. P. Ry. Co. (139 Ill. 151), 992, 1107.
 O'Hara v. Hernan (79 Mich. 224), 1240.
 O'Hara v. Jones (46 Ill. 288), 1438.
 O'Hara v. King (52 Ill. 304), 1095, 1211.
 O'Hara v. O'Brien (4 Ill. App. 154), 369.
 O'Hara v. Port Huron (47 Mich. 585), 503.
 Ohio etc. Ry. Co. v. Brewbacker (47 Ill. 462), 492.
 Ohio & M. Ry. Co. v. Brown (25 Ill. 124), 1147.
 Ohio & M. Ry. Co. v. Brown (23 Ill. 94), 682, 1002.
 Ohio & M. Ry. Co. v. Brown (49 Ill. App. 40), 454, 1004.
 Ohio & M. Ry. Co. v. Cope (36 Ill. App. 97), 1208.
 Ohio & Mississippi R. R. Co. v. Jones (27 Ill. 41), 144.
 Ohio & M. Ry. Co. v. Long (52 Ill. App. 670), 1053, 1138.
 Ohio & M. Ry. Co. v. Noe (77 Ill. 513), 180.
 Ohio etc. Ry. Co. v. Palm (18 Ill. 22), 462, 968.
 Ohio & Miss. Ry. Co. v. People (120 Ill. 200), 1295.
 Ohio & M. Ry. Co. v. People (121 Ill. 483), 1295.
 Ohio & M. Ry. Co. v. People (32 Ill. App. 69), 1304.
 Ohio & M. Ry. Co. v. People (49 Ill. App. 225), 460, 622, 681.
 Ohio & Miss. Ry. Co. v. Porter (92 Ill. 437), 1104.
 Ohio & Mississippi R. R. Co. v. Saxton (27 Ill. 426), 140.
 Ohio & M. Ry. Co. v. Taylor (27 Ill. 207), 101, 683, 1053.
 Ohio & M. Ry. Co. v. Wangelin (152 Ill. 138), 230, 1277.
 O'Keefe v. Kellogg (15 Ill. 347), 192, 1119.
 Oldershaw v. Knowles (6 Ill. App. 325), 17.
 Oldham v. Hunt (4 Hump. (Tenn.) 332), 111.
 Oldman v. Pfleger (84 Ill. 102), 263.
 Olds v. Open Board of Trade (33 Ill. App. 345), 169.
 Olds v. Loomis (10 Ill. App. 498), 1442.
 Oliver v. Chicago & Aurora R. R. Co. (17 Ill. 587), 345.
 Oliver v. Cochran (19 Ill. App. 236), 797.
 Olivers v. Girstle (58 Ill. App. 615), 958.
 Oliver v. Hart (35 Ill. 55), 974, 977.
 Oliver v. Upsahl (69 Ill. 273), 153, 1100.
 Olson v. Muskegon Circuit Judge (49 Mich. 85), 1298.
 Omaha, etc., Refining Co. v. Tabor (Colo.) (21 Pac. Rep. 925), 164.
 O'Malia v. Glynn (42 Ill. App. 51), 1420.
 O'Morrow v. Port Huron (47 Mich. 585), 524.
 O'Neal v. Boone (53 Ill. 35), 259.
 O'Neal v. Calhoun (67 Ill. 219), 1087, 1147.
 O'Neil v. O'Neil (123 Ill. 361), 1042, 1084, 1141.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Opaque Cloth Shade Co. v. Veight (161 Ill. 337), 1196.
 Oppenheimer & Co. v. Giershofer & Co. (54 Ill. App. 38, 1169, 1173).
 O'Reilly v. Fitzgerald (40 Ill. 310), 1029, 1094, 1147, 1148.
 Orient Ins. Co. v. Weaver (22 Ill. App. 122), 306.
 Ormychund v. Baker (1 Atk. 21), 1023.
 Orne v. Cook (31 Ill. 238), 99, 771, 1042, 1086.
 Orr v. Jason (1 Ill. App. 439), 1108.
 Orr v. Tanner (12 R. I. 94n), 1474.
 Orser v. Storms (9 Cowen (N. Y.) 687), 138.
 Ortman v. Greenman (4 Mich. 291), 178.
 Orton v. McCord (33 Wis. 205), 1471.
 Orvis v. Dana (1 Abb. (N. Y.) N. C. 268), 788, 791.
 Osburn v. McCartney (121 Ill. 458), 1161, 1277, 1283.
 Osborne v. Bank (9 Wheaton (U. S.) 738), 1478.
 Osborne v. Dwyer (13 Ill. App. 377), 1278.
 Osborne v. Forshee (22 Mich. 209), 746.
 Osborne v. Francis (45 N. J. L. 441), 53.
 Osborne v. Fulton (1 Blackf. (Ind.) 234), 113, 119.
 Osborne & Co. v. Rich (53 Ill. App. 661), 837, 838, 1042.
 Oscanyan v. Arms Co. (103 U. S. 261), 995.
 Osgood v. Blackmore (59 Ill. 261), 415, 1069, 1173.
 Osgood v. McConnell (18 Ill. 532), 1117.
 Osgood v. McConnell (32 Ill. 74), 1057.
 Osgood v. Stevens (25 Ill. 89), 1377, 1378, 1379.
 Ostatag v. Taylor (44 Ill. App. 469), 135.
 O'Sullivan v. People (144 Ill. 504), 1275.
 Otis v. Hitchcock (6 Wend. (N. Y.) 433), 1154.
 Ottawa v. People (48 Ill. 233), 1305.
 Ottawa Gas Light, etc., Co. v. Thompson (39 Ill. 598), 47.
 Ottawa Gas L. & C. Co. v. Graham (35 Ill. 346), 1053, 1208.
 Ottawa, etc., Ry. Co. v. Hall (1 Ill. 612), 1051.
 Ottawa O. & F. R. V. Ry. Co. v. McMath (91 Ill. 105), 1134, 1135, 1200.
 Ottawa O. & F. Ry. Co. v. McMath (1 Ill. App. 429), 1057.
 Ottawa O. & F. R. V. Ry. Co. v. McMath (4 Ill. App. 356), 1109.
 Otten v. Lehr (68 Ill. 64), 367, 370.
 Otter v. Williams (21 Ill. 119), 168.
 Otto v. Jackson (35 Ill. 349), 461.
 Ousley v. Hardin (23 Ill. 403), 154, 1143.
 Overman & Cook v. Consolidated Coal Co. (51 Ill. App. 289), 1110, 1220.
 Owens v. Crossett (105 Ill. 354), 1036.
 Owens v. Derby (2 Scam. 26), 7, 69.
 Owen v. Fowley (24 Cal. 192), 260.
 Owens v. Weedman (82 Ill. 409), 96, 161.
 Oxley v. Storer (54 Ill. 159), 1004.
 Ozburn v. Adams (70 Ill. 291), 68, 149.

P.

- Pace v. Vaughn (1 Gilm. (Ill.) 30), 519, 605.
 Packer v. Roberts (140 Ill. 9), 37, 1175.
 Packard v. Van Scholck (58 Ill. 79), 1050.
 Paddock v. Higgins (2 Root (Conn.) 482), 602.
 Paddon v. Williams (2 Abb. (N. S.) 88), 46.
 Paff v. Slack (7 Barb. (N. Y.) 254), 147.
 Page v. Brant (18 Ill. 37), 33.
 Page v. Cole (120 Mass. 37), 1051.
 Page v. De Leuw (58 Ill. 85), 61.
 Page v. Du Puy (40 Ill. 506), 279, 1412.
 Page v. Mitchell (13 Mich. 63), 221.
 Page v. Northwestern Ins. Co. (54 Ill. App. 157), 1209.
 Page v. Merwin (54 Com. 434), 202.
 Page v. People (99 Ill. 418), 1258, 1263, 1264.
 Pahlmeen v. King (49 Ill. 451), 1107.
 Pahlman v. Taylor (75 Ill. 629), 1125.
 Paige v. Carter (64 Cal. 489), 1031.
 Paine v. Fox (16 Mass. 133), 509.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Paine v. Root (121 Ill. 77), 278.
 Painter v. Baker (16 Ill. 103), 131, 132.
 Palmer v. Albee (50 Va. 429), 1049.
 Palmer v. Evanston (2 Cow. (N. Y.) 417), 797.
 Palmer v. Gardiner (77 Ill. 143), 808, 1254, 1257.
 Palmer v. Goldsmith (15 Ill. App. 544), 1043.
 Palmer v. Harris (98 Ill. 507), 981, 983.
 Palmer v. Hutchins (1 Cow. (N. Y.) 42), 927.
 Palmer v. Logan (3 Scam. (Ill.) 56), 757, 1042.
 Palmer v. McAvoy (58 Ill. 24), 1147.
 Palmer v. Nassau Bank (78 Ill. 380), 876.
 Palmer v. Richardson (70 Ill. 544), 213, 216.
 Pangburn v. Brill (1 Wend. (N. Y., 345), 709.
 Parlon v. Holland (17 Johns. (N. Y.) 92), 689.
 Paltzer v. National Bank of Illinois (145 Ill. 177), 310.
 Pardridge v. Ring (75 Ill. 236), 967.
 Pardridge v. Ryan (35 Ill. 230), 1403, 1405.
 Pardon v. Dwire (23 Ill. 572), 275, 1072.
 Parish v. Stone (14 Pick. (Mass.) 199), 506.
 Parisher v. Waldo (72 Ill. 71), 1186, 1187.
 Parker v. Crane (6 Wend. (N. Y.) 647), 506.
 Parker v. Ensloe (102 Ill. 272), 1067.
 Parker v. Fergus (52 Ill. 419), 1098.
 Parker v. Fisher (39 Ill. 164), 90, 1119.
 Parker v. Follensbee (45 Ill. 473), 429.
 Parker v. Foote (19 Wend. (N. Y.) 309), 734.
 Parker v. Fuller (39 Ill. 164), 85.
 Parker v. Hart (32 N. J. Eq. 230), 895.
 Parker v. Holmes (22 Ill. 522), 865.
 Parker v. Palmer (22 Ill. 489), 783.
 Parker v. Parker (146 Ill. 220), 468.
 Parker v. Parker (52 Ill. App. 333), 1052, 1055.
 Parker v. Parmele (20 Johns. (N. Y.) 130), 512.
 Parker v. Pike (33 Me. 213), 1045.
 Parker v. Shannon (121 Ill. 452), 1283.
 Parker v. Smith (1 Gilm. (Ill.) 411), 154, 784.
 Parker v. Smith (6 Cal. 105), 1074.
 Parker v. Tiffany (52 Ill. 286), 156.
 Parkins v. Harkshaw (2 Starkey Rep. (Eng.) 239), 1472.
 Parkhurst v. Lawton, (2 Swanst 216), 1472.
 Parmalee v. Smith (21 Ill. 620), 46.
 Parmalee v. Fischer (22 Ill. 212), 844.
 Parmalee v. Rogers (26 Ill. 56), 92.
 Parr v. Van Horn (38 Ill. 226), 278, 458, 660, 752, 1151.
 Parr v. Van Horne (40 Ill. 122), 408, 1148, 1183.
 Parrott v. Goss (17 Ill. App. 110), 759.
 Parrott v. Hodgson (46 Ill. App. 230), 1413.
 Parry v. Arnold (33 Ill. App. 622), 1266.
 Partenheimer v. Van Order (20 Barb. (N. Y.) 479), 69.
 Partlow v. Williams (19 Ill. 132), 868.
 Parson v. Haskell (30 Ill. App. 444), 1270.
 Parsons v. Aldrich (6 N. H. 264), 1396.
 Parsons v. Case (45 Ill. 296), 324, 815.
 Parsons v. Jones (9 Mass. 106), 471.
 Parsons v. Lee (1 Scam. (Ill.) 193), 462.
 Parsons v. Manufacturers' Ins. Co. 16 Gray (Mass.) 463, 1032.
 Passmore Estate (50 Mich. 226), 1018.
 Patten v. Gurney (17 Mass. 186), 69.
 Patchell & Turner v. Johnson (64 Ill. 305), 1414, 1418.
 Pate v. People (3 Gilm. (Ill.) 644), 1041, 1052.
 Patrick v. Jack, Admx. (82 Ill. 81), 1031.
 Patrick v. Berryman (52 Ill. App. 514), 1078.
 Patterson v. Chalmers (7 B. Mon. (Ky.) 595), 472.
 Patterson v. Edwards (2 Gilm. (Ill.) 720), 206, 737.
 Patterson v. Graham (140 Ill. 531), 1422.
 Patterson v. Hubbard (30 Ill. 201), 1116.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Patterson v. McKinney (6 Ill. App. 394), 15.
 Patterson v. Steele (36 Ill. 272), 892.
 Patterson v. Wabash, S. L. Ry. (54 Mich. 91), 69.
 Paul v. People (82 Ill. 82), 986.
 Paulin v. Howser (63 Ill. 312), 135.
 Paulsen v. Manske (126 Ill. 72), 1390.
 Paxton v. Boyer (67 Ill. 132), 132, 133, 134.
 Paxton v. Frew (52 Ill. App. 393), 1259.
 Paxton v. Schick (3 Ill. App. 542), 192.
 Payne v. Welble (30 Ill. 166), 807.
 Peabody v. Kendall (145 Ill. 519), 846, 1263.
 Peak v. People (71 Ill. 278), 395.
 Peak v. Pricer (21 Ill. 164), 42, 63.
 Peak v. Shasted (21 Ill. 137), 72.
 Peake v. Walton (52 Ill. App. 90), 462, 1003.
 Pearce v. Atwood (13 Mass. 324), 220, 416.
 Pearce v. Pearce (67 Ill. 207), 57.
 Pearce v. Rhawn (13 Ill. App. 637), 884.
 Pearce v. Swan (1 Scam. (Ill.) 266), 390.
 Pearly v. Wellman (3 Gilm. (Ill.) 311), 859.
 Pearsons v. Bailey (1 Scam. (Ill.) 507), 1281.
 Pearson v. Herr (53 Ill. 154), 1416.
 Pearsons v. Lee (1 Scam. (Ill.) 193), 1003.
 Pearson v. Sanderson (128 Ill. 88), 1393.
 Pease v. Phelps (10 Conn. 62), 772.
 Pease v. Roberts (9 Ill. App. 132), 1135.
 Pease v. Underwriters' Union (1 Ill. App. 288), 1005.
 Peck v. Brewer (48 Ill. 55), 895, 1120.
 Peck v. Bogess (1 Scam. (Ill.) 281), 909.
 Peck v. Cooper (13 Ill. App. 27), 1109.
 Peck v. Dyson (4 Campb. 198), 147.
 Peck v. Houghtening (35 Mich. 127), 602, 623.
 Peck v. Hubbard (4 Ill. App. 566), 841.
 Peck v. Lake (3 Lans. (N. Y.) 136), 1032.
 Peck v. Wilson (22 Ill. 205), 195, 758.
 Peck, Admr. v. Blight (40 Ill. 112), 1254.
 Pederson v. Cline (27 Ill. App. 249), 1426.
 Peed v. Brennehan (72 Ind. 288), 1132.
 Peeples v. McKee (92 Ill. 397), 1107.
 Pekin v. Brereton (67 Ill. 477), 730.
 Pemberton v. Williams (87 Ill. 15), 91.
 Pendell v. Newberger (64 Mich. 221), 507.
 Pennsylvania Co. v. Backes (133 Ill. 255), 1115.
 Pennsylvania Co. v. Backes (35 Ill. App. 376), 995.
 Pennsylvania Co. v. Conlan (101 Ill. 93), 1004, 1052, 1069, 1085, 1089.
 Pennsylvania Co. v. Ellett (132 Ill. 654), 456, 1090, 1152.
 Penn. Mut. Life Ins. Co. v. Keach (134 Ill. 583), 1107, 1122.
 Pennsylvania Co. v. Keane (143 Ill. 172), 1276, 1277.
 Pennsylvania Co. v. Marshall (119 Ill. 399), 1098, 1103.
 Pennsylvania Co. v. Rudel (100 Ill. 603), 963, 992, 1108.
 Pennsylvania Co. v. Sloan (125 Ill. 72), 55, 1101.
 Pennsylvania Co. v. Sloan (1 Ill. App. 364), 341, 420.
 Pennsylvania Co. v. Versten (140 Ill. 637), 1255, 1276.
 Pennsylvania, etc., v. Sloetke (104 Ill. 201), 1009.
 Pennsylvania Ry. Co. v. Connell (127 Ill. 419), 1098.
 Penniman v. Patchin (5 Vt. 346), 1482, 1485.
 Penny v. Little (4 Ill. (3 Scam.) 301), 1434, 1435.
 Pensoneau v. Bertke (82 Ill. 421), 1418.
 People v. Allen (25 Ill. App. 657), 114.
 People v. Allison (68 Ill. 151), 1463, 1464, 1466.
 People v. Altgeld (43 Ill. App. 400), 9, 1216.
 People v. Anthony (25 Ill. App. 532), 1074, 1297.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- People v. Anthony 129 Ill. 218),
 1216, 1217, 1224, 1296.
 People v. Bacon (18 Mich. 247),
 1306.
 People v. Baker (56 Ill. 299), 1465,
 1466, 1473.
 People v. Barker (60 Mich. 278),
 1017, 1072.
 People v. Barnett (91 Ill. 422),
 1313.
 People v. Beach (15 Ill. App. 659),
 880.
 People v. Belt (97 Ill. 462), 1098.
 People v. Betts (55 N. Y. 600), 364.
 People v. Bird (20 Ill. App. 568),
 1326.
 People v. Blades (10 Ill. App. 17),
 1204, 1219.
 People v. Blue Mountain Joe (129
 Ill. 370), 1196.
 People v. Board of Education (127
 Ill. 613), 1305, 1307, 1312.
 People v. Board of Trade (80 Ill.
 134), 1297.
 People v. Boyd (132 Ill. 60), 771,
 1324.
 People v. Boyd (30 Ill. App. 608),
 1324.
 People v. Browne (3 Gilm. (Ill.) 87,
 1215.
 People v. Brooks (57 Ill. 142),
 1313.
 People v. Brislin (80 Ill. 424), 1258.
 People v. Cameron (2 Gilm. (Ill.)
 468), 290, 313, 315, 316.
 People v. Canty (55 Ill. 33), 785.
 People v. Callaghan (83 Ill. 128),
 1324, 1327.
 People v. Carrier (46 Mich. 442),
 993.
 People v. Core (85 Ill. 248), 188.
 People v. Chicago & A. Ry. Co.
 (55 Ill. 96), 1295.
 People v. Judge Circuit Court of
 Wayne Co. (11 Mich. 393),
 1317.
 People v. City of Cairo (50 Ill.
 154), 421, 1308.
 People v. City of Chicago (25 Ill.
 483), 1308.
 People v. City of Chicago (27 Ill.
 App. 217), 1306, 1307.
 People v. City of Danville (147 Ill.
 127), 1303, 1312, 1315.
 People v. City of Springfield (60
 Ill. App. 501), 1324.
 People v. City of Spring Valley
 (129 Ill. 169), 912, 1328, 1332,
 1336.
 People v. Cloud (2 Scam. (Ill.)
 362), 1297.
 People v. Cole (84 Ill. 327), 1464,
 1486.
 People v. Compler (14 Ill. 447),
 115.
 People v. Common Council, etc.,
 (53 Ill. 424), 1295.
 People v. Commissioners (23 N. Y.
 192), 364.
 People v. Comrs. of Highways
 (118 Ill. 239), 1303.
 People v. Comrs. of Highways
 (158 Ill. 197), 1303.
 People v. Comrs. of Highways
 (53 Ill. App. 442), 1296, 1304,
 1306.
 People v. Comrs. of Highways
 (52 Ill. 498), 1311.
 People v. Comrs. of Highways
 (32 Ill. App. 164), 1301.
 People v. Comrs. of Highways
 (29 Ill. App. 115), 1310.
 People v. Commissioners of
 Highways (4 Ill. App. 391),
 1301.
 People v. Conwell (28 Ill. App.
 285), 1326.
 People v. Cooper (139 Ill. 461), 773,
 1324, 1329, 1331, 1333, 1335.
 People v. Cover (50 Ill. 100), 1295.
 People v. Crabb (156 Ill. 155), 1302,
 1306, 1307.
 People v. Cullom (100 Ill. 472),
 1299.
 People v. Davis (93 Ill. 133), 1295,
 1306, 1308.
 People v. Deams (92 Ill. 192), 30,
 859.
 People v. Detroit Bd. of Ed. (18
 Ill. 400), 1305.
 People v. Doseberg (17 Mich. 185),
 1113.
 People v. Dowling (55 Barb. (N.
 Y.) 197), 1467.
 People v. Drainage Comrs. (31 Ill.
 App. 219), 784, 1324.
 People v. Dubois (33 Ill. 9), 1294,
 1295, 1296, 1299, 1307, 1312.
 People v. Dulaney (96 Ill. 503),
 1295, 1299, 1307.
 People v. Dunlap (13 Johns (N. Y.)
 446), 641.
 People v. Edwards (66 Ill. 59),
 1298.
 People v. Emigh (100 Ill. 517), 388,
 394.
 People v. Ferguson (13 Ill. App.
 329), 1222.

[References are to pages, Vol. I., pp. 1-990; Vol. II., pp. 961-1496.]

- People v. Fesler (45 Ill. 68), 109.
 People v. Filmer (5 Gilm. (Ill.) 242), 1295.
 People v. Fletcher (2 Scam. (Ill.) 482), 1298.
 People v. Foster (133 Ill. 496), 93, 846.
 People v. Foster (29 Ill. App. 208), 115.
 People v. Force (100 Ill. 549), 255.
 People v. Ford (54 Ill. 520), 1463.
 People v. Forquer (1 Ill. (Breese) 104), 1295.
 People v. Forward (2 Cow. (N. Y.) 500), 370.
 People v. Freshour (55 Cal. 875), 1020.
 People v. Frost (32 Ill. App. 242), 1307.
 People v. Garnett (130 Ill. 340), 1295, 1296.
 People v. Gary (105 Ill. 264), 1218.
 People v. Getzendaner (137 Ill. 234), 1303, 1306.
 People v. Gibbons (161 Ill. 510), 1298.
 People v. Gilmer (5 Gilm. (Ill.) 242), 1302.
 People v. Ginness (5 Mich. 305), 1058.
 People v. Glann (70 Ill. 232), 511, 1295, 1306.
 People v. Glover (71 Mich. 303), 1037.
 People v. Goodrich (79 Ill. 148), 1463, 1466.
 People v. Gray (72 Ill. 343), 460, 1069.
 People v. Green (7 Col. 235), 1462.
 People v. Green (58 Ill. 236), 620.
 People v. Hamilton (24 Ill. App. 609), 1335.
 People v. Hanson (150 Ill. 122), 1269.
 People v. Harlow (29 Ill. 43), 411.
 People v. Harmon (15 Ill. App. 189), 115.
 People v. Harrison Admr. (82 Ill. 84), 1167.
 People v. Harvey (41 Ill. 277), 1463.
 People v. Hastings (5 Ill. App. 436), 1307.
 People v. Hatch (33 Ill. 9), 773, 1294, 1295, 1296, 1299, 1307, 1312.
 People v. Hawes (30 Ill. App. 94), 15, 1297.
 People v. Hawes (25 Ill. App. 326), 1217, 1219.
 People v. Healy (128 Ill. 9), 461, 698.
 People v. Hennesey (39 Ia. 192), 1391.
 People v. Hilliard (29 Ill. 413), 1302, 1308.
 People v. Holden (91 Ill. 446), 775, 1306, 1311.
 People v. Holtz (92 Ill. 426), 1336.
 People v. Horton (46 Ill. App. 434), 1217, 1310.
 People v. Hughes (101 Ill. 652), 1274.
 People v. Hunter (89 Ill. 392), 1000.
 People v. Huntoon (71 Ill. 536), 537, 1295.
 People v. Hyde Park (117 Ill. 464), 1309, 1312.
 People v. Illinois Cent. Ry. Co. (62 Ill. 510), 1295, 1312.
 People v. Johnson (100 Ill. 537), 1295, 1299.
 People v. Johnson (14 Ill. 342), 340, 349.
 People v. Johnson (4 Ill. App. 346), 115, 312.
 People v. Jarrett (7 Ill. App. 566), 154.
 People v. Ketchum (72 Ill. 212), 1294.
 People v. Kilduff (15 Ill. 492), 1303, 1310.
 People v. Klokke (92 Ill. 134), 1295.
 People v. Knodell (40 Ill. App. 101), 15.
 People v. Lake St. Elev. Ry. Co. (54 Ill. App. 348), 1324, 1327, 1328, 1334, 1335.
 People v. Lake (12 N. Y. 358), 1055.
 People v. Lamborn (1 Scam. (Ill.) 123), 1465.
 People v. Lane (36 Ill. App. 649), 455.
 People v. La Salle County (84 Ill. 303), 1300.
 People v. Leary (84 Ill. 190), 1463.
 People v. Lewis (103 Ill. 224), 803, 1028.
 People v. Lieb (85 Ill. 484), 1295.
 People v. Loomis (94 Ill. 587), 1306, 1309.
 People v. Madison Co. (125 Ill. 334), 1050, 1105, 1300, 1308.

[References are to pages, Vol. I., pp. 1-980; Vol. II., pp. 981-1486.]

- People v. Manufacturing Co. (95 Ill. 355), 312.
 People v. Marquette Circuit Judge (39 Mich. 407), 790.
 People v. Masonic Ben. Assn. (98 Ill. 635), 1295.
 People v. Mather (4 Wend. (N. Y.) 229), 998, 1065.
 People v. Matteson (17 Ill. 167), 1326.
 People v. Matthews (53 Ill. App. 305), 1326.
 People v. Maxon (139 Ill. 306), 1309.
 People v. May (2 Mich. 605), 1452.
 People v. Mayor of Chicago (51 Ill. 17), 1295.
 People v. Mayor, etc., of New York (2 Hill (N. Y.) 9), 364.
 People v. McClellan (137 Ill. 352), 907.
 People v. McConnell (146 Ill. 532), 1295, 1297.
 People v. McCormick (106 Ill. 184), 1296, 1312.
 People v. McDonald (1 Cow. (N. Y.) 189), 954.
 People v. McFall (124 Ill. 642), 1328, 1337.
 People v. McFarland (3 Ill. App. 237), 1234, 1236.
 People v. McHatten (2 Gilm. (Ill.) 731), 604, 917.
 People v. McRoberts (100 Ill. 458), 1298.
 People v. Meacham (74 Ill. 292), 1381.
 People v. Mechanics Aid Soc. (22 Mich. 86), 1308.
 People v. Mississippi & A. Ry. Co. (13 Ill. 96), 1328.
 People v. Mt. Morris (137 Ill. 576), 1306, 1307.
 People v. Murphy (119 Ill. 159), 1463.
 People v. Murray (52 Mich. 289), 1072.
 People v. Neal (3 Ill. App. 181), 1191.
 People v. Nedrow (16 Ill. App. 192), 987, 1006.
 People v. Neill (74 Ill. 68), 191.
 People v. North Chicago Ry. Co. (88 Ill. 537), 1324, 1327, 1328.
 People v. O'Brien (41 Ill. 303), 1370.
 People v. O'Hair (29 Ill. App. 239), 1326.
 People v. Owners of Land (108 Ill. 442), 1260.
 People v. Olmstead (30 Mich. 431), 1066.
 People v. Ottawa Hydraulic Co. (115 Ill. 281), 884, 1329.
 People v. Palmer (61 Ill. 255), 1463, 1464.
 People v. Pavey (151 Ill. 101), 1306.
 People v. Pavey (137 Ill. 585), 1306.
 People v. Pearson (1 Scam. (Ill.) 473), 1298.
 People v. Pearson (2 Scam. (Ill.) 189), 1216, 1217, 1296, 1297.
 People v. Pearson (3 Scam. (Ill.) 270), 1297, 1298, 1313.
 People v. Pendergrast (117 Ill. 588), 1300.
 People v. People's Ins. Exch. (126 Ill. 466), 1090.
 People v. Pirfenbrink (96 Ill. 68), 11, 1160.
 People v. Porter (23 Ill. App. 196), 1342.
 People v. Price (3 Ill. App. 15), 1006.
 People v. Quick (92 Ill. 580), 1486.
 People v. Ransom (77 Wend. (N. Y.) 417), 1137.
 People v. Robinson (89 Ill. 159), 115, 188.
 People v. Salmon (46 Ill. 333), 1311.
 People v. Salomon (54 Ill. 39), 11, 1315.
 People v. Scates (3 Scam. (Ill.) 351), 17.
 People v. School Trustees (111 Ill. 171), 1367.
 People v. Seeleye (146 Ill. 189), 616, 849, 902, 1090, 1261.
 People v. Shaw (13 Ill. 581), 869, 1330.
 People v. Skinner (13 Ill. 287), 398.
 People v. Skinner (19 Ill. App. 302), 1235.
 People v. Soucy (122 Ill. 335), 1279.
 People v. Stacey (6 Ill. App. 521), 30.
 People v. Stewart (6 Ill. App. 62), 115.
 People v. Stitt (7 Ill. App. 294), 343.
 People v. Stone (142 Ill. 281), 1222.
 People v. Supiger (103 Ill. 434), 1010.

[References are to pages, Vol. I., pp. 1-980; Vol. II., pp. 981-1486.]

- Peoria, P. & J. R. R. Co. v. Slitman (88 Ill. 529), 229.
 Peoria & P. W. R. R. Co. v. Barton (38 Ill. App. 469), 880.
 Peoria & R. I. Ry. Co. v. Mitchell (74 Ill. 394), 935.
 Peoria & R. I. R. W. Co. v. Warner (61 Ill. 52), 872.
 Peppers v. International Bank (10 Ill. App. 531), 1431.
 Pepper v. Rowley (73 Ill. 262), 896.
 Perkins v. Freeman (26 Ill. 477), 170.
 Perkins v. Guy (55 Miss. 153), 1017.
 Perkins v. Hart (11 Wheaton, 237), 482.
 Perkins v. Norvell (6 Hump. (Tenn.) 151), 288.
 Perkins v. Proctor (2 Wills. 385), 151.
 Perkins v. Wing (10 Johns (N. Y.) 143), 1393.
 Pertee v. People (70 Ill. 171), 1232.
 Perrin v. Parker (126 Ill. 201), 95, 1103.
 Perry v. Burton (126 Ill. 599), 1283.
 Perry v. Burton (111 Ill. 138), 1007, 1042.
 Perry v. Lovejoy (49 Mich. 529), 653, 703.
 Perry v. Moore (2 E. D. Smith (N. Y.) 32), 1391.
 Petefish Skiles & Co. v. Watkins (124 Ill. 384), 1141.
 Peru Coal Co. v. Merrick (79 Ill. 112), 934, 969.
 Peter v. Rose (12 Johns (N. Y.) 209), 551.
 Peters v. Banta (120 Ind. 416), 969.
 Peters v. Bourneau (22 Ill. App. 177), 207.
 Peters v. Opie (2 Saund. (Eng.) 350), 97.
 Peterson v. Lawrence (20 Ill. App. 631), 367, 374.
 Peterson v. Parrott (4 W. Va. 42), 1455.
 Peterson v. Tilden (44 Ill. 168), 793.
 Petillon v. Gilman (86 Ill. 401), 384.
 Petillon v. Hipple (90 Ill. 420), 92.
 Petition of Ferrier (103 Ill. 367), 985.
 Petition of Splane (123 Pa. St. 527), 1453, 1460.
 Petrie v. Lane (58 Mich. 527), 1056.
 Pettibone v. Stevens (6 Hill (N. Y.) 258), 778.
 Pettier v. Sewell (12 Wend. (N. Y.) 386), 482.
 Pettis v. Westlake (3 Scam. 535), 885, 893.
 Peyton v. Tappan (1 Scam. (Ill.) 388), 508.
 Pfeiffer v. Grossman (15 Ill. 53), 142.
 Pfund v. Zimmerman (29 Ill. 269), 86.
 Phares v. Barber (61 Ill. 271), 1059.
 Phelan v. Andrews (52 Ill. 486), 504, 505, 1003.
 Phelan v. Kinderdine (20 Pa. St. 354), 1018, 1019.
 Phelix v. Scharnwaber (119 Ill. 445), 1080.
 Phelps v. Conrant (30 Vt. 277), 104.
 Phelps v. Jenkins (4 Scam. (Ill.) 48), 1006.
 Phelps v. Dolan (75 Ill. 90), 1194, 1387.
 Phelps v. Funkhouse (40 Ill. 27), 1268.
 Phelps v. McGee (18 Ill. 155), 96, 799.
 Phelps v. Randolph (147 Ill. 335), 1412, 1425.
 Phelps v. Reeder (39 Ill. 72), 336.
 Phelps v. Young (1 Ill. (Breese) 327), 303, 938.
 Phenix v. Cartner (108 Ill. 207), 1096, 1097.
 Phenix Ins. Co. v. McKenzie & Calkins (38 Ill. App. 630), 1493.
 Phenix Ins. Co. v. Stocks (149 Ill. 319), 883.
 Phillips v. Abbott (52 Ill. App. 328), 1111.
 Phillips v. City of Springfield (39 Ill. 83), 258.
 Phillips v. Dana (1 Scam. (Ill.) 498), 917.
 Phillips v. Dickerson (85 Ill. 11), 1089, 1103.
 Phillips v. Hood (85 Ill. 450), 986.
 Phillips v. Kerr (26 Ill. 213), 436.
 Phillips v. Moir (69 Ill. 155), 858.
 Phillips v. People (88 Ill. 160), 1206.
 Phillips v. Roberts (90 Ill. 492), 1101.
 Phillips v. Singer Mfg. Co. (88 Ill. 305), 28, 610.
 Phillips v. South Park Commissioners (119 Ill. 626), 1479.
 Phillips v. Thorn (84 Ind. 84), 1065.

[References are to pages, Vol. I., pp. 1-900; Vol. II., pp. 961-1496.]

- Phippen v. Moorehouse (50 Mich. 538), 89.
 Phoenix Mut. Life Ins. Co. v. Arbuckle (52 Ill. App. 33), 151, 152, 211.
 Phoenix M. L. Ins. Co. v. Baker (85 Ill. 410), 90.
 Phoenix Ins. Co. v. Johnston (143 Ill. 106), 1202.
 Phoenix, etc., v. Perkey (92 Ill. 164), 565.
 Phy v. Clark (85 Ill. 377), 1005.
 Plano Co. v. Ellis (68 Mich. 101), 551.
 Pick v. Glickman (54 Ill. App. 646), 945.
 Pickard v. McCormick (11 Mich. 68), 501.
 Pickard v. Michigan State Bank (2 Doug. (Mich.) 359), 449.
 Pickard & Munger v. Bates & Towslee (38 Ill. 40), 502.
 Pickard v. Teatro (34 Ill. App. 348), 691.
 Pickering v. Pulcifer (4 Gilm. (Ill.) 79), 521.
 Piepho v. Piepho (88 Ill. 438), 845.
 Pierce v. Benjamin (14 Pick. 356), 160.
 Pierce v. Carleton (12 Ill. 358), 322, 348, 349.
 Pierce v. Cooley (56 Mich. 552), 551.
 Pierce v. Pierce (40 Ill. 292), 1143.
 Pierce v. Roche (40 Ill. 292), 311.
 Pierce v. Short (14 Ill. 144), 106.
 Pierce v. Tuttle (53 Barb. (N. Y.) 155), 260.
 Pierce v. Wade (19 Ill. App. 185), 348, 368.
 Pierson v. Finney (37 Ill. 29), 933.
 Pierson v. Hendrix (88 Ill. 39), 595, 876, 1165, 1259.
 Pierson v. Post (3 Caines (N. Y.) 175), 136.
 Pierson v. Waters (7 Ill. App. 400), 1223.
 Piggott v. Snell (59 Ill. 106), 415.
 Piner v. Cover (55 Ill. 391), 1098, 1109.
 Pinneo v. Goodspeed (104 Ill. 184), 1002.
 Pinney v. Andrus (41 Vt. 631), 1031.
 Pinney v. Cahill (48 Mich. 584), 1037.
 Piper v. Jacobson (98 Ill. 389), 1201.
 Plqua Bank v. Knoup (6 Ohio State 342), 9.
 Pitkin v. Yaw (13 Ill. 251), 254, 258.
 Pitt v. Swearingen (76 Ill. 250), 1431.
 Pitt v. Yalden (4 Burr. (Eng.) 2060), 1487.
 Pitts v. Magee (24 Ill. 670), 1175.
 Pittsburg, Cincinnati, etc., Ry. v. Thompson (56 Ill. 138), 1005.
 Pittsburg, etc., Ry. Co. v. City of Chicago (53 Ill. 80), 1165.
 Pittsburg, etc., Ry. Co. v. Powers (74 Ill. 341), 1098.
 Pittsburgh, etc., Ry. Co. v. Reich (101 Ill. 157), 1069, 1085.
 Pittsburgh, F. W. & Co. Ry. Co. v. Chicago (159 Ill. 369), 1294.
 Pitts Sons Mfg. Co. v. Com. Nat. Bank (121 Ill. 582), 795, 807, 812, 815, 825.
 Pixley v. Boynton (79 Ill. 351), 1005, 1280.
 Planing Mill Co. v. National Bank (86 Ill. 587), 419.
 Planing Mill Lumber Co. v. City of Chicago (56 Ill. 304), 1218, 1223.
 Platt v. Platt (58 N. Y. 646), 1041.
 Platt v. Brand (26 Mich. 173), 897.
 Platt v. Broderick (70 Mich. 577), 551.
 Player v. Burlington, etc., Ry. Co. (62 Ga. 723), 1058.
 Pleasant v. Fant (23 Wall. 116), 1091.
 Plumb v. Campbell (129 Ill. 101), 1098, 1141.
 Plumb v. Taylor (27 Ill. App. 238), 96, 863.
 Plumleigh v. Dawson (1 Gilm. (Ill.) 544), 1144.
 Plumleigh v. White (4 Gilm. 387), 12.
 Plummer v. Morrill (48 Me. 184), 1396, 1398.
 Plummer v. Rigdon (78 Ill. 222), 222, 1146.
 Pollack v. Slack (92 Ill. 221), 328.
 Poleman v. Johnson (84 Ill. 260), 1076, 1077, 1084, 1088.
 Pollard v. Rutter (35 Ill. App. 370), 1224.
 Pollard v. Lyon (95 U. S. 226), 202.
 Pollard v. People (69 Ill. 148), 1098.
 Pollard v. Wilder (17 Vt. 48), 952.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Pollock v. Maison (45 Ill. 516), 256.
 Pomeroy v. Bruce (13 Serg. & R. (Pa.) 118), 517.
 Pomroy v. Gould (2 Metc. (Mass.) 500), 512.
 Pomeroy v. Villavossa (37 Ill. App. 590), 213.
 Poole v. Vanlandingham (1 Ill. (Breese) 47), 435, 864, 865.
 Poor v. People (142 Ill. 309), 1333.
 Poppers v. International Bank (10 Ill. App. 531), 1117.
 Poppers v. Meager (33 Ill. App. 20), 1442.
 Poppers v. Miller (14 Ill. App. 87), 212.
 Pope v. North (33 Ill. 441), 1236.
 Poppers v. Peterson (33 Ill. App. 384), 161.
 Porter v. Cushman (19 Ill. 572), 107.
 Porter v. Drennan (13 Ill. App. 362), 524, 605.
 Porter v. Triola (84 Ill. 325), 969, 1139.
 Post v. Brown (55 Ill. App. 355), 505.
 Post v. Campau (42 Mich. 90), 25.
 Postmaster General U. S. v. Cochran (2 Johns (N. Y.) 415), 517, 518.
 Potter v. Bacon (2 Wend. (N. Y.) 583), 516, 517.
 Potter v. Board of Trustees (10 Ill. App. 343), 1240.
 Potter v. Hopkins (25 Wend. (N. Y.) 417), 1145.
 Potter v. Gronbeck (117 Ill. 404), 1167.
 Potter v. McCoy (26 Pa. St. 438), 777.
 Potter v. Potter (41 Ill. 80), 1107.
 Pottle v. McWorter (13 Ill. 454), 1209, 1399.
 Potts v. Collum (68 Ill. 217), 283.
 Potwin v. Johnson (106 Ill. 532), 1196.
 Powell v. Ansell (9 Dowl. 893), 113.
 Powell v. Feeley (49 Ill. 143), 397.
 Powell v. Hyndman (29 Ill. App. 179), 184.
 Powell v. McCord (121 Ill. 330), 1027, 1207.
 Powers v. Ware (2 Pick. (Mass.) 451), 82.
 Poyer v. Village of Des Plaines (124 Ill. 310), 974.
 Prairie Farmer Co. v. Taylor (69 Ill. 440), 81.
 Prather v. Vineyard (4 Gilm. (Ill.) 40), 809, 912.
 Pratt v. Bryant (2 Ill. App. 314), 380.
 Pratt v. Grimes (35 Ill. 164), 821.
 Pratt v. Hotchkiss (10 Ill. App. 603), 20.
 Pratt v. Stone (10 Ill. App. 633), 1090, 1106, 1413, 1414.
 Pratts' Admrs. v. United States (22 Wall. 496), 1051.
 Prentice v. Moore (3 Ill. App. 539), 192.
 Presbyterian Church v. Emerson (66 Ill. 269), 1147.
 Prescott v. Guyler (32 Ill. 312), 546.
 President, etc., v. McKean (11 Johns (N. Y.) 98), 556.
 President v. Thompson (20 Ill. 197), 1325, 1326.
 President & Trustees, Town of Jacksonville v. Block (1 Scam. 290), 112.
 Presley v. Freeman (3 Term R. 51), 242.
 Presley Admr. v. Powers (82 Ill. 125), 664.
 Preston v. Gahl (94 Ill. 586), 1430.
 Preston v. Smith (156 Ill. 359), 89.
 Preston v. Zahl (4 Ill. App. 423), 254, 1416.
 Prettyman v. Hartley (79 Ill. 205), 1434.
 Prettyman v. Urnland (77 Ill. 206), 1436, 1437.
 Price v. Bailey (66 Ill. 48), 219.
 Price v. Dime Sav. Bank (124 Ill. 317), 1282.
 Price v. Easton (4 Bar. & Adol. 433), 508.
 Price v. Farrar (5 Ill. App. 536), 836.
 Price v. Hay (132 Ill. 543), 1491, 1492.
 Price v. Henagen (5 Ill. App. 234), 1001.
 Price v. People (131 Ill. 223), 972.
 Price v. Pittsburgh Ry. Co. (40 Ill. 44), 381, 767.
 Prickard v. Nelson (6 Mes. & W. 771), 791.
 Prignitz v. Fischer (4 Minn. 336), 1317, 1318, 1320.
 Primm v. Legg (67 Ill. 500), 1050.
 Primmer v. Clabaugh (78 Ill. 94), 1015.

[References are to pages, Vol. I., pp. 1-990; Vol. II., pp. 991-1496.]

- Prince v. Dulin (33 Ill. App. 118), 193.
 Prince v. Griffin (16 Ia. 522), 1480.
 Prince v. Lamb (1 Ill. (Breeze) 378), 809.
 Pringle v. Leverich (97 N. Y. 181), 1078.
 Pringle v. Phillips (5 Sandf. 157), 180.
 Prins v. Hinchliff (17 Ill. App. 153), 297, 299.
 Prior v. Craig (5 Serg. & R. (Pa.) 44), 87.
 Pritchett v. People (1 Gilm. (Ill.) 525), 837.
 Propeller Niagara v. Martin (42 Ill. 106), 381.
 Protection Life Ins. Co. v. Dill (91 Ill. 174), 1104, 1142.
 Protection Life Ins. Co. v. Foote (79 Ill. 361), 918, 1258.
 Prote Ins. Co. v. Palmer (81 Ill. 88), 85.
 Prout v. Grout (72 Ill. 456), 353, 1222.
 Prudy v. Reeder (41 Ill. 279), 136.
 Pry v. Pry (109 Ill. 466), 1069.
 Pugh v. Reat (107 Ill. 440), 1133.
 Pullman v. Nelson (28 Ill. 112), 296, 299, 324.
 Pullman Palace Car Co. v. Laack (143 Ill. 242), 1091.
 Pulliam v. Pensoneau (33 Ill. 375), 1390, 1399.
 Pulsifer v. Clauson (100 Ill. 557), 1201.
 Purcell v. Steele (12 Ill. 93), 315, 326.
 Purdy v. Hall (134 Ill. 298), 1002, 1090.
 Purington v. Akhurst (74 Ill. 490), 1273, 1274.
 Pusey v. Pick (67 Ill. 98), 892, 907.
 Putt v. Duncan (2 Ill. App. 461), 783, 787, 1069.
 Puterbaugh v. Smith (131 Ill. 199), 985.
 Putman v. Wadley (40 Ill. 346), 1041, 1147.
 Putman v. Wiley (8 Johns (N. Y.) 432), 137, 138.
 Pyncheon v. Day (118 Ill. 9), 1091.
 Pyncheon v. Day (18 Ill. App. 147), 1044.
 Quarles v. Waldron (20 Ala. 217), 771.
 Queck v. Lemon (105 Ill. 578), 887.
 Queen v. Doolan (55 Ill. 526), 890.
 Quick v. I. & St. L. Ry. Co. (130 Ill. 334), 1125.
 Quigley v. Roberts (44 Ill. 503), 72.
 Quimbo Appo v. People (20 N. Y. 531), 1317.
 Quincy Coal Co. v. Hood, Admr. (77 Ill. 68), 785, 842, 1000.
 Quincy Horse Ry. Co. v. Gnuse (137 Ill. 264), 1063.
 Quincy Whig Co. v. Tillson (67 Ill. 351), 972.
 Quincy, etc., Ry. v. Wellhoener (72 Ill. 60), 140.
 Quinn v. Rawson (5 Ill. App. 130), 1102.
 Quinn v. Schmidt (91 Ill. 84), 175.
 Quyle v. Guild (91 Ill. 378), 124.
 R.
 Race v. Chandler (15 Ill. App. 522), 160, 161.
 Race v. Irving Park Hall Ass'n. (50 Ill. App. 131), 759.
 Race v. Weston (86 Ill. 91), 1050.
 Racine & M. Ry. Co. v. Farmers' L. and T. Co. (70 Ill. 248), 1191.
 Radcliffe v. Noyes (43 Ill. 318), 414, 933.
 Radeke v. Cook (21 Ill. App. 595), 1142, 1277.
 Rae v. Hulbert (17 Ill. 572), 889.
 Rafferty v. McGowan (136 Ill. 620), 1163.
 Ragini v. Garbett (2 Carr & Ker. 474), 1020.
 Raggio v. People (135 Ill. 533), 1081, 1145.
 Ragor v. Kendall (70 Ill. 95), 1167.
 Ragor v. McKay (44 Ill. App. 79), 264, 1425.
 Ralph v. Baxter (66 Ill. 416), 1175.
 Ralston v. Chapin (49 Mich. 274), 765.
 Ralston v. Lothain (18 Ind. 303), 970.
 Ramsey v. Erie Ry. Co. (3 Abb. (N. Y.) Pr. 174), 1475.
 Rand v. Vaughn (1 Bing. (N. C.) 767), 1154.
 Randall v. Guney (1 Chitt. R. 674), 416.
 Randall v. Johnson (13 R. I. 338), 293.
 Randall v. People (63 Ill. 202), 1146.

Q.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Randolph v. County Board (19 Ill. App. 100), 1239.
 Randolph v. Emerick (13 Ill. 344), 1204.
 Randolph v. Onstott (58 Ill. 52), 1002.
 Randolph v. Ralls (18 Ill. 29), 7.
 Rangler v. McCreight (27 Pa. St. 95), 148.
 Rankey v. Raum (51 Ill. 88), 1009.
 Rankin v. Curtenius (12 Ill. 334), 973.
 Rankin v. Kinsey (7 Ill. App. 215), 195.
 Rankin v. Simons (27 Ill. 352), 349, 354, 357.
 Ranlett v. Moore (21 N. H. 336), 482, 508.
 Ran Mfg. Co. v. Townsend (50 Ill. App. 558), 1035.
 Ransford v. Willets (43 Ill. App. 436), 201.
 Ransom v. Fox (65 Ill. 204), 1051.
 Ransom v. McCurley (140 Ill. 626), 206, 1071.
 Rathbone v. Ingles (7 Wend. (N. Y.) 320), 1489.
 Rattan v. Stone (3 Scam. (Ill.) 540), 411, 1167.
 Rough v. Ritchie (1 Ill. App. 188), 919, 1435.
 Rawlings v. Bailey (152 Ill. 178), 273, 753.
 Rawlins v. Commonwealth (1 Leigh (Va.) 581), 134.
 Ray v. Bell (24 Ill. 444), 1058.
 Ray v. Faulkner (73 Ill. 469), 338.
 Ray v. Goings (112 Ill. 626), 210.
 Ray v. Williams (112 Ill. 91), 97.
 Rayburn v. Mason Lumber Co. (57 Mich. 273), 1041.
 Rayfield v. People (144 Ill. 332), 1329.
 Raymond v. Fisher (6 Mo. 29), 120, 623.
 Raymond v. Leavitt (46 Mich. 447), 105.
 Rayner v. Dyett (2 Wend. (N. Y.) 300), 929.
 Raysor v. People (27 Ill. 190), 1370.
 Razor v. Kinsey (55 Ill. App. 605), 134.
 Read v. Brookman (3 Term. Rep. 159), 449.
 Read v. Howard (2 Metc. (Mass.) 36), 293.
 Read v. Penrose (36 Pa. St. 214), 347.
 Read v. Walker (52 Ill. 333), 458, 465, 505, 506, 775.
 Reading v. Linington (12 Ill. App. 491), 1002.
 Reaugh v. McConnell (36 Ill. 373), 322.
 Redden v. Inman (6 Ill. App. 55), 1030.
 Redlich v. Bauerlee (98 Ill. 134), 1035, 1261.
 Rednau v. Sanders (2 Dana (Ky.) 70), 1479.
 Redner v. Davern (41 Ill. App. 245), 1222.
 Reece v. Allen (5 Gilm. (Ill.) 536), 262.
 Reece v. Rigby (4 Barn. & Ald. 202), 1452.
 Reece v. Smith (94 Ill. 362), 775.
 Reed v. Bradley (17 Ill. 321), 1208.
 Reed v. Curry (35 Ill. 536), 979, 983.
 Reed v. Driscoll (84 Ill. 96), 393.
 Reed v. Hawley (45 Ill. 40), 1418.
 Reed v. Hobbs (2 Scam. (Ill.) 297), 870, 1049.
 Reed v. Horne (73 Ill. 598), 1204, 1206.
 Reed v. Moore (5 Carr & P. 200), 98.
 Reed v. Noxon (48 Ill. 323), 302.
 Reed v. Peoria & O. Ry. Co. (18 Ill. 403), 466, 467.
 Reed v. Reber (62 Ill. 240), 425.
 Reed v. Reed (135 Ill. 482), 1002.
 Reed v. Rich (49 Ill. App. 262), 1007.
 Reed v. Thompson (88 Ill. 245), 1138, 1139.
 Reed v. Tyler (56 Ill. 288), 262.
 Reeder v. Purdy (48 Ill. 261), 134.
 Reeder v. Purdy (41 Ill. 279), 145, 1411, 1413.
 Reeder v. Snyder (3 W. Va. 413), 1455.
 Reeder v. Wexford County Treasurer (37 Mich. 351), 1305.
 Rees v. City of Chicago (38 Ill. 322), 1167, 1281.
 Reese v. Henck (14 Ill. 482), 1009.
 Reese v. People (11 Ill. 346), 1370.
 Reeve v. Fox (40 Ill. App. 127), 163.
 Reeves v. Forman (26 Ill. 313), 837.
 Reeves v. Herr (59 Ill. 81), 1015.
 Reeves v. Reeves (59 Ill. 203), 733, 935.
 Reeves v. Reeves (54 Ill. 332), 1216.
 Reeve v. Smith (113 Ill. 47), 328.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Regents v. Detroit Co. (12 Mich. 138), 669.
 Regime v. Sutchff (4 McCord 387), 72.
 Reichmann v. Baler (46 Ill. App. 346), 1141.
 Reichwald v. Gaylord (73 Ill. 503), 1209.
 Reid v. Degener (82 Ill. 508), 804.
 Reiman v. Ater (88 Ill. 299), 376, 377, 974, 1210.
 Reinback v. Crabtree (77 Ill. 182), 868.
 Rels v. Statton (23 Ill. App. 314), 379.
 Reiter v. Atman (88 Ill. 299), 379.
 Reitz v. People (77 Ill. 518), 297, 309, 314.
 Reitz v. Trustees (3 Ill. App. 448), 612.
 Reitzell v. Miller (25 Ill. 67), 1386.
 Reitzell v. People (72 Ill. 416), 1380.
 Renold v. Alberti (1 Binn (Pa.) 649), 1483.
 Renwick v. Hall (84 Ill. 162), 1325, 1367.
 Republica v. Coates (1 Yeates 2), 602.
 Republic Life Ins. v. Swigert (135 Ill. 150), 1260.
 Reutchmer v. Hucke (3 Ill. App. 144), 890.
 Rex v. Barker (1 Wm. Bla. 253), 1293.
 Rex v. D'Eon (3 Burrill 1513), s. c. (1 W. Black 510), 968.
 Rex v. Hawrth (4 Car. & P. 254), 1042.
 Rex v. Inhabitants (1 B. & C. 142), 364.
 Rex v. Nichols (1 Kenyon (Eng.) 512), 1411.
 Reynolds v. Auspach (14 Ill. App. 38), 978.
 Reynolds v. DeGeer (11 Ill. App. 113), 392.
 Reynolds v. Greenbaun (80 Ill. 416), 1097.
 Reynolds v. Lambert (69 Ill. 495), 1147.
 Reynolds v. McCormick (62 Ill. 412), 177, 823, 852.
 Reynolds v. McMillan (63 Ill. 46), 1495.
 Reynolds v. Palmer & Hopper (70 Ill. 288), 1068.
 Reynolds v. Perry (11 Ill. 534), 392.
 Reynolds v. Phillips (13 Ill. App. 557), 140, 1075.
 Reynolds v. Rounsburly (6 Hill (N. Y.) 534), 1022.
 Reynolds v. Sumner (126 Ill. 58), 1033.
 Reynolds v. Thomas (17 Ill. 207), 1418.
 Rhoads v. Rhoads (43 Ill. 239), 1259.
 Rhode v. Lehman (50 Ill. 455), 1220.
 Rhode v. Matthai (35 Ill. App. 147), 302.
 Rhode v. McLean (101 Ill. 467), 1042.
 Rhode Island v. Massachusetts (12 Pet. (U. S.) 718), 6.
 Rhodes v. City of Metropolis (144 Ill. 580), 1119.
 Rice v. Benedict (18 Mich. 75), 1409.
 Rice v. Brown (77 Ill. 550), 1415, 1426.
 Rice v. Heap. Admr. (151 Ill. 264), 1258.
 Rice v. Heap (46 Ill. App. 448), 1143.
 Rice v. Rice (108 Ill. 199), 1068.
 Rice v. Rock Island Ry. Co. (21 Ill. 93), 1325.
 Rich v. City of Chicago (59 Ill. 286), 1251.
 Rich v. Hathaway (18 Ill. 548), 108, 786, 878, 982, 1222.
 Rich v. Rich (16 Wend (N. Y.) 663), 640.
 Richards v. Booth (4 Wis. 67), 135.
 Richards v. Greene (78 Ill. 525), 935, 1236.
 Richards v. Hadsall (106 Ill. 476), 1051.
 Richard Iron Works v. Glennon (71 Ill. 11), 971, 1044.
 Richards v. L. S. & M. S. Ry. Co. (124 Ill. 516), 6.
 Richards v. People (100 Ill. 423), 1198.
 Richards v. Shaw (67 Ill. 222), 96.
 Richard v. Williams (7 Wheat. (U. S.) 59), 253.
 Richardson v. Gifford (28 Eng. C. L. Rep. 35), 543.
 Richardson v. Kelly (85 Ill. 491), 1063.
 Richardson v. Lester (83 Ill. 55), 338.
 Richardson v. Rardin (88 Ill. 124), 164, 311.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 931-1496.]

- Richardson v. Smith (8 Johns. (N. Y.) 439), 483, 502, 538.
 Richardson v. Thompson (41 Ill. 202), 422.
 Richalleu Hotel Co. v. Mil. Encamp. Co. (140 Ill. 250), 909, 1003.
 Richeson v. Ryan (15 Ill. 13), 38, 881.
 Richey v. Dunham (50 Ill. App. 246), 1266.
 Richmond v. Roberts (98 Ill. 472), 226, 992, 1096, 1101, 1103.
 Richmond v. Tallmadge (16 Johns. (N. Y.) 307), 816.
 Ricker v. Scofield (28 Ill. App. 32), 815, 820, 917.
 Rickert v. Snyder (9 Wend. (N. Y.) 416), 517, 637.
 Rider v. Alton & Sangamon Ry. Co. (13 Ill. 516), 1034.
 Rider v. Glover (3 Scam. (Ill.) 547), 1365, 1366.
 Ridgely Nat. Bank v. Fairbank (54 Ill. App. 296), 917, 921.
 Ridgway v. Smith (17 Ill. 33), 301, 324.
 Riebling v. Tracy (17 Ill. App. 158), 1049.
 Riedle v. Mulhausen (20 Ill. App. 68), 1104.
 Rietzell v. People (72 Ill. 416), 1359.
 Rigg v. Cook (4 Gilm. (Ill.) 336), 270.
 Riggs v. Powell (142 Ill. 453), 1040, 1041.
 Riggs v. Savage (4 Gilm. (Ill.) 129), 276.
 Rigdon v. Conley (141 Ill. 565), 1057.
 Rigor v. Frye (62 Ill. 507), 257.
 Riley v. Loughrey (22 Ill. 98), 908.
 Ring v. Billings (51 Ill. 475), 72.
 Ring v. Rocksborough (2 Tryw. 468), 509.
 Ringberg v. Peterson (76 Mich. 107), 887.
 Ringhouse v. Keener (63 Ill. 230), 280, 881, 891.
 Ringhouse v. Keever (49 Ill. 470), 754.
 Ripley v. Davis (15 Mich. 75), 842.
 Ripley v. Mossir (2 Gilm. (Ill.) 381), 1232.
 Ripley v. People's Savings Bank (18 Ill. App. 430), 342.
 Ripley v. Savings Bank (119 Ill. 341), 343.
 Rippen v. Schoen (92 Ill. 229), 350.
 Risewick v. Davis (19 Md. 82), 288.
 Risley v. Fellows (5 Gilm. (Ill.) 531), 1480.
 Risser v. Martin (Ia.) (53 N. Y. Rep. 270), 1178.
 Ritchie v. Gibbs (7 Ill. App. 149), 856.
 Ritchey v. West (23 Ill. 385), 1141.
 Rivard v. Gardner (39 Ill. 125), 424.
 Riverside Co. v. Townsend (120 Ill. 9), 252, 270.
 Rives v. Marrs (25 Ill. 315), 1002.
 R. J. Gunning Co. v. Cusack (50 Ill. App. 290), 1015, 1070, 1141.
 Roach v. People (77 Ill. 25), 1096.
 Roady v. Finnegan (43 Md. 390), 1019.
 Roan v. Rohrer (72 Ill. 582), 416.
 Robb v. Brachman (39 Mich. 423), 1391.
 Robb v. Connelly (111 U. S. 624), 1341.
 Robb v. Smith (4 Ill. (3 Scam.) 46), 31, 1454.
 Robbins v. Brooks (42 Mich. 62), 886.
 Robbins v. Roth (95 Ill. 464), 1073.
 Robbins v. Laswell (58 Ill. 203), 490.
 Roberts v. Corby (86 Ill. 183), 465, 1182.
 Roberts v. Dame (11 N. H. 226), 1154.
 Roberts v. Dunn (71 Ill. 46), 290, 296, 304, 315, 330.
 Roberts v. Fahs (46 Ill. 268), 1252.
 Roberts v. Fahs (32 Ill. 474), 1232, 1247, 1249.
 Roberts v. Failis (1 Cow. (N. Y.) 238), 1112.
 Roberts v. Leslie (48 N. Y. Super. (Jones & S.) 46), 1079.
 Roberts v. Spencer (123 Mass. 397), 1045.
 Roberts v. Thomson (28 Ill. 79), 876, 966, 973.
 Robertson v. Brost (83 Ill. 116), 1015, 1062.
 Robertson v. Burkell (2 Scam. (Ill.) 278), 926, 928.
 Robertson v. Lynch (18 Johns. (N. Y.) 451), 502, 507.
 Robertson v. March (3 Scam. 198), 32.
 Robertson v. Morgan (38 Ill. App. 137), 1208.

[References are to pages, Vol. I., pp. 1 960; Vol. II., pp. 961-1496.]

- Robinoe v. Doe (6 Blackf. (Ind.) 52), 253.
 Robins v. Broge (3 Mees. & W. 119), 1476.
 Robinson v. Allen (11 Ill. App. 574), 395.
 Robinson v. Brown (82 Ill. 279), 1010, 1033, 1169, 1259.
 Robinson v. Crummer (5 Gilm. (Ill.) 218), 1420, 1428.
 Robinson v. Hardy (22 Ill. App. 512), 161.
 Robinson v. Hawes (56 Mich. 136), 1486.
 Robinson v. Hibbs (48 Ill. 408), 889.
 Robinson v. Magarity (28 Ill. 423), 1051, 1248.
 Robinson v. Maghee (85 Ill. 545), 978.
 Robinson v. Moore (25 Ill. 135), 767.
 Robinson v. McNiell (51 Ill. 225), 1028.
 Robinson v. Parish (62 Ill. 130), 1006, 1147.
 Robinson v. People (8 Ill. App. 279), 189.
 Robinson v. Randall (82 Ill. 521), 990, 1007.
 Robinson v. Robinson (51 Ill. App. 317), 1006.
 Roblin v. Yaggy (35 Ill. App. 537), 1224.
 Roby v. Cossitt (78 Ill. 683), 845.
 Roby v. Colehour (135 Ill. 300), 1486, 1490, 1495.
 Roche v. Rhode Island Ins. Ass'n. (2 Ill. App. 360), 341, 346, 808.
 Rockefeller v. Tobias (3 Ill. App. 461), 1210.
 Rockford City Ry. Co. v. Matthews (50 Ill. App. 267), 454, 606.
 Rockford, R. I. & St. L. Ry. Co. v. Heflin (65 Ill. 366), 140, 1143.
 Rockford, R. I. & St. L. Ry. Co. v. Beckmeyer (72 Ill. 267), 772.
 Rockford, R. I. & St. L. Ry. Co. v. Phillips (66 Ill. 548), 240, 241.
 Rockford, R. I. & St. L. Ry. Co. v. Rose (72 Ill. 183), 1140.
 Rockford, R. I. & St. L. Ry. Co. v. Steele (69 Ill. 253), 1165.
 Rockford Ins. Co. v. Nelson (75 Ill. 548), 938, 971, 990, 1097.
 Rockford Ins. Co. v. Nelson (65 Ill. 415), 85, 1097, 1103.
 Rock Valley Paper Co. v. Nixon (84 Ill. 11), 423, 1002.
 Rockwell v. Jones (21 Ill. 279), 1375, 1378.
 Rockwell v. Ohio (11 Ohio 130), 111.
 Rockwell v. Servant (63 Ill. 424), 1379.
 Rockwood v. Poundstone (38 Ill. 199), 1008, 1004.
 Rodemund v. Clark (46 N. Y. 345), 78.
 Roden v. Chicago & G. T. Ry. Co. (133 Ill. 72), 1090.
 Roethke v. Phil. Best Brew. Co. (33 Mich. 341), 899.
 Rogers v. C. B. & Q. Ry. Co. (117 Ill. 115), 1277.
 Rogers v. Hall (3 Scam. (Ill.) 5), 1221, 1260.
 Rogers v. Higgins (57 Ill. 244), 857.
 Rogers v. Holden (13 Ill. 293), 1385.
 Rogers v. Miller (4 Scam. 333), 413.
 Rogers v. People (68 Ill. 154), 1314.
 Rogers v. Rogers (4 Johns. (N. Y.) 485), 451.
 Rohn v. Harris (31 Ill. App. 26), 15.
 Rohrheimer v. Eagle (30 Ill. App. 498), 1222.
 Roland v. Fisher (30 Ill. 224), 254.
 Rolfe v. Rich (46 Ill. App. 406), 1102, 1479.
 Rolling Stock Co. v. People (147 Ill. 234), 1328.
 Rolling Stock Co. v. People (139 Ill. 461), 1334.
 Rollins v. Duffy (14 Ill. App. 69), 480, 487, 843.
 Rooney v. Milwaukee, etc., Co. (65 Wis. 397), 1078.
 Roosevelt v. Gardenier (2 Cow. (N. Y.) 463), 468, 790.
 Root v. Campau (42 Mich. 90), 80.
 Root v. Curtis (38 Ill. 192), 1107.
 Root v. Renwick (15 Ill. 461), 1395, 1399.
 Root v. Stevenson (24 Ind. 115), 72.
 Root v. Wood (34 Ill. 293), 1063.
 Root v. Woodruff (6 Hill (N. Y.) 418), 778, 880.
 Root v. Wright (84 N. Y. 72), 1472, 1473.
 Rople v. Town of Bishop (111 Ill. 124), 1004.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Rorke v. Goldstein (86 Ill. 568), 377.
 Rose v. Blakemore, Ryan & M. 383), 1020.
 Rose v. Jackson (40 Mich. 30), 501.
 Rose v. Reddick (1 Scam. (Ill.) 73), 466.
 Roseland Mfg. Co. v. Arcan (55 Ill. App. 336), 1182.
 Rosenberg v. Barrett (2 Ill. App. 386), 380, 388.
 Rosenfield v. Case (87 Mich. 295), 292.
 Rosenheim v. Fifield (12 Ill. App. 302), 1108.
 Rosenmueller v. Lampe (89 Ill. 212), 80, 1051.
 Rosenstein v. Case (9 Ill. App. 482), 15, 799.
 Ross v. Allen (67 Ill. 317), 33, 57.
 Ross v. Claussen (47 Ill. 402), 457, 569.
 Ross v. DeMoss (45 Ill. 447), 1475.
 Rosenheim v. Fifield (12 Ill. App. 302), 299.
 Ross v. Hammond (16 Ill. 99), 1395, 1398, 1399.
 Ross v. Irving (14 Ill. 171), 282.
 Ross v. Nesbitt (2 Gilm. (Ill.) 252), 818, 851, 857.
 Ross v. Payson (160 Ill. 349), 1486, 1487.
 Ross v. People (78 Ill. 375), 1301.
 Ross v. Plano Steel Work (34 Ill. App. 323), 1254.
 Ross v. Taylor (63 Ill. 215), 1116, 1282.
 Ross & Co. v. Innis (35 Ill. 487), 213, 215, 217.
 Rossett v. Gardner (3 W. Va. 531), 967.
 Roth v. Eppy (80 Ill. 283), 1002, 1107.
 Roth v. Smith (41 Ill. 314), 220, 1146.
 Rothschild v. Bruscke (131 Ill. 265), 888, 1089, 1120.
 Rothschild v. Meyer (18 Ill. App. 284), 706, 707.
 Rough v. Woriner (76 Mich. 375), 166.
 Roundtree v. Stewart (1 Ill. (Breese) 73), 965.
 Roundy v. Hunt (24 Ill. 598), 1173, 1177, 1206.
 Rountree v. Little (54 Ill. 323), 255.
 Rountree v. Talbot (89 Ill. 246), 1133.
 Rouse v. County of Peoria (2 Gilm. (Ill.) 99), 787.
 Roush v. Washburn (88 Ill. 215), 161.
 Rowan v. Bowles (25 Ill. 113), 1252.
 Rowell v. Chandler (83 Ill. 288), 502.
 Rowlan v. Kelsey (18 Barb. (N. Y.) 484), 249.
 Rowland v. Hewitt (19 Ill. App. 450), 1434.
 Rowland v. Shepherd (27 Neb. 497), 968.
 Rowley v. Berrian (12 Ill. 198), 289, 295, 297, 327.
 Rowley v. Hughes (40 Ill. 71), 374.
 Roy v. Garroway (54 Ill. App. 610), 1209.
 Roy v. Goings (6 Ill. App. 140), 215, 1086.
 Roy v. Goings (112 Ill. 656), 215, 1093.
 Royal Ins. Co. v. Roodhouse (25 Ill. App. 61), 485.
 Rozler v. Williams (92 Ill. 187), 10, 379.
 Rubel v. Elliot (30 Ill. App. 62), 1492.
 Rucker v. Fuller (11 Ill. 223), 328.
 Rucker v. Wheeler (39 Ill. 436), 386.
 Ruckman v. Allwood (40 Ill. 128), 409.
 Ruckman v. Alwood (44 Ill. 183), 1483, 1486.
 Rue v. City of Chicago (66 Ill. 256), 365.
 Ruegger v. Indianapolis Ry. Co. (103 Ill. 449), 858.
 Ruff v. Jarrett (94 Ill. 475), 1048, 1101.
 Ruggles v. Gatton (50 Ill. 412), 1035, 1204.
 Ruggles v. Hall (14 Johns (N. Y.) 112), 1140.
 Rulse v. Tollman (49 Ill. App. 490), 1006.
 Runnells v. Moffatt (73 Mich. 188), 1404, 1405, 1409.
 Rupert v. Mark (15 Ill. 540), 271.
 Rupley v. Daggett (74 Ill. 351), 1094.
 Rush v. Fisher (70 Mich. 469), 1392.
 Rusminger v. People (47 Ill. 384), 936.
 Russell v. Ball (2 Johns (N. Y.) 50), 569, 577.

[References are to pages, Vol. I., pp. 1-900; Vol. II., pp. 961-1496.]

- Russell v. Brown (41 Ill. 183), 1377, 1378.
 Russell v. City of Chicago (22 Ill. 283), 609.
 Russell v. Deeve (7 Ill. App. 181), 213.
 Russell v. Gilmore (54 Ill. 147), 501.
 Russell v. Hamilton (2 Scam. (Ill.) 56), 605, 622, 836, 856.
 Russell v. Koehler (66 Ill. 459), 231.
 Russell v. Lilja (90 Ill. 327), 762.
 Russell v. Martin (2 Scam. (Ill.) 492), 916, 1061.
 Russell v. Palmer (2 Wils. 325), 1452.
 Russell v. Pickering (17 Ill. 31), 367.
 Russell v. Slade (12 Conn. 455), 507.
 Russell v. Whipple (2 Cow. (N. Y.) 536), 579.
 Rust v. Frothingham & Fort (1 Ill. (Breese) 331), 772.
 Rust v. Low (6 Mass. 91), 148.
 Rutledge v. Stribling (26 Ill. App. 353), 296, 330.
 Ryan v. B. & O. Ry. Co. (60 Ill. App. 612), 1207.
 Ryan v. Barger (16 Ill. 28), 888.
 Ryan v. Driscoll (83 Ill. 415), 424, 425.
 Ryan v. Kirchberg (17 Ill. App. 132), 1428.
 Ryan v. Lander (89 Ill. 554), 815.
 Ryan v. May (14 Ill. 49), 785, 908.
 Ryan v. Miller (52 Ill. App. 191), 1006.
 Ryan v. Newcomb (147 Ill. 368), 277.
 Ryan v. Vanlangingham (25 Ill. 128), 846, 901, 903, 911.
 Rybolt v. Milliken (5 Ill. App. 490), 926.
 Ryder v. Meyer (66 Ill. 40), 1431.
 Ryder v. Twiss (3 Scam. (Ill.) 4), 982.
- S.**
- Sack v. Dolese (137 Ill. 129), 1064, 1090.
 Sadler v. Leigh (4 Campb. 395), 31.
 Safford v. Miller (59 Ill. 205), 904, 912.
 Safford v. Sangamon Ins. Co. (88 Ill. 296), 406, 799, 801.
 Safford v. Vail (22 Ill. 326), 1205.
 St. Clair Benev. Society v. Fletsam (97 Ill. 474), 1003.
 St. Clair Ben. Soc. v. Fietsam (6 Ill. App. 151), 1002.
 St. Clair v. People (85 Ill. 396), 1295.
 St. Croix Lumber Co. v. Pennington (2 Dak. 470), 1204.
 St. Denis v. Saunders (36 Mich. 369), 1409.
 Sale v. Fike (54 Ill. 292), 1237.
 Salee v. Fales (67 Ill. 186), 481.
 Sallisbury v. Gillett (3 Ill. (2 Scam.) 290), 33.
 Salwasser v. Hazlitt (18 Ill. App. 243), 1052.
 Salsbury v. Falk (28 Ill. App. 292), 868.
 Sammis v. Clark (17 Ill. 398), 94, 489, 859, 979.
 Sample v. Broadwell (87 Ill. 617), 178, 852.
 Samuel v. Agnew (80 Ill. 553), 178.
 Sanborn v. Haynes (26 Ill. App. 335), 104.
 Sanders v. People (124 Ill. 218), 1098.
 Sanders v. Seelye (128 Ill. 631), 1478, 1496.
 Sanderson v. Town of La Salle (117 Ill. 171), 1070.
 Sanford v. Chase (3 Cow. (N. Y.) 381), 416.
 Sandusky v. Neal (2 Ill. App. 624), 27.
 Sandwich v. Dolan (42 Ill. App. 53), 237, 1061.
 Sands v. Bullock (20 Wend. 680), 829.
 Sands v. Hughes (53 N. Y. 287), 270.
 Sands v. Kagey (150 Ill. 109), 253, 254.
 Sands v. Wacaser (149 Ill. 530), 268, 1134.
 Sandoval Coal and Mining Co. v. Main (23 Ill. App. 395), 90.
 Sanford v. Gaddis (13 Ill. 329), 206, 746, 775, 872.
 Sanford v. Rawlings (43 Ill. 92), 1053.
 Sangamon Coal Mining Co. v. Richardson (33 Ill. App. 277).
 Sanger and Shreffler v. Nadelhofer (34 Ill. App. 252), 114, 384.
 Sapp v. Phelps (92 Ill. 588), 1050.
 Sappington v. Pulliam (3 Scam. (Ill.) 385), 569.
 Sargent v. Central Warehouse Co. (15 Ill. App. 553), 987.

[References are to pages, Vol. I., pp. 1-960; Vol. II. pp. 961-1496]

- Sargent v. Courrier (66 Ill. 245), 174, 1437.
 Sargent v. Kellogg (5 Gilm. (Ill.) 273), 889, 1070.
 Sargent v. People (64 Ill. 347), 1146.
 Sargeant v. Marshall (28 Ill. App. 177), 1099, 1106.
 Saunders v. McCollins (4 Scam. (Ill.) 419), 1206.
 Savage v. French (13 Ill. App. 17), 193.
 Saveland v. Green (40 Wis. 431), 1039.
 Savings Bank v. Ward (100 U. S. 195), 1491.
 Sawyer v. Daniels (48 Ill. 269), 1147.
 Sawyer v. Stephenson (1 Ill. (Breese) 24), 1148.
 Saxton v. Johnson (10 Johns (N. Y.) 418), 569, 577.
 Scales v. Sabar (51 Ill. 232), 982.
 Scammon v. City of Chicago (40 Ill. 146), 321.
 Scammon v. City of Chicago (25 Ill. 361), 130.
 Scammon v. McKey (21 Ill. 554), 10, 877.
 Scarritt v. Carruthers (29 Ill. 487), 1276.
 Scates' case (90 Ill. 586), 1089.
 Scaton v. Ruff (29 Ill. App. 235), 1270.
 Schaefer v. People (20 Ill. App. 605), 1336.
 Schalk v. Kingsley (142 N. J. L. 32), 1477.
 Schattgen v. Holnback (149 Ill. 646), 213, 216.
 Schattgen v. Holnback (52 Ill. App. 54), 1064.
 Schaumtoeffel v. Belm (77 Ill. 567), 1411, 1422.
 Scheel Exrs. v. Eidman (68 Ill. 193), 33.
 Scheel v. Eldman (77 Ill. 301), 1007.
 Schemerhorn v. Mitchell (15 Ill. App. 418), 178, 1166.
 Schenk v. White (53 Ill. 358), 259.
 Schertz v. First Nat. Bank (47 Ill. App. 124), 618.
 Schwalier v. Seager (121 Ill. 169), 1008.
 Schiek v. Trustees of Schools (16 Ill. App. 49), 1005.
 Schnell v. Reisdorf (88 Ill. 411), 382, 383, 1071.
 Schirmer v. People (40 Ill. 66), 368, 1240.
 Schlattweiler v. St. Clair County (63 Ill. 449), 1192.
 Schlinker v. Risley (3 Scam. (Ill.) 483), 153.
 Schlessinger v. Keeper (131 Ill. 104), 1127.
 Schlump v. Reidersdorf (28 Ill. 68), 933.
 Schmid v. People (161 Ill. 436), 1253, 1277.
 Schmidt v. Bauer (33 Ill. App. 92), 1174, 1222.
 Schmidt v. Chicago & N. W. Ry. Co. (83 Ill. 405), 990, 1208.
 Schmidt v. Postel (63 Ill. 58), 61.
 Schmidt v. Sennott (103 Ill. 160), 1093, 1096.
 Schmidt v. Skelly (9 Ill. App. 532), 1206.
 Schmisser v. Kreilich (92 Ill. 347), 204, 206.
 Schnell v. North Side Pl. Mill Co. (89 Ill. 581), 380.
 Schnell v. Schlernitzauer (82 Ill. 439), 1478, 1491.
 Schnell v. Rothbath (71 Ill. 83), 966.
 Schnier v. People (23 Ill. 17), 1025.
 Schoenfeld v. Brown (78 Ill. 487), 1144.
 Schofield v. Pope (104 Ill. 130), 1197.
 Schofield v. Settley (31 Ill. 515), 1151, 1204.
 Scholl v. German Coal Co. (139 Ill. 21), 259.
 School Directors v. Parks (85 Ill. 338), 1004.
 School Directors v. Reddick (77 Ill. 628), 547.
 School Directors v. School D'rs (135 Ill. 404), 1304.
 School Directors v. School Directors (105 Ill. 653), 873.
 School Directors v. Wright (43 Ill. App. 270), 1299.
 School District v. Bragdon (23 N. H. 507), 72.
 School Inspectors v. Grove (20 Ill. 526), 1302.
 School Inspectors of Peoria v. People (20 Ill. 525), 1294, 1295.
 Schools v. Ackerland (13 Ill. 650), 809.
 School Trustees v. People (71 Ill. 559), 1304, 1306.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Schooner Constitution v. Woodward (1 Scam. (Ill.) 511), 376.
 Schooner Little Charles (1 Brock 354, 374), 7.
 Schoonhoven v. Gott (20 Ill. 46), 1002.
 Schoonmacher v. Doolittle (118 Ill. 605), 260, 1069.
 Schripps v. Reilly (35 Mich. 371), 995, 996.
 Schroeder v. Harvey (75 Ill. 638), 874.
 Schroeder v. Merchants, etc., (104 Ill. 71), 410, 423, 1232.
 Schroeder v. Walsh (120 Ill. 403), 1202.
 Schroeder v. Walsh (10 Ill. App. 38), 1070.
 Schroer v. Wessell (89 Ill. 113), 982.
 Schuchman v. Comr's of Highways (52 Ill. App. 497), 370.
 Schuchmann v. Knoebel (27 Ill. 175), 865, 896.
 Schup v. D'Oench (51 Ill. 85), 1204.
 Schulenberg v. Farwell (84 Ill. 400), 290, 323, 330.
 Schultz v. Meiselbar (144 Ill. 26), 980, 981, 983.
 Schwarz v. Bradley (95 Ill. 168), 1202.
 Schwab v. Gingerick (13 Ill. 697), 351, 1146.
 Schwarz v. Herrenkind (26 Ill. 208), 1084.
 Schwartz v. Karlovsky (51 Ill. App. 371), 1210.
 Schwarze v. Spiegel (41 Ill. App. 351), 1205, 1225, 1254.
 Schwartz v. Sutherland (51 Ill. App. 175), 882.
 Schwarz v. Schwarz (26 Ill. 81), 1276.
 Scofield v. Sheeler (18 Ill. App. 507), 948.
 Sconce v. Henderson (102 Ill. 376), 1200, 1201.
 Scott v. Bryson (74 Ill. 420), 144.
 Scott v. Chambers (62 Mich. 532), 1485.
 Scott v. Elmerndorf (12 Johs. (N. Y.) 315), 1483.
 Scott v. Lieber (2 Wend. (N. Y.) 479), 602.
 Scott v. Maxwell (18 Ill. App. 72), 1402.
 Scott v. Pentz (5 Sandt. (N. Y.) 572), 1045.
 Scott v. People (141 Ill. 195), 1037.
 Scott v. Shaw (13 Johns (N. Y.) 378), 710.
 Scott v. Shepard (2 Bl. Rep. 892), 200.
 Scott v. Waller (65 Ill. 181), 406, 784, 804.
 Scott v. White (71 Ill. 287), 19, 29, 42.
 Scott v. Wirshing (64 Ill. 103), 149.
 Scott v. Woodward (2 McCord (S. C.) 161), 998.
 Scotten v. Sutter (37 Mich. 526), 95.
 Scovell v. Miller (140 Ill. 504), 1279, 1280, 1282.
 Scoville v. Miller (40 Ill. App. 237), 86.
 Scraftfield v. Sheeler (18 Ill. App. 507), 808, 983.
 Scribner v. Kelly (38 Barb. (N. Y.) 14), 150.
 Searpass v. City of Alton (13 Ill. 371), 110.
 Searing v. Butler (69 Ill. 575), 1001.
 Seaton v. Kendall (61 Ill. App. 289), 1389, 1400.
 Seaver v. Slegel (54 Ill. App. 632), 1175, 1178.
 Seavey v. Beckler (132 Mass. 204), 1402.
 Seavey v. Carrigan (4 Ill. App. 324), 84.
 Seavey v. Rogers (69 Ill. 534), 907.
 Selby v. Hutchinson (4 Gilm. (Ill.) 319), 86, 1135, 1185.
 Seckel v. Scott (66 Ill. 106), 501.
 Seely v. Pelton, Admr. (63 Ill. 101), 1397.
 Seelye v. Seelye (143 Ill. 264), 1201.
 Seelye v. People (40 Ill. App. 449), 913.
 Sedgwick v. Bliss (23 Neb. 617), 1492.
 Sedgwick v. Johnson (107 Ill. 385), 1201.
 Selinas v. Wright (11 Tex. 572), 508, 509, 510.
 Selkirk v. Cobb (13 Gray (Mass.) 313), 1075.
 Selleck v. Selleck (107 Ill. 389), 1098.
 Sells v. Hoare (3 Brod. & B. 232), 1024.
 Sells v. Sandwich Mfg. Co. (21 Ill. App. 56), 1107.
 Selove v. Redford's Exrs. (52 Pa. St. 308), 1031.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Selover v. Osgood (52 Ill. App. 260), 148, 149.
 Semple v. Anderson (4 Gilm. (Ill.) 546), 407.
 Semple v. Hailman (3 Gilm. (Ill.) 131), 1113.
 Semple v. Locke (1 Ill. (Breese) 389), 759.
 Sercomb v. Catlin (25 Ill. App. 195), 1234, 1235.
 Seroggin v. Brown (14 Ill. App. 340), 93.
 Setzke v. Setzke (121 Ill. 30), 1133.
 Severin v. Eddy (52 Ill. 189), 70, 858.
 Sevey v. Blacklin (2 Mass. 541), 778.
 Sexton v. Charley (147 Ill. 269), 265.
 Sexton v. City of Chicago (107 Ill. 323), 1127.
 Sexton v. Holmes 3 Munf. (Va.) 566), 508.
 Seybold v. Morgan (43 Ill. App. 39), 61.
 Seymour v. Ellison (2 Cow. (N. Y.) 13), 1454.
 Shackelford v. Bailey (35 Ill. 387), 257, 258, 1266.
 Shadley v. People (17 Ill. 252), 1370.
 Shafer v. Newlan (29 Ill. 43), 916.
 Shaffer v. Currier (13 Ill. 667), 392.
 Shaffner v. Killian (7 Ill. App. 620), 101.
 Shank v. Strong (4 N. J. 87), 73.
 Shannon v. Lee (86 Mich. 557), 1053.
 Shannon v. People (5 Mich. 36), 1205.
 Shannon v. Smith (31 Mich. 541), 363.
 Sharman v. Morton (31 Ga. 34), 967.
 Sharp v. Babcock (49 Ill. App. 404), 1085.
 Sharp v. St. Louis Ry. Co. (49 Ind. 296), 251.
 Sharpe v. W. J. Morgan & Co. (144 Ill. 382), 314.
 Shaver v. Ingham (58 Mich. 649), 547.
 Shaw v. Hill (83 Mich. 322), 268.
 Shea v. Wagner (29 Ill. App. 193), 1277.
 Sheaff v. People (87 Ill. 189), 1302.
 Sheahan v. Collins (20 Ill. 325), 210, 872.
 Shedd v. Dalzell (30 Ill. App. 356), 1209, 1210.
 Shedd v. Moran (10 Ill. App. 618), 679.
 Sheel v. Eldman (77 Ill. 301), 915.
 Sheen v. Peoria Journal Co. (43 Ill. App. 267), 1147.
 Sheeran v. Chicago & M. Ry. Co. (48 Ill. 523), 1147.
 Sheetz v. Baker (36 Ill. App. 348), 164.
 Sheldon v. Hinton (6 Ill. App. 216), 343.
 Sheldon v. Lewis (97 Ill. 640), 829, 845, 864, 865.
 Sheldon v. Patterson (55 Ill. 507), 857.
 Sheldon v. Reihle (1 Scam. (Ill.) 519), 1229.
 Sheldon v. Tiffen (6 How. (U. S.) 163), 1480.
 Sheldon v. Van Vleck (106 Ill. 45), 260.
 Shell v. Ball (55 Ill. App. 503), 888.
 Shelp v. Morrison (13 Hun. (N. Y.) 110), 1045.
 Shelton v. Franklin (68 Ill. 333), 1115.
 Shennefield v. Dulton (85 Ill. 503), 888.
 Shepard v. Butterfield (41 Ill. 76), 194.
 Shepard v. Ogden (2 Scam. (Ill.) 257), 108, 459, 462, 800.
 Shepard v. Rhodes (10 Ill. App. 557), 1194.
 Shepardson v. McDole (49 Ill. App. 350), 264, 808, 809.
 Shepherd v. Hees (12 Johns. (N. Y.) 433), 67, 148.
 Sherfy v. Graham (72 Ill. 158), 1385, 1394, 1399, 1401.
 Sheridan v. Beardsley (89 Ill. 477), 292, 394.
 Sherman v. Dutch (16 Ill. 283), 1435, 1440.
 Sherman v. Skinner (83 Ill. 584), 1118.
 Sherman v. Smith (20 Ill. 350), 453.
 Sherwood v. Landon (27 Mich. 220), 637.
 Sherwood v. Sherwood (45 Wis. 357), 1049.
 Shinkel v. Letcher (40 Ill. 48), 382.
 Shipherd v. Field (70 Ill. 438), 456.
 Shissler v. People (96 Ill. 472), 6, 1195.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Shoemate v. Lockbridge (53 Ill. 503), 920.
 Sholty v. Sholty (140 Ill. 82), 1191.
 Shook v. Thomas (21 Ill. 86), 965.
 Shortall v. Hinckley (31 Ill. 219), 40.
 Shoudy v. School Directors (32 Ill. 290), 462, 1072, 1411.
 Shoup v. Shields (116 Ill. 488), 143.
 Shove v. Farwell (9 Ill. App. 256), 302.
 Shreffler v. Nadelhoffer (133 Ill. 536), 1120, 1151, 1153.
 Shrimpton & Sons v. Dunaway (52 Ill. App. 448), 99, 1085.
 Shriver v. Nimick (41 Pa. St. 91), 121.
 Shroudenbeck v. Company (22 Wis. 207), 1480.
 Shufeldt v. Buckley (45 Ill. 223), 858.
 Shufeldt v. Fidelity Sav. Bank (93 Ill. 597), 775.
 Shufeldt v. Seymour (21 Ill. 524), 34.
 Shuler v. Pulsifer (49 Ill. 262), 407.
 Shulter v. Searles (48 Ill. 551), 487.
 Shultys v. Owens (14 Johns. (N. Y.) 345), 822.
 Shumway v. Fowler (4 Johns. (N. Y.) 425), 1142.
 Shunick v. Thompson (25 Ill. App. 619), 16, 836, 846, 912, 1425, 1428, 1431.
 Sibert v. Thorpe (77 Ill. 43), 426.
 Siddall v. Jansen (143 Ill. 537), 1279, 1281.
 Sidway v. Marshall (83 Ill. 438), 917.
 Sidwell v. Lobly (27 Ill. 438), 1208.
 Sidwell v. Schumacher (99 Ill. 426), 254, 256, 211, 1072.
 Siebel v. Vaughan (69 Ill. 257), 1134.
 Siegel v. Hanchett (33 Ill. App. 634), 197, 1494.
 Sigden v. Beasley (9 Ill. App. 71), 837.
 Silsbe v. Lucas (53 Ill. App. 479), 1151.
 Silver v. People (45 Ill. 224), 1307, 1310.
 Silverman v. Chase (90 Ill. 37), 58.
 Silverman v. Foreman (3 E. D. Smith 322), 997.
 Simington v. Winter (5 Peters 149), 826.
 Simmons v. Jenkins (76 Ill. 489), 174, 841.
 Simmons v. Chicago, etc., (110 Ill. 340), 1091.
 Simmons v. Nelson (48 Ill. App. 520), 1107, 1125.
 Simons v. People (18 Ill. App. 588), 846, 1332, 1333.
 Simonton v. Barrell (21 Wend. (N. Y.) 362), 111.
 Simpkins v. Rogers (15 Ill. 397), 163.
 Simpson v. Dahl (3 Wall. (U. S.) 60), 1042.
 Simpson v. Simpson (3 Ill. App. 432), 1219.
 Simpson v. Wrenn (50 Ill. 222), 173, 852.
 Sims v. Hugsby (1 Ill. (Breese) 413), 509.
 Sims v. Klein (1 Ill. (Breese) 302), 864, 868.
 Sims' Case v. Cush (Mass.) 293), 1346.
 Sing. Mfg. Co. v. Price (26 Ill. App. 415), 1085.
 Singer v. Bender (64 Wis. 172), 202.
 Singer v. Town of Harvard (147 Ill. 304), 1282.
 Singer, Davis & Co. v. Diggins (76 Mich. 557), 899.
 Singer Mfg. Co. v. Holdfoet (86 Ill. 455), 218.
 Singer Mfg. Co. v. May (86 Ill. 398), 1139.
 Singer, Ninick & Co. v. Steele (125 Ill. 426), 1482.
 Sinsheimer v. Wm. Skinner Mfg. Co. (54 Ill. App. 151), 33, 461, 881.
 Sippiger v. Covenant Mut. Benefit Assn. of Ill. (20 Ill. App. 595), 1088.
 Sivettitsch v. Waskow (37 Ill. App. 153), 1416.
 Skeeles v. Starret (57 Mich. 350), 646.
 Skelly v. Boland (78 Ill. 438), 1097, 1141.
 Sketoos v. Ellos (14 Ill. 75), 1443.
 Skidmore v. Bricker (77 Ill. 164), 216.
 Skiles v. Caruthers (88 Ill. 458), 1096, 1146.
 Skinner v. Lake View Ave. Co. (57 Ill. 151), 376, 1192.
 Slade v. McClure (76 Ill. 319), 971, 1140.
 Slade v. Eisenmeyer (94 Ill. 96), 970.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Slater v. Rink (18 Ill. 527), 134.
 Slanter v. Whitelock (12 Ind. 338), 1022.
 Slemmons v. Walfield (53 Ill. App. 497), 1277.
 Sloan v. Edwards (61 Md. 189), 1065.
 Sloan v. Petrie (15 Ill. 425), 207.
 Sloo v. State Bank of Ill. (1 Scam. (Ill.) 428), 377, 1171, 1191.
 Smart v. Howe (3 Mich. 590), 183.
 Smith v. Archer (53 Ill. 241), 130, 164.
 Smith v. Barker (3 Day (Conn.) 312), 507.
 Smith v. Barse (2 Hill (N. Y.) 387), 930.
 Smith v. Bateman (79 Ill. 531), 876.
 Smith v. Belt (31 Ill. App. 96), 1141.
 Smith v. Binder (75 Ill. 492), 1107.
 Smith v. Bingman (3 Ill. App. 65), 1277.
 Smith v. Bowker (1 Mass. 76), 805.
 Smith v. Brittenham (109 Ill. 540), 1488.
 Smith v. Brittanham (94 Ill. 624), 1284, 1285.
 Smith v. Byrd (2 Gilm. (Ill.) 412), 1167.
 Smith v. City of Gilman (38 Ill. App. 393), 1222.
 Smith v. Clinton Bridge Co. (13 Ill. App. 572), 313, 922.
 Smith v. Coats (19 Ill. 405), 1234.
 Smith v. Com'rs of Highways (150 Ill. 385), 365, 1241.
 Smith v. Cremer (71 Ill. 185), 1050.
 Smith v. Curry (16 Ill. 146), 841.
 Smith v. Davis (89 Ill. 203), 382, 395.
 Smith v. Davis (38 Me. 459), 952.
 Smith v. Doty (25 Ill. 163), 865.
 Smith v. Douglass (16 Ill. 34), 1387, 1397, 1398, 1399.
 Smith v. Eames (3 Scam. (Ill.) 76), 1112, 1120, 1136.
 Smith v. Emery (7 Hals 53), 516.
 Smith v. Ferguson (91 Ill. 304), 258.
 Smith v. Frazer (61 Ill. 164), 390, 1002, 1004.
 Smith v. Gillett (50 Ill. 290), 551, 1076.
 Smith v. Hall (37 Ill. App. 28), 213, 1111.
 Smith v. Harris (113 Ill. 136), 1201.
 Smith v. Harris (12 Ill. 462), 759, 785, 1184.
 Smith v. Hicks (5 Wend. (N. Y.) 48), 791.
 Smith v. Hoag (45 Ill. 250), 1425.
 Smith v. Hulett (65 Ill. 495), 1030.
 Smith v. Huntoon (134 Ill. 24), 297.
 Smith v. Hyde Park Portland Cement Paving Co. (55 Ill. App. 283), 381.
 Smith v. Jansen (8 Johns (N. Y.) 111), 516.
 Smith v. Judge of Wayne (27 Mich. 87), 469.
 Smith v. Killeck (5 Gilm. (Ill.) 293), 1422, 1427.
 Smith v. Kimball (128 Ill. 583), 1259.
 Smith v. Kinkaid (1 Ill. App. 620), 1078, 1186.
 Smith v. Knight (71 Ill. 148), 1005.
 Smith v. Little (53 Ill. App. 157), 884, 1168.
 Smith v. Lyons (80 Ill. 600), 595.
 Smith v. Martin & Oesterle (28 Ill. App. 224), 377, 391.
 Smith v. Moore (6 Greenl. 278), 606.
 Smith v. Mumford (9 Cow. (N. Y.) 26), 619.
 Smith v. Myers (19 Mo. 433), 100.
 Smith v. Nevlin (89 Ill. 192), 1077, 1088.
 Smith v. People (142 Ill. 117), 1081.
 Smith v. People (140 Ill. 355), 1326.
 Smith v. People (99 Ill. 445), 1412.
 Smith v. Peoria County (59 Ill. 412), 115.
 Smith v. Price (2 Ill. 399), 145.
 Smith v. Prles (21 Ill. 755), 114.
 Smith v. Propeller Niagara (40 Ill. 112), 396.
 Smith v. Riddell (87 Mich. 165), 846, 850.
 Smith v. Robinson (11 Ill. 119), 408, 409.
 Smith v. Shattuck (12 Ore. 362), 1048.
 Smith v. Shaw (12 Johns. (N. Y.) 257), 152.
 Smith v. Shultz (1 Scam. (Ill.) 490), 1142.
 Smith v. Slocum (62 Ill. 354), 1146, 1150.
 Smith v. Smith (28 Ill. 56), 1391, 1399, 1400.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496]

- Smith v. Smith (17 Ill. 482), 799.
 Smith v. Snyder (15 Wend. (N. Y.) 325), 841.
 Smith v. Stevens (133 Ill. 183), 1278, 1281, 1360.
 Smith v. Stevens (82 Ill. 554), 270.
 Smith v. Stewart (6 Johns (N. Y.) 48), 102.
 Smith v. Taggart (21 Ill. App. 38), 916.
 Smith v. Third Nat. Bank of St. Louis (79 Ill. 118), 974.
 Smith v. Thompson (1 Cow. (N. Y.) 221), 1112.
 Smith v. Underlich (70 Ill. 426), 144.
 Smith v. United States Express Co. (135 Ill. 279), 315.
 Smith v. Warner (16 Mich. 390), 886.
 Smith v. Warner (14 Mich. 152), 886, 1405, 1409.
 Smith v. Webb (16 Ill. 105), 508, 509, 510.
 Smith v. Whittacker (23 Ill. 267), 501.
 Smith v. Whitaker (11 Ill. 417), 382.
 Smith v. Williams (22 Ill. 357), 1116.
 Smith v. Wilson (26 Ill. 186), 952, 1206.
 Smith v. Wilson (1 Dowl. (Eng.) 545), 1454.
 Smoke Consuming Co. v. Lyford (123 Ill. 300), 1102.
 Smyth v. Harvie (31 Ill. 62), 1479.
 Snager v. Fincher (28 Ill. 347), 896.
 Snell v. Cottingham (72 Ill. 161), 909, 1003.
 Snell v. Cottingham (72 Ill. 124), 1100.
 Snell v. De Land (43 Ill. 323), 33, 35, 41, 48, 510.
 Snell v. Methodist Church (58 Ill. 290), 1206.
 Snell v. Trustees, etc., (58 Ill. 290), 1204.
 Snell v. Warner (91 Ill. 472), 1280.
 Snell v. Weir (59 Ill. 494), 159.
 Snowball v. People (147 Ill. 260), 1325.
 Snowball v. People (43 Ill. App. 241), 1336.
 Snowell v. Moss (70 Ill. 313), 1423.
 Snyder v. Brosse (51 Ill. 357), 152, 415, 418.
 Snyder v. Croy (2 Johns. (N. Y.) 428), 775.
 Snyder v. Gaither (3 Scam. (Ill.) 91), 1113, 1260.
 Snyder v. McKeever (10 Ill. App. 188), 1041.
 Snyder v. Snyder (142 Ill. 60), 1108.
 Soucy v. McCracken (21 Ill. App. 370), 1336.
 Society for the Propagation of the Gospel v. Town of Pawlett (4 Peters (U. S.) 501), 811.
 Somers v. Balabrega (1 Dall. (U. S.) 164), 1483.
 Sontag v. Bigelow (142 Ill. 144), 255.
 Songer v. Wilson (52 Ill. App. 117), 1098.
 Sorgenfree v. Schroeder (75 Ill. 397), 222.
 Souerbry v. Fisher (62 Ill. 135), 1168.
 South Bend v. Hardy (98 Ind. 577), 1019, 1058.
 Southerland v. Phelps (22 Ill. 91), 114.
 South Park Comrs. v. Gavin (139 Ill. 280), 265, 266, 752.
 Spades v. Barrett (57 Ill. 289), 205.
 Spahr v. Tartt (23 Ill. App. 420), 852, 855, 880.
 Spain v. Thomas (49 Ill. App. 249), 10, 1208, 1221, 1266.
 Spannagle v. C. & A. Ry. Co. (31 Ill. App. 460), 1104.
 Spangenberg v. Charles (44 Ill. App. 526), 1209, 1221.
 Spangler v. Indiana & Ill. Cent. Ry. Co. (21 Ill. 276), 556, 785.
 Spangler v. Danforth (65 Ill. 152), 99.
 Spaulding v. Lowe (58 Ill. 96), 801.
 Spaulding v. Russell (100 Ill. 522), 596.
 Spear v. D'Clercy (40 Ill. 56), 1268.
 Speck v. Hickman (5 Ill. App. 395), 1256.
 Speck v. Pullman Palace Car Co. (121 Ill. 33), 44, 215.
 Speer v. Craig (22 Ill. 433), 571.
 Speer v. Sinner (35 Ill. 282), 187.
 Speight v. People (87 Ill. 594), 5.
 Spence v. Anderson (108 Ill. 457), 1197.
 Spencer v. Boardman (118 Ill. 553), 1042.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1493.]

- Spencer v. Langdon (21 Ill. 292), 905.
 Spencer v. McMasters (16 Ill. 405), 872.
 Spencer v. Overton (1 Day (Conn.) 183), 514.
 Sperry v. More's Estate (42 Mich. 354), 1056.
 Spillman v. People (16 Ill. App. 234), 948, 982, 983.
 Splane v. Byrne (9 Ill. App. 392), 207, 213, 215, 971.
 Spooner v. Manchester (133 Mass. 272), 150, 160, 167.
 Spradling v. Russen (100 Ill. 522), 877.
 Sprague v. Craig (51 Ill. 289), 1078.
 Sprague v. Dodge (48 Ill. 142), 1007.
 Sprague v. Hosmer (82 N. Y. 466), 1029.
 Sprague, Warner & Co. v. Hazenwinkle (53 Ill. 419), 1098.
 Spray v. Ammerman (66 Ill. 309), 897.
 Springdale Cemetery Ass'n v. Smith (24 Ill. 480), 1097.
 Springer v. Bigford (55 Ill. App. 198), 326.
 Springer v. Cooper (11 Ill. App. 267), 1426.
 Springfield Con. Ry. Co. v. De Camp (11 Ill. App. 475), 231, 678.
 Springfield Con. Ry. Co. v. Welsh (155 Ill. 511), 235.
 Springfield & Ill. S. E. Ry. Co. v. Clark (74 Ill. 27), 1295.
 Spurck v. Crook (19 Ill. 415), 1391, 1398.
 Spurck v. Forsyth (40 Ill. 438), 1413, 1416, 1422, 1423.
 Staat v. Evans (35 Ill. 455), 156, 462, 1002.
 Stacy v. Baker (1 Scam. (Ill.) 417), 908.
 Stacy v. Cobbs (36 Ill. 349), 1083.
 Stafford v. C., B. & Q. Ry. Co. (114 Ill. 244), 1205.
 Stafford v. Fargo (35 Ill. 381), 1057.
 Stafford v. Ingersoll (3 Hill (N. Y.) 38), 149.
 Stafford v. Low (20 Ill. 152), 440.
 Stafford v. Rubens (115 Ill. 196), 461, 53.
 Stafford v. Woods (144 Ill. 203), 255.
 Stagg v. Monro (8 Wend. (N. Y.) 399), 512.
 Stahl v. Catskill Bank (18 Wend. (N. Y.) 466), 1022.
 Staley, Admx. v. Dodge, Admrs. (50 Ill. 43), 1486.
 Stall v. Diamond (37 Mich. 429), 1298.
 Stallings v. Owens (51 Ill. 92), 130.
 Stampofski v. Steffens (79 Ill. 303), 1087.
 Stanberry v. Moore (56 Ill. 472), 921, 1151.
 Standard Oil Co. v. Morrison, Adams, etc., Co. (54 Ill. App. 531), 302.
 Stanley v. Gaylord (1 Cush (Mass.) 536), 141.
 Stanley v. Neale (89 Mass. 343), 175.
 Stanley v. Robinson (14 Ill. App. 480), 179.
 Stanton v. Dudley (64 Ill. 325), 1146.
 Stanton v. Hart (27 Mich. 539), 706.
 Stanton v. Kinsey (151 Ill. 301), 784, 794, 1163.
 Staple v. Staples (85 Va. 76), 1488.
 Staples v. Holdsworth (5 Bing. New Cases 117), 792.
 Starin v. Mayor (106 N. Y. 82), 1491.
 Stark v. People (5 Denio (N. Y.) 106), 1065.
 Stark v. Ratcliff (111 Ill. 75), 452, 510, 798.
 Starkweather v. Kittle (17 Wend. (N. Y.) 21), 788, 789, 791.
 Starr v. Vanderheyden (9 Johns (N. Y.) 253), 1486.
 Start v. Moran (27 Ill. App. 119), 1004.
 Startout v. Evans (41 Ill. 376), 1026.
 State v. Alford (31 Conn. 40), 998.
 State v. Ashle (1 Ark. 279), 1323.
 State v. Bailey (94 Mo. 211), 972.
 State v. Barrels of Liquor (47 N. H. 369), 7.
 State v. Bean (3 Blackf. (Ind.) 222), 1116.
 State v. Cleaves (59 Me. 298 s. c. 9 Am. Rep. 422), 71.
 State v. District, etc., Society (35 N. J. L. 200), 364.
 State v. District Ct. of Wetson Co. (Wyo.) (39 Pac. Rep. 749), 1319.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- State v. Douglas (20 W. Va. 770), 1473.
 State v. Elkin (Mo.) (3 S. W. Rep. 333), 1319.
 State v. Frye (43 Ia. 651), 1020.
 State v. Hendrick (32 Kans. 559), 1065.
 State v. Hudson (32 N. J. Law 395), 364.
 State v. Judge (24 La. Ann. 598), 1320.
 State v. Judge (21 La. Ann. 735), 1320.
 State v. Judge (11 Wis. 50), 1317.
 State v. Kirke (12 Fla. 278), 1467.
 State v. Lawlor (28 Minn. 216), 1065.
 State v. Lonsdale (48 Wis. 348), 1018, 1019.
 State v. Mason (40 La. Ann. 751), 1116.
 State v. Murdy (81 Ia. 603), 972.
 State v. People (85 N. Y. 390), 1066.
 State v. Primeaux (39 La. Ann. 673), 969.
 State v. Ridgell (2 Bailey (S. C.) 560), 1317.
 State v. Sieverson (78 Ia. 653), 1016.
 State v. Vittum (9 N. H. 519), 468.
 State v. White (2 Nott. & M. (S. C.) 174), 1319.
 State Sav. Inst. v. Nelson (49 Ill. 171), 1163.
 State Bank v. Hinchcliffe (4 Ark. 444), 183.
 State Bank v. Wilson (9 Ill. 57), 1379.
 State Bank of Tonawanda v. Dawson (49 Ill. App. 256), 1074.
 Steamboat Delta v. Walker (24 Ill. 233), 395.
 Stebbins v. Duncan (108 U. S. 32), 1041.
 Stearn v. Barrett (1 Mason 153), 1116.
 Stearns v. Barrett (1 Pick. (Mass.) 443), 509.
 Stearns v. Cope (109 Ill. 340), 773, 785, 912, 1000, 1259.
 Stearns v. Padeford (10 Mass. 230), 510.
 Stearns v. Reidy (135 Ill. 119), 1002.
 Steele v. Etheridge (15 Minn. 503), 1116.
 Steele Exr. v. Steele (89 Ill. 51), 376, 1194.
 Steele v. Grand Trunk Junct. Ry. Co. (125 Ill. 385), 809, 1263.
 Steele v. Grand T. Ry. Co. (20 Ill. App. 366), 809, 1162.
 Steele v. Thatcher (79 Ill. 400), 60, 931.
 Steelman v. Watson (5 Gilm. (Ill.) 249), 787.
 Steels Admrs. v. Clark Admr. (77 Ill. 471), 27.
 Steere v. Brownell (124 Ill. 27), 78, 890.
 Stein v. Chicago & G. T. Ry. Co. (44 Ill. App. 38), 1124, 1155.
 Stein v. Kendall (1 Ill. App. 101), 1217, 1223.
 Stelner v. Priddy (28 Ill. 179), 1420.
 Steinborn v. Thomas (8 Ill. App. 515), 394.
 Stein, Block & Co. v. Good (16 Ill. App. 516), 1172, 1173.
 Steketee v. Kimm (48 Mich. 322), 741, 1034.
 Stelle v. Lovejoy (23 Ill. App. 575), 382.
 Stempel v. Thomas (89 Ill. 146), 91.
 Stemps v. Kelley (22 Ill. 140), 1093.
 Stephens v. People (13 Ill. 131), 382.
 Sterling Bridge Co. v. Baker (75 Ill. 139), 1107.
 Sternheim v. Burecky (149 Ill. 241), 1267.
 Sterling v. Jackson (69 Mich. 488), 1036.
 Sterling Bridge Co. v. Pearl (80 Ill. 251), 991.
 Stenger v. Swartout (62 Ill. 257), 1147.
 Sternberg v. Strauss (41 Ill. App. 147), 1254.
 Stetauer v. White (96 Ill. 72), 1033.
 Stetham v. Shultz (17 Ill. 99), 1139.
 Stephens v. Cross (27 Ill. 35), 398.
 Stephenson Ins. Co. v. Dunn (45 Ill. 211), 419.
 Stevens v. Beach (12 Vt. 585), 1056.
 Stevens v. Brown (58 Ill. 289), 1147.
 Stevens v. Brown (12 Ill. App. 619), 1057.
 Stevens v. Chamberlain (1 Vt. 25), 119.
 Stevens v. Dillman (86 Ill. 233), 343.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Stevens v. Farnsworth (7 Ill. 215), 874.
 Stevens v. Faucet (12 Ill. 483), 163.
 Stevens v. Fitch (11 Metc. (Mass.) 248), 489.
 Stevens v. Graham (8 Serg. & R. (Pa.) 405), 509.
 Stevens v. Otis (58 Mich. 343), 1050.
 Stevens v. Stebbins (3 Scam. (Ill.) 25), 458, 1002.
 Stevens v. Walker & Detxer (55 Ill. 151), 1484, 1487.
 Stevenson v. Marony (29 Ill. 532), 1005.
 Stevenson v. Sherwood (22 Ill. 238), 844.
 Stevenson v. Morrissey (22 Ill. App. 258), 1416.
 Stevison v. Earnest (80 Ill. 513), 196.
 Stewart v. Carbray (59 Ill. App. 397), 558.
 Stewart v. Eden (2 Caines (N. Y.) 121), 581.
 Stewart v. Hamilton (18 Abb. Pr. 298), 995.
 Stewart v. Hibernian Banking Ass'n (78 Ill. 596), 762.
 Stickley v. Otto (86 Ill. 161), 1034, 1146.
 Stickley v. Little (29 Ill. 316), 336.
 Stickney v. Stickney (21 N. H. 61), 117.
 Stier v. Harding (154 Ill. 476), 142.
 Stier v. Harms (54 Ill. App. 526), 1105.
 Stiles v. Stillford (10 Wend. (N. Y.) 340), 509.
 Stiles v. Stewart (12 Wend. (N. Y.) 473), 619.
 Stilley v. King (3 Ill. App. 338), 392.
 Stillman v. Palls (134 Ill. 532), 1410, 1419, 1421, 1422, 1425.
 Stillson v. Harger (1 Ill. App. 154), 1000.
 Stillson v. Hill (18 Ill. 262), 57.
 Stilwell v. Carpenter (62 Ill. 639), 474.
 Stimson v. Gardner (33 Me. 94), 772.
 Stimson v. Judge (41 Mich. 3), 931.
 Stinnett v. Wilson (19 Ill. App. 38), 978.
 Stipp v. Johnston (68 Ill. 176), 91.
 Stirten v. Neustadt (50 Ill. App. 378), 1254.
 Stix v. Dodds (5 Ill. App. 27), 290.
 St. Louis v. Flynn (119 Ill. 200), 1076.
 St. Louis v. Kirby (104 Ill. 305), 1100.
 St. Louis Bridge, etc., Ry. Co. v. People (127 Ill. 627), 1263.
 St. Louis Coal Ry. Co. v. Moore (14 Ill. App. 510), 1069.
 St. Louis, etc., v. Canty (103 Ill. 423), 1195.
 St. Louis, etc., v. Edwards (103 Ill. 472), 1226.
 St. Louis, etc., Ry. Co. v. Grove (39 Kans. 371), 1478.
 St. Louis, etc., v. Himrod (88 Ill. 410), 1403.
 St. Louis, etc., Co. v. Hurst (14 Ill. App. 419), 244.
 St. Louis, etc., Ry. Co. v. Lindner (37 Ill. 433), 48.
 St. Louis, etc., Ry. Co. v. Manley (58 Ill. 300), 1098.
 St. Louis, etc., R. R. Co. v. Miller (43 Ill. 199), 112, 113, 600.
 St. Louis, etc., Ry. Co. v. Montgomery (39 Ill. 335), 1005.
 St. Louis, etc., v. Sandoval (111 Ill. 309), 419.
 St. Louis, etc. v. Wiggins (102 Ill. 514), 1202.
 St. Louis & A. E. Ry. Co. v. Casner (72 Ill. 384), 989.
 St. Louis, A. & C. R. R. Co. v. Dalby (19 Ill. 353), 132.
 St. Louis, A. & R. I. R. R. Co. v. Coultas (33 Ill. 1879), 453.
 St. Louis, A. & T. Ry. Co. v. Brown (34 Ill. App. 552), 904.
 St. Louis, A. & T. H. R. R. Co. v. Barrett ((52 Ill. App. 510), 1110.
 St. Louis, A. & T. H. Ry. Co. v. Dorsey (68 Ill. 326), 1209.
 St. Louis, A. & T. H. R. R. Co. v. Hill (14 Ill. App. 579), 786.
 St. Louis, A. & T. H. Ry. Co. v. Goodall (43 Ill. App. 234), 1211.
 St. Louis, A. & T. H. R. R. Co. v. Odum (52 Ill. App. 519), 140.
 St. Louis, A. & T. H. Ry. Co. v. Strolz (47 Ill. App. 342), 1001.
 St. Louis, A. & T. H. Ry. Co. v. Will (53 Ill. App. 649), 1111, 1119.
 St. Louis Brewing Ass'n v. Hamilton (41 Ill. App. 461), 1085.
 St. Louis Coal Co. v. Sandoval Coal Co. (111 Ill. 32), 803.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- St. Louis & C. Ry. Co. v. East St. L. Con. Ry. Co. (139 Ill. 401), 1126.
- St. Louis, J. & C. Ry. Co. v. Hamilton (46 Ill. 450), 465, 683.
- St. Louis, J. & C. Ry. Co. v. Lurton (72 Ill. 118), 912.
- St. Louis, J. & C. Ry. Co. v. Terhune (50 Ill. 151), 227, 229, 235, 1147.
- St. Louis, J. & C. Ry. Co. v. Thomas (47 Ill. 116), 465, 650, 682.
- St. Louis & K. C. Ry. Co. v. Olive (40 Ill. App. 82), 971.
- St. Paul, F. & M. Ins. Co. v. Johnson (77 Ill. 598), 28, 1145.
- St. Louis Ry. Co. v. Hill (11 Ill. App. 248), 655.
- St. Louis R. R. Co. v. Miller Admr. (43 Ill. 199), 619.
- St. Louis & P. Ry. Co. v. Kerr (48 Ill. App. 497), 1259, 1260.
- St. Louis & S. E. Ry. Co. v. Britz (72 Ill. 256), 1097, 1124.
- St. Louis & S. E. Ry. Co. v. Dorman (72 Ill. 504), 1124.
- St. Louis & S. E. Ry. Co. v. Wheelis (72 Ill. 538), 989.
- St. Louis & T. H. R. Co. v. Hill (11 Ill. App. 248), 607.
- St. Louis, V. & T. H. Ry. Co. v. Funk (85 Ill. 460), 1001.
- St. Louis, Vandalia & T. H. Ry. Co. v. Kaulbrumer (59 Ill. 152), 163.
- St. Louis V. & T. H. R. R. Co. v. Town of Summit (3 Ill. App. 155), 144.
- Stock Quotation Telegraph Co. v. Board of Trade (44 Ill. App. 358), 1221.
- Stock Quotation Tel. Co. v. Chicago Board of Trade (144 Ill. 370), 1090.
- Stocker v. Watson (1 Scam. (Ill.) 207), 864.
- Stocking v. Knight (19 Ill. App. 501), 369.
- Stockley v. Goodwin (78 Ill. 127), 965, 967.
- Stoetzell v. Fullerton (44 Ill. 108), 802.
- Stokes v. Jacobs (10 Mich. 290), 1243.
- Stolp v. Blair (68 Ill. 541), 1061, 1065.
- Stone v. Chicago, etc., Ry. Co. (66 Mich. 76), 1054.
- Stone v. Fargo (53 Ill. 71), 890.
- Stone v. Great Western Oil Co. (41 Ill. 85), 803, 1070.
- Stone v. Mayor, etc., (25 Wend. (N. Y.) 167), 364.
- Stone v. Williamston (17 Ill. App. 175), 295, 297, 916.
- Stone v. Wood (85 Ill. 603), 1015.
- Stone & Lime Co. v. City of Kankakee (128 Ill. 173), 1071, 1109.
- Stone & Shugart (45 Ill. 76), 68, 148.
- Stonehouse v. De Silva (3 Camp. 390), 474.
- Stokey v. Stokey (89 Ill. 40), 1070.
- Stores v. Scoughle (48 Mich. 387), 1018.
- Storey v. People (79 Ill. 45), 211.
- Stort v. Ellison (15 Ill. App. 222), 1015.
- Story v. Early (86 Ill. 461), 217.
- Story v. Hull (143 Ill. 506), 1496.
- Story v. Jones (52 Ill. App. 112), 203.
- Story v. Wallace (60 Ill. 51), 205.
- Stose v. People (25 Ill. 600), 1165.
- Stout v. Cook (47 Ill. 530), 1042.
- Stout v. Oliver (40 Ill. 245), 1005.
- Stout v. Slatterly (12 Ill. 162), 367.
- Stow v. Yarwood (14 Ill. 424), 895.
- Stowell v. Deagle (79 Ill. 525), 1109.
- Stowell v. Jackson Supervisors (67 Mich. 31), 993.
- Stowell v. Raymond (83 Ill. 120), 108.
- Strader v. Snyder (67 Ill. 404), 737, 907, 1042.
- Straight v. Hanchett (23 Ill. App. 584), 558, 926, 928.
- Strain v. Strain (14 Ill. 368), 772.
- Strange v. Clements (17 Mich. 402), 514, 519.
- Stratton v. Central City H. R. Co. (95 Ill. 25), 231, 234, 1084, 1085, 1101, 1105.
- Stratton v. Henderson (26 Ill. 68), 1475.
- Stratton Imp., etc., v. Henderson (26 Ill. 68), 589.
- Strauss v. Kranert (56 Ill. 254), 176.
- Strauss v. Meyer (48 Ill. 385), 203, 204, 205, 209.
- Straus v. Oltusky (62 App. 660), 1382, 1383.
- Stream v. Loyd (128 Ill. 493), 753.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Streeter v. Streeter (43 Ill. 155), 897, 1002.
- Stribling v. Prettyman (57 Ill. 371), 1100.
- Strickfadden v. Ziprick (49 Ill. 286), 1110.
- Strickland v. Barrett (20 Pick. (Mass.) 415), 167.
- Strohm v. Hayes (70 Ill. 41), 1057.
- Strohm v. People (160 Ill. 582), 1265.
- Strong v. Allen (40 Ill. 43), 1256.
- Strong v. Connell (115 Mass. 575), 998.
- Strong v. Linington (8 Ill. App. 436), 834.
- Stroud v. Garard (1 Salk. 8), 508.
- Strubel v. Hake (14 Ill. App. 546), 1071.
- Stuart v. Dutton (39 Ill. 91), 271.
- Stubblefield v. Borders (92 Ill. 279), 257, 1004.
- Stuber v. Shank (83 Ill. 191), 878.
- Studwell v. Shapter (54 N.Y. 249), 73.
- Stults v. Dickey (5 Bin. (Pa.) 285), 145.
- Stumer v. Pitchman (124 Ill. 250), 1137.
- Stumpf v. Osterhage (111 Ill. 82), 1051.
- Stumpf v. Osterhage (94 Ill. 115), 254.
- Stumps v. Beene (37 Ala. 627), 1487.
- Stumps v. Kelley (22 Ill. 140), 41.
- Stumer v. Pitchman (124 Ill. 250), 203.
- Sturges v. Fourth Nat. Bank of Chicago (75 Ill. 595), 568.
- Sturges v. Hart (45 Ill. 103), 773.
- Sturges v. Keith (57 Ill. 451), 168.
- Sturgess v. Allis (10 Wend. (N. Y.) 354), 489.
- Sturman v. Colon (48 Ill. 463), 156.
- Stuve v. McCord (52 Ill. App. 331), 1149.
- Succession of Zenon (34 La. Ann. 1187), 1493.
- Sugden v. Beasley (9 Ill. App. 71), 517, 518, 879.
- Sullivan v. Dee (8 Ill. App. 263), 820, 1098.
- Sullivan v. Dollins (13 Ill. 85), 1147.
- Sullivan v. Dollins (11 Ill. 16), 1229.
- Sullivan v. People (18 Ill. App. 627), 1336.
- Sullivan v. Sullivan (48 Ill. App. 435), 201.
- Sullivan v. Stepheson (62 Ill. 290), 174.
- Summers v. Stark (76 Ill. 208), 1146.
- Sundmacher v. Block (39 Ill. App. 553), 154, 1005.
- Sun Mut. Ins. Co. v. Ocean Ins. Co. (107 U. S. 501), 1122.
- Supervisors v. Gorrell (24 Gratt (Va.) 484), 1320.
- Supervisors v. Magoon (109 Ill. 142), 364, 366.
- Supervisors of Kendall Co. v. People (12 Ill. App. 210), 1307.
- Supervisors of Mercer County v. Hubbard (45 Ill. 139), 480.
- Supervisors of Stephenson County v. Manny (56 Ill. 160), 87.
- Supreme Council, etc., v. Curd (111 Ill. 284), 1070.
- Supreme Lodge K. of H. v. Dalburg (138 Ill. 508), 1255.
- Supreme Lodge K. of H. v. Dalburg (114 Ill. 244), 1285.
- Supreme Lodge v. Zulke (129 Ill. 298 (30 Ill. App. 98)), 55, 807.
- Sutherland v. Phelps (20 Ill. 91), 395.
- Sutphen v. Cushman (40 Ill. 77), 1252.
- Sutphen v. Cushman (35 Ill. 186), 1005.
- Sutton v. Buck (2 Taunt 302), 46.
- Snoor v. O'Reilly (80 Ill. 104), 1117.
- Suydam v. Williamson (20 How. (U. S. 427), 1122, 1232.
- Svanoe v. Jurgens (144 Ill. 507), 1198.
- Swain v. Cawood (2 Scam. (Ill.) 505), 865.
- Swain v. Humphreys (42 Ill. App. 371), 1473.
- Swan v. People (98 Ill. 610), 1097, 1101.
- Swanston v. Ijams (63 Ill. 165), 92.
- Swantz v. Muller (27 Ill. App. 320), 858.
- Swanzy v. Moore (22 Ill. 63), 484.
- Swarnes v. Sitton (58 Ill. 155), 992.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496]

- Swartout v. Michigan A. L. Ry. Co. (24 Mich. 389), 926.
 Swart v. Kimball (43 Mich. 443), 221.
 Swart v. People (109 Ill. 621), 1326.
 Swartout v. Evans (37 Ill. 442), 1289.
 Sweeney v. People (28 Ill. 208), 1153.
 Sweet v. Leach (6 Ill. App. 212), 1109.
 Sweet v. Merkl (27 Ill. App. 245), 1162.
 Sweet v. Sherman (20 Vt. 23), 1066.
 Sweetland v. Tuthill (54 Ill. 215), 764.
 Sweet v. Garwood (88 Ill. 407), 28.
 Swift v. Applebone (23 Mich. 252), 1024.
 Swift v. Crocker (21 Pick. (Mass.) 244), 459.
 Swift v. Lee (65 Ill. 336), 765.
 Swift & Co. v. Raleigh (54 Ill. App. 44), 448, 647.
 Swift, Mayor v. People (160 Ill. 561), 1195.
 Swigart v. Weare (37 Ill. App. 238), 807.
 Swiggart v. Harber (5 Ill. (1 Scam.) 364), 1379.
 Sword v. Martin (23 Ill. App. 304), 1001.
- T.**
- Tabor v. Jenny (1 Sprague (U. S.), 315), 1392.
 Talcott v. Dudley (4 Scam. 427), 57.
 Talliaferro v. Ives (51 Ill. 247), 1034.
 Tandler v. Saunders (56 Mich. 142), 242.
 Tantum v. Tantum (5 Ill. App. 598), 1101.
 Tappen v. Campbell (9 Yerg. (Tenn.) 436), 113.
 Tappin, McKillop & Co. v. Rend (5 Ill. App. 150), 1030.
 Tarbles' Case (13 Wall. 397), 1341.
 Tascott v. Grace (12 Ill. App. 639), 100, 1085.
 Taylor v. Bates (5 Cow. (N. Y.) 376), 1489.
 Taylor v. Boardman (24 Mich. 287), 1472.
 Taylor v. Foster (2 Car. & P. 195), 1472.
 Taylor v. Greenburg (46 Ill. App. 511), 484.
 Taylor v. Kneeland (1 Doug. (Mich.) 67), 737, 745.
 Taylor v. McIrdin (94 Ill. 488), 1019, 1045.
 Taylor v. Morrison (73 Ill. 565), 153.
 Taylor v. People (66 Ill. 323), 1303.
 Taylor v. Renn (19 Ill. 181), 101.
 Taylor v. Riddle (35 Ill. 567), 184.
 Taylor v. Vessel, etc., Co. (25 Ill. App. 503), 1393, 1394, 1399.
 Taylor v. Young (56 Mich. 285), 1490.
 Teal v. Russell (2 Scam. (Ill.) 319), 1193.
 Tearney v. Smith (86 Ill. 391), 730.
 Tedens v. Sanitary District (149 Ill. 87), 1086.
 Tedrick v. Hiner (61 Ill. 189), 1000, 1494.
 Tedrick v. Wells (152 Ill. 214), 376, 377, 319, 392.
 Tefft v. Ashbaugh (13 Ill. 602), 1105.
 Tefft v. Wilcox (6 Kan. 46), 102.
 Tenny v. Foot (95 Ill. 99), 1200, 1202.
 Tenney v. Hemenway (53 Ill. 97), 1180.
 Terhune v. Colton (10 N.Y. Eq. 21), 1482.
 Terre Haute & I. Ry. Co. v. Bond (13 Ill. App. 328), 1224.
 Terre Haute, etc., Ry. Co. v. Clark (73 Ind. 168), 1155.
 Terre Haute, V. & I. Ry. Co. v. Goodwin (4 Ill. App. 165), 1270.
 Terre Haute & I. Ry. Co. v. Voelker (129 Ind. 540), 1071, 1125.
 Terry v. Eureka College (70 Ill. 236), 922.
 Teutonic Life Ins. Co. v. Beck (74 Ill. 165), 1145.
 Teutonia Life Ins. Co. v. Mueller (77 Ill. 22), 915.
 Texas, St. L. & K. C. Ry. Co. v. Cline (135 Ill. 41), 1000.
 Thayer v. Allison (109 Ill. 180), 1259.
 Thayer v. Davis (38 Vt. 163), 998.
 Thayer v. Finley (36 Ill. 262), 859.
 Thayer v. McEwen (4 Ill. App. 416), 1473.
 Thayer v. Peck (93 Ill. 357), 1258.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Thebus v. Smiley (110 Ill. 316), 888.
 Theilman v. Burg (73 Ill. 293), 1010.
 The Palmyra (12 Wheat (U. S.) 1), 7.
 Thimbling v. Miller (13 Ill. App. 595), 1151, 1152.
 Third Swedish M. E. church v. Wetherell (43 Ill. App. 414), 885.
 Thom v. Hess (51 Ill. App. 274), 1030.
 Thomas v. Dike (11 Vt. 273), 471.
 Thomas v. Dodge (8 Mich. 851), 108.
 Thomas v. Fame Ins. Co. (108 Ill. 91), 916, 1277.
 Thomas v. Fischer (71 Ill. 576), 1001.
 Thomas v. Greenwood (69 Mich. 216), 455.
 Thomas v. Hinsdale (78 Ill. 259), 309, 1547.
 Thomas v. Kelly (27 Ill. App. 491), 982.
 Thomas v. Lowy (60 Ill. 512), 820.
 Thomas v. Mead (36 Mo. 232), 1316, 1318, 1320.
 Thomas v. Mueller (106 Ill. 36), 1173.
 Thomas v. People, etc., (107 Ill. 517), 6.
 Thomas v. People (13 Ill. 696), 619.
 Thomas v. Roosa (7 Johns. (N. Y.) 461), 515, 519.
 Thomas v. Steele (22 Wis. 207), 1480.
 Thomas Pressed Brick Co. v. Hester (162 Ill. 46), 1201.
 Thomasson v. Wilson (46 Ill. App. 398), 1419, 1425.
 Thomasson v. Wilson (146 Ill. 384), 1412, 1414, 1417.
 Thompkins v. Gerry (52 Ill. App. 592), 1395.
 Thompkins v. Gerry (52 Ill. App. 570), 30, 889.
 Thompson v. Anthony (48 Ill. 468), 1140, 1147.
 Thompson v. Burhans (79 N. Y.) 93), 258.
 Thompson v. Dearborn (107 Ill. 87), 27.
 Thompson v. Duff (17 Ill. App. 304), 1216.
 Thompson v. Duff (119 Ill. 326), 1098.
 Thompson v. Elsworth (39 Mich. 719), 221.
 Thompson v. Evans (49 Ill. App. 289), 154, 218.
 Thompson v. Follansbee (55 Ill. 427), 1191.
 Thompson v. Force (65 Ill. 370), 213, 215, 1097.
 Thompson v. Haskell (21 Ill. 215), 424, 1010.
 Thompson v. Ketcham (8 Johns. (N. Y.) 189), 578.
 Thompson v. Kimball (55 Ill. App. 249), 589.
 Thompson v. Lee (21 Ill. 242), 468.
 Thompson v. McCormick (136 Ill. 135), 265, 266.
 Thompson v. Mead (67 Ill. 395), 1437.
 Thompson v. Michigan M. B. Ass'n (52 Mich. 522), 773.
 Thompson v. Mitchell (35 Me. 281), 1396.
 Thompson v. People (125 Ill. 256), 1222.
 Thompson v. People (144 Ill. 378), 1079.
 Thompson v. Reed (48 Ill. 118), 861.
 Thompson v. Richards (14 Mich. 172), 483.
 Thompson v. Seipp (44 Ill. App. 515), 1216.
 Thompson v. Shepherd (9 Johns. (N. Y.) 262), 953, 954.
 Thompson v. Sornberger (78 Ill. 353), 916, 1416, 1425.
 Thompson v. Strain (16 Ill. 369), 807.
 Thompson v. Sutton (51 Ill. App. 213), 397.
 Thompson v. Thornton (41 Cal. 626), 967.
 Thompson v. Turner (22 Ill. 388), 760.
 Thompson v. United States (103 U. S. 480), 1306.
 Thompson v. Danzinger (50 Ill. App. 306), 519.
 Thorn v. Hess (51 Ill. App. 274), 959.
 Thornton v. Grange (66 Barb. (N. Y.) 507), 100.
 Thormeyer v. Sisson (83 Ill. 188), 288, 321.
 Thornton v. Wood (42 Me. 282), 291.

[References are to pages, Vol. I., pp 1-960; Vol. II., pp. 961-1496.]

- Thorp v. Burling (11 Johns (N. Y.) 285), 137.
 Thorp v. Goewey Admr. (85 Ill. 611), 1017, 1050, 1097, 1100, 1194.
 Thorp v. Thorp Admr. (40 Ill. 113), 1238.
 Thorp v. Wheeler (23 Ill. 544), 774.
 Thrall v. Waller (13 Vt. 231), 112.
 Throop v. Sherwood (4 Gilm. (Ill.) 92), 501.
 Thurston v. Blanchard (22 Pick. 18), 160.
 Thurston v. Percival (1 Pick. (Mass.) 415), 1479.
 Thwaites v. Mackerson (3 Carr. & P. (Eng.) 341), 1488.
 Thyn v. Thyn (Styles (Eng.) 101), 249.
 Tobey v. Robinson (99 Ill. 222), 92.
 Tobin v. Chicago City Ry. Co. (17 Ill. App. 82), 1063.
 Tobin v. People (101 Ill. 121), 1094, 1141.
 Tibballs v. Libby (97 Ill. 552), 1126, 1127.
 Tibbitts v. Pickering (5 Cush. (Mass.) 83), 106.
 Tibbs v. Allen (29 Ill. 535), 978.
 Tiernan v. Granger (65 Ill. 351), 98, 1048.
 Tiffany v. Breese (4 Ill. 499), 1365.
 Tilden v. Gardiner (24 Wend. (N. Y.) 663), 1140.
 Tilley v. Bridges (105 Ill. 336), 857.
 Tilgham and West v. Little (13 Ill. 239), 264.
 Tillman v. Fuller (13 Mich. 113), 624.
 Tillman v. Wheeler (17 Johns. (N. Y.) 326), 540.
 Tillotson v. Mitchell (111 Ill. 578), 270, 1030.
 Tillotson v. Preston (3 Johns. (N. Y.) 229), 85.
 Tillow v. Hutchinson (13 N. J. L. 192), 947.
 Tillson v. Moulton (23 Ill. 648), 1050.
 Tilton v. Beecher (59 N. Y. 176), 790.
 Timmons v. Kidwell (138 Ill. 13), 253, 257, 270.
 Tinker v. City of Rockford (36 Ill. App. 460), 902.
 Tinker v. Cox (68 Ill. 119), 1038.
 Tinkham & Co. v. Heyworth (31 Ill. 519), 201.
 Tindall v. Meeker (1 Stam. (Ill.) 137), 398.
 Tinsdale v. Town of Minonk (46 Ill. 10), 324.
 Tipton v. Carrigan (10 Ill. App. 318), 846.
 Titley v. Kahler (9 Ill. App. 537), 398, 964.
 Toledo, etc., Ry. Co. v. Butler (53 Ill. 323), 922, 1255.
 Toledo, P. & W. Ry. Co. v. Durst (50 Ill. 365), 683.
 Toledo, etc., Ry. Co., v. Foster (43 Ill. 415), 141.
 Toledo, etc., Co. v. Ingraham (77 Ill. 309), 1152.
 Toledo, etc., Ry. Co. v. Ingraham (58 Ill. 120), 1098.
 Toledo, etc., Ry. Co. v. Miller (55 Ill. App. 448), 1210.
 Toledo, etc., Ry. Co. v. McClannan (41 Ill. 238), 777.
 Toledo, etc., Ry. Co. v. Town of Chenoa (43 Ill. 209), 1240.
 Toledo, etc., Ry. Co. v. Williams (77 Ill. 354), 407.
 Toledo, P. & W. Ry. Co. v. Bray (57 Ill. 514), 1100.
 Toledo, P. & W. Ry. Co. v. Eastburn (54 Ill. 381), 1007.
 Toledo, P. & W. Ry. Co. v. Eastburn (79 Ill. 140), 1164.
 Toledo, P. & W. R. R. Co. v. Parker (73 Ill. 526), 1110.
 Toledo, P. etc., Ry. Co. v. Pence (68 Ill. 524), 454, 606.
 Toledo & P. W. Ry. Co. v. Pin-dar (53 Ill. 477), 682.
 Toledo, St. L. & K. C. Ry. Co. v. Bailey (145 Ill. 159), 1100.
 Toledo St. L. & K. C. Ry. Co. v. Clark (147 Ill. 171), 1202.
 Toledo, St. L. & K. C. Ry. Co. v. Cline (135 Ill. 41), 1101.
 Toledo, W. & W. R. R. Co. v. Beggs (85 Ill. 81), 798.
 Toledo, W. & W. R. W. Co.'s v. Chew (67 Ill. 378), 83, 156.
 Toledo, W. & W. Ry. Co. v. Cole (50 Ill. 184), 683.
 Toledo, W. & W. Ry. Co. v. Corn (71 Ill. 493), 82.
 Toledo, W. & W. Ry. Co. v. Durkin (76 Ill. 395), 1282.
 Toledo, W. & W. Ry. Co. v. Eddy (72 Ill. 138), 933, 935.
 Toledo, W. & W. Ry. Co. v. Elliott (76 Ill. 67), 1147.

[References are to pages, Vol. I., pp. 1-980; Vol. II., pp. 961-1496.]

- Toledo, W. & W. Ry. Co. v. Grable Admr. (88 Ill. 440), 1101.
 Toledo, W. & W. R. W. Co. v. Jones (75 Ill. 311), 229, 1000.
 Toledo W. & W. Ry. Co. v. Lockhart (71 Ill. 627), 1103.
 Toledo, W. & W. Ry. Co. v. McLaughlin (63 Ill. 389), 452.
 Toledo W. & W. Ry. Co. v. Maxfield (72 Ill. 95), 935, 1123.
 Toledo, W. & W. Ry. Co. v. Moore, Admx. (77 Ill. 217), 1146.
 Toledo W. & W. Ry. Co. v. Morgan (72 Ill. 155), 1119.
 Toledo, W. & W. Ry. Co. v. Reynolds (72 Ill. 487), 335.
 Toledo, W. & W. Ry. Co. v. Roberts (71 Ill. 540), 674.
 Toledo, W. & W. Ry. Co. v. Seitz (53 Ill. 542), 1141.
 Toledo, W. & W. Ry. Co. v. Williams (77 Ill. 354), 406, 800, 1058.
 Tolman v. Dreyer (50 Ill. App. 243), 1253.
 Tolman v. Grane (44 Ill. App. 237), 1202.
 Tolman v. Race (36 Ill. 472), 1146.
 Tolman v. Wheeler (57 Ill. App. 342), 1254.
 Tomle v. Hampton (28 Ill. App. 142), 237, 238.
 Tomle v. Hampton (129 Ill. 379), 237.
 Tomlin v. Green (39 Ill. 225), 386, 387.
 Tomlin v. Tonica & P. Ry. Co. (23 Ill. 429), 912.
 Tomlinson v. Earnskow (112 Ill. 311), 521.
 Tomlinson v. Mathews (98 Ill. 178), 40.
 Tompkins v. Gerry (52 Ill. App. 592), 1385.
 Tompkins v. Gerry (52 Ill. App. 670), 901.
 Tompkins v. Wittberger (56 Ill. 385), 1281.
 Topper v. Snow (20 Ill. 434), 864, 865.
 Topping v. Root (5 Cow (N. Y.) 404), 551.
 Topping v. Maxe (39 Ill. 159), 1146.
 Towle v. Gouter (5 Ill. App. 409), 1170.
 Towle v. Lamphere (8 Ill. App. 399), 302.
 Town of Carthage v. Buckner (8 Ill. App. 152), 1030.
 Town of De Soto v. Buckles (40 Ill. App. 85), 85, 1108.
 Town of Fox v. Town of Kendall (97 Ill. 73), 1102.
 Town of Harlem v. Emmert (41 Ill. 519), 130.
 Town of Geneva v. Peterson (21 Ill. App. 454), 1101.
 Town of Havana v. Biggs (58 Ill. 483), 1097.
 Town of Lewiston v. Proctor (27 Ill. 414), 397, 802.
 Town of Normal v. Gresham (49 Ill. App. 196), 1221.
 Town of Partridge v. Snyder (78 Ill. 519), 376, 382, 391.
 Town of South Ottawa v. Foster (20 Ill. 296), 785.
 Town of Mt. Vernon v. Patton (94 Ill. 65), 86, 1222.
 Town of Waverly v. Kemper (88 Ill. 578), 368.
 Town of Windsor v. Hallett (97 Ill. 204), 834.
 Town of Winfield v. Moffatt (42 Ill. 47), 382.
 Town v. Wood (37 Ill. 512), 85, 105.
 Tower v. Bradley (66 Ill. 189), 1204.
 Towner v. George (53 Ill. 168), 354.
 Towner v. Johnson (82 Ga. 940), 1471.
 Townsend v. Briggs (99 Cal. 481), 1067.
 Township of Dayton v. Rounds (28 Mich. 82), 1300.
 Tracy v. People (97 Ill. 101), 1072.
 Tracy v. Warren (104 Mass. 377), 175.
 Trained v. Lawrence (36 Ill. App. 90), 1240.
 Trasher v. Pike Co. R. R. Co. (25 Ill. 393), 32.
 Trask v. White (7 Mass. 241), 471.
 Travers v. Cook (42 Ill. App. 580), 173.
 Travers v. Wormer (13 Ill. App. 39), 1119.
 Treadwell v. Goodwin (6 Bosw. (N. Y.) 538), 998.
 Tregent v. Maybe (54 Mich. 226), 493, 523.
 Treishel v. McGill (28 Ill. App. 68), 16, 1219, 1222.
 Treman v. Morris (9 Ill. App. 237), 187.
 Trepp v. Baker (78 Ill. 146), 1015.
 Triebel v. Colburn (64 Ill. 376), 341.
 Tritlipo v. Lacy (55 Ind. 287), 1155.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Trogon v. Cleveland Stone Co. (53 Ill. App. 206), 384, 803.
 Trotter v. Smith (59 Ill. 240), 1487, 1496.
 Trout v. Emmons (29 Ill. 433), 1386.
 Troutman v. Hills (5 Ill. App. 396), 919.
 Trowbridge v. Wier (6 La. Ann. 706), 1452.
 Troy v. Reilly (3 Scam. (Ill.) 19), 1241.
 Troy v. Reilly (3 Scam. (Ill.) 259), 1241, 1142.
 Truby v. Case (41 Ill. App. 153), 1177, 1266.
 Truesdale Mfg. Co. v. Hoyle (39 Ill. App. 532), 1006, 1054, 1057.
 Truesdell v. Hunter (28 Ill. App. 292), 450, 875, 876.
 Truett v. Wainright (4 Gilm. (Ill.) 411), 1171.
 Truitt v. Griffin (61 Ill. 26), 337, 349, 846, 902, 1251.
 Trumbull v. Campbell (3 Gilm. 502), 91.
 Trustee v. Colgrove (4 Hun. (N. Y.) 362), 1049.
 Trustees v. People (12 Ill. 248), 1307.
 Trustees v. School Directors (88 Ill. 100), 365, 366, 1240, 1241.
 Trustees v. Walters (12 Ill. 154), 409.
 Trustees of Lincoln University v. Hepley (28 Ill. App. 629), 1099.
 Trustees of Schools v. People (25 Ill. App. 25), 1304.
 Trustees of Schools v. Rodgers (7 Ill. App. 33), 457.
 Trustees of Schools v. Shepherd (139 Ill. 114), 367.
 Trustees of Schools v. Starbird (13 Ill. 49), 391.
 Trustees of Schools v. Stoltz (26 Ill. App. 389), 1222.
 Tucker v. Burkitt (49 Ill. App. 278), 1070, 1074, 1075.
 Tucker v. Champaign Co. Agr. Bd. (52 Ill. App. 316), 1100.
 Tucker v. Conwell (67 Ill. 552), 1378.
 Tucker v. Finch (66 Wis. 17), 1472, 1473.
 Tucker v. Hamilton (108 Ill. 464), 281.
 Tucker v. Page (69 Ill. 179), 531, 1385, 1386, 1395, 1399.
 Tucker v. People (87 Ill. 76), 115.
 Tucker v. People (122 Ill. 583), 1078.
 Tucker v. Randall (2 Mass. 284), 85.
 Tucker v. Smith (69 Ill. 179), 1397.
 Tucker v. Welch (17 Mass. 160), 1022.
 Tucker v. Woods (12 Johns (N. Y.) 190), 507.
 Tubs v. Van Kleek (12 Ill. 446), 226.
 Tudor Iron Works v. Weber (129 Ill. 535), 1056, 1105.
 Tufts v. Gibbons (19 Wend. (N. Y.) 639), 926.
 Tuller v. Talbot (23 Ill. 357), 1081.
 Tullis v. Henderson (26 Ill. 442), 1067.
 Tullock v. Cunningham (1 Cow. (N. Y.) 256), 1475.
 Tunnell v. Ferguson (17 Ill. App. 76), 206.
 Tunnison v. Field (21 Ill. 108), 85, 480, 481.
 Turnbull v. Richardson (69 Mich. 400), 1475, 1495.
 Turnan v. Temke (84 Ill. 286), 1480.
 Turney v. Chamberlain (1 Ill. 271), 270.
 Turney v. Organ (16 Ill. 43), 427.
 Turner v. Armstrong (9 Ill. App. 24), 315, 316.
 Turner v. Klekr (27 Ill. App. 391), 228.
 Turner v. Myers (23 Ia. 391), 1494.
 Turner v. Retter (58 Ill. 264), 169.
 Turner v. Richardson (7 East 340), 627.
 Turner Brothers v. Alabama Mining & Mfg. Co. (25 Ill. App. 144), 294.
 Tuttle v. Campbell (74 Mich. 652), 165.
 Tuttle v. Robinson (78 Ill. 332), 180, 181.
 Twining v. Martin (65 Ill. 157), 409, 1094, 1146.
 Tyson v. McGuineas (25 Wis. 656), 467.

U.

- Udell v. Howard (28 Ill. App. 124), 1278.
 Uhl v. Dighton (25 Ill. 152), 1436.
 Ulery v. Chicago L. S. Ex. Co. (54 Ill. App. 233), 208, 737, 740.
 Ulery v. Jones (81 Mich. 403), 67.
 Ulrich v. McCabe (1 Hitt. 251), 47.
 Ulrich v. Gockley (2 Pa. Dist. Rep. 350), 347.

[References are to pages, Vol. I., pp. 1-900; Vol. II., pp. 961-1496]

- Umlauf v. Umlauf (117 Ill. 580), 857.
 Umlauf v. Umlauf (103 Ill. 651), 1198, 1201.
 Underhill v. Graff (48 Ill. 198), 94.
 Underhill v. Kirkpatrick (26 Ill. 84), 423, 981.
 Underhill v. M. & O. Ry. Co. (40 Ill. App. 21), 1210.
 Underwood v. Hossack (40 Ill. 98), 1223.
 Underwood v. Hassack (38 Ill. 208), 99.
 Underwood v. McDuffy (15 Mich. 361), 1205.
 Underwood v. Waldren (33 Mich. 239), 227.
 Union Coal Co. v. City of La Salle (136 Ill. 119), 9.
 Union Mut. Ins. Co. v. Buchanan (100 Ind. 63), 1491.
 Union Mut. Ins. Co. v. Kerchoff (149 Ill. 536), 1258.
 Union Mutual Life Ins. Co. v. Kirchoff (51 Ill. App. 67), 16.
 Union Nat. Bank v. Baldenwick (45 Ill. 375), 1005.
 Union Nat. Bank v. Byram (131 Ill. 92), 291, 293, 312, 324.
 Union Nat. Bank v. International Bank (123 Ill. 512), 1285.
 Union Nat. Bank of Chicago v. First Nat. Bank of Centralia, Ia. (90 Ill. 56), 820.
 Union Nat. Bank of Chicago v. Post (55 Ill. App. 369), 30.
 Union Pac. Ry. Co., v. Miller (87 Ill. 45), 419, 420.
 Union Rolling Mill Co. v. Gillen (100 Ill. 52), 1141, 1143.
 Union Ry. & Transit Co. v. Kallaher (12 Ill. App. 400), 233.
 Union Stock Yd. & T. Co. v. Malory Son, etc., Co. (54 Ill. App. 170), 161.
 Union Stock Yds. Tr. Co. v. Monaghan (13 Ill. App. 148), 1210.
 United Brethren Church v. First M. E. Church (138 Ill. 608), 253.
 United States v. Anthony (11 Blatch (U. S.) 203), 1455.
 United States v. Arredondo (6 Peters 691, 702), 6.
 United States v. Breitling (20 How. (U. S.) 252), 1073.
 United States v. Colt (1 Peters 147), 82.
 United States v. Eames (99 U. S. 45), 773.
 United States v. Edme (9 Serg. & R. (Pa.) 147), 416.
 United States v. Gundy (3 Cranch (U. S.) 337), 7.
 United States v. Hoffman (4 Wall (U. S.) 158), 1317.
 United States v. Mattuck (2 Shaw 149), 492.
 United States v. Shanks (15 Minn. 369), 1320.
 United States v. La Vengeance (3 Dall (U. S.) 297), 7.
 United States Ex. Co. v. Bedbury (34 Ill. 460), 340, 982.
 United States Ex. Co. v. Meints (72 Ill. 293), 1194, 1204.
 United States Ins. Co. v. Ludwig (108 Ill. 511), 35, 915.
 United States Life Ins. Co. v. Ludwig (103 Ill. 305), 36.
 United States Life Ins. Co. v. Shattuck (57 Ill. App. 372), 1218.
 United States Rolling Stock Co. v. Wilder (116 Ill. 100), 1098.
 United States Sav. Inst. v. Brockschmidt (72 Ill. 370), 395, 894.
 United Workmen v. Zuhlke (129 Ill. 298), 767, 1000, 1280.
 Unknown Heirs, etc., v. Baker (23 Ill. 484), 1194, 1234.
 Upton v. Vail (6 Johns (N. Y.) 181), 242.
 Utley v. Burns (70 Ill. 162), 935, 972.
 Utica Ins. Co. v. Caldwell (3 Wend. (N. Y.) 296), 1044.
 Utter v. Jaffray (15 Ill. App. 236), 463.

V.

- Vail v. Lewis (4 Johns (N. Y.) 450), 151, 509.
 Vaillant v. Dundermead (2 Atkins. 524), 1472.
 Vairin v. Edmonson (5 Gilm. (Ill.) 270), 321, 979.
 Valle v. Picton (91 Mo. 207), 965.
 Valleus v. Hopkins (51 Ill. App. 337), 955, 1484.
 Vallette v. Bennett (69 Ill. 632), 255.
 Valtez v. Ohio & M. Ry. Co. (85 Ill. 500), 1089.
 Van Blaricum v. People (22 Ill. 86), 1370.
 Van Brundt v. Schenck (11 Johns (N. Y.) 687), 138.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Van Buskirk v. Day (32 Ill. 260), 1050.
 Vance v. Schuyler (1 Gilm. (Ill.) 160), 1134.
 Vancill v. People (16 Ill. 120), 1370.
 Van Cott v. Sprague (5 Ill. App. 99), 1206.
 Vanderbilt v. Johnson (3 Scam. (Ill.) 48), 766, 786, 1134.
 Vanderpoo l v. Richardson (52 Mich. 337), 226.
 Vanderslice v. Mumma (1 Ill. App. 434), 1437.
 Vandusen v. Newcomber (40 Mich. 690), 1054.
 Vandusen v. Plum (18 Pick. (Mass.) 229), 82.
 Van Dusen v. Young (29 Barber (N. Y.) 9), 47.
 Van Dusen v. People (78 Ill. 645), 417.
 Van Dusen v. Pomery (24 Ill. 289), 827.
 Van Dusen v. Presb. Cong. of Ft. Edward (3 Keyes (N. Y.) 550), 249.
 Van Duser v. Allen (90 Ill. 499), 1104.
 Van v. City Evanston (150 Ill. 616), 1081, 1137.
 Van Horn v. Burroughs (62 Ill. 388), 501, 1099.
 Van Horn v. Jones (2 Scam. (Ill.) 1), 466.
 Van Houghton v. Post (33 N. J. Eq. 344), 1049.
 Vanlandingham v. Lowery (2 Scam. (Ill.) 240), 1399.
 Vanlandingham v. Ryan (17 Ill. 25), 785, 857, 865.
 Van Leuven v. Lyke (1 N. Y. 515), 66.
 Vanliew v. Second Nat. Bank of Galesburg (21 Ill. App. 126), 891.
 Van Namee v. Bradley (69 Ill. 290), 874, 875, 823, 841.
 Van Pelt v. Dunford (58 Ill. 145), 1204.
 Van Ransselaar v. Sheriff (1 Cow. (N. Y.) 443), 1475.
 Van Santvoord v. Sandford (12 Johns (N. Y.) 197), 601.
 Van Steenburgh v. Tobias (17 Wend. (N. Y.) 562), 69.
 Van Sycles v. Perry (3 Robt. 621), 1092.
 Van Tuyl v. Riner (3 Ill. App. 556), 205.
 Van Valkenburg v. Payton (2 Gilm. (Ill.) 44), 144.
 Van Vranken v. Circuit Judge (85 Mich. 140), 793.
 Van Valkenberg v. Ronk (12 Johns (N. Y.) 337), 836.
 Van Winkle v. Beck (2 Scam. (Ill.) 488), 1401.
 Varner v. Varner (69 Ill. 445), 902, 1147.
 Vasse v. Smith (6 Cranch 126), 73.
 Vaughan v. Thompson (15 Ill. 39), 115, 398.
 Vaught v. Rider (86 Ill. 669), 965.
 Vennum v. Harwood (1 Gilm. (Ill.) 659), 992, 1136.
 Verrett v. Phillips (90 Ill. 237), 393.
 Vescher v. Yates (11 Johns (N. Y.) 23), 31.
 Vessel Owners Tow. Co. v. Taylor (126 Ill. 250), 1393.
 Vennum v. Thompson (38 Ill. 144), 72.
 Vicary v. Pler (16 Mich. 50), 475.
 Vickers v. Hill (1 Scam. (Ill.) 307), 965.
 Vickery v. McClellan (61 Ill. 311), 1485.
 Vienna v. Barclay (3 Cow. (N. Y.) 281), 527.
 Vigus v. O'Bannon (118 Ill. 334), 1008.
 Village of Auburn v. Goodwin (128 Ill. 57), 254, 1090, 1208.
 Village of Brooklyn v. Orthwein (140 Ill. 620), 1283.
 Village of Coulterville v. Gillen (72 Ill. 599), 390.
 Village of Crotty v. People (3 Ill. App. 465), 1303.
 Village of Fairbury v. Rogers (98 Ill. 554), 236, 1096, 1107.
 Village of Glencoe v. People (78 Ill. 382), 421, 425.
 Village of Glencoe v. People (85 Ill. 396), 1296.
 Village of Harren v. Wight (103 Ill. 298), 1061, 1100.
 Village of Hyde Park v. Andrews (87 Ill. 229), 1049.
 Village of Hyde Park v. Corwith (122 Ill. 441), 113, 114.
 Village of Hyde Park v. Cornell (4 Ill. App. 602), 1134.
 Village of Hyde Park v. Dunham (85 Ill. 569), 1219, 1223, 1233.
 Village of Hyde Park v. Thatcher (13 Ill. App. 613), 16, 1308.

[References are to pages, Vol. I., pp. 1-990; Vol. II., pp. 991-1496.]

- Village of Jefferson v. Chapman (127 Ill. 438), 237, 1073, 1097.
 Village of Morgan Park v. Haham (35 Ill. App. 646), 502.
 Village of Marseilles v. Howland (136 Ill. 81), 1217.
 Village of Marseilles v. Howland (34 Ill. App. 350), 1218, 1219.
 Village of Melrose v. Bernard (126 Ill. 496), 1221.
 Village of Riverside v. Watson (54 Ill. App. 434), 1195.
 Village of Sheridan v. Hibbard (119 Ill. 307), 1097.
 Village of South Banville v. Jacobs (42 Ill. App. 533), 1027.
 Village of Warren v. Wright (3 Ill. 602), 236, 238, 1096, 1100.
 Vincent & Bertrand v. Morrison (1 Ill. (Breese) 227), 1122.
 Vining v. Leeman (45 Ill. 246), 449.
 Vinyard v. Barnes (124 Ill. 346), 187, 193, 195.
 Vipond v. Hurlburt (22 Ill. 226), 118.
 Virgie v. Stetson (73 Me. 572), 1047.
 Vocht v. Reed (70 Ill. 491), 179.
 Volts v. Harris (40 Ill. 155), 909.
 Von Glahn v. Van Glahn (40 Ill. 73), 368.
 Von Kettler v. Johnson (57 Ill. 109), 151.
 Voorhels v. Chicago, etc., Ry. Co. (71 Ia. 734), 965.
 Vose v. Hart (12 Ill. 378), 841.
 Vose v. Strong (144 Ill. 109), 1263.
 Voss v. Bachop (5 Kans. 67), 1489.
 Vrooman v. Griffith (1 Keys (N. Y.) 53), 1059.
 Vrooman v. Sawyer (13 Johns 339), 66.
 Vrooman v. Michle (69 Mich. 42), 1334.
 Vrooman v. Phelps (2 Johns (N. Y.) 177), 600.
- W.**
- Waarich v. Winter (33 Ill. App. 36), 966.
 Wabash, etc., v. Mills (105 Ill. 63), 1001.
 Wabash, etc., v. Rector (104 Ill. 296), 1109.
 Wabash, etc., v. Shacklet (105 Ill. 364), 46, 679, 1098.
 Wabash R. R. Co. v. Brown (152 Ill. 484), 229, 230.
 Wabash R. R. Co. v. Dougan (142 Ill. 248), 346, 349, 358.
 Wabash Ry. Co. v. Elliott (98 Ill. 481), 234.
 Wabash Ry. Co. v. Henks (91 Ill. 406), 1198.
 Wabash, St. L. & P. Ry. Co. v. Black (11 Ill. App. 465), 843.
 Wabash, St. L. & P. Ry. Co. v. Lynch (12 Ill. App. 365), 519.
 Wabash, St. L. & P. Ry. Co. v. McDougall (126 Ill. 111), 1077.
 Wabash, St. L. & P. Ry. Co. v. Peterson (15 Ill. App. 149), 1216.
 Wabash, St. L. & P. Ry. Co. v. Pratt (15 Ill. App. 177), 842.
 Wabash Western Ry. Co. v. Friedman (146 Ill. 583), 1000, 1001, 1002.
 Wade v. Halligan (16 Ill. 507), 377.
 Wade v. Walden (23 Ill. 425), 213, 215.
 Wade v. Watkins (58 Ill. 64), 1147.
 Wadhams v. Hotchkiss (80 Ill. 437), 19, 394.
 Wadhams v. Swan (109 Ill. 46), 843, 1048.
 Wadsworth v. Ætna Nat. Bank (84 Ill. 272), 593.
 Wadsworth v. Thompson (18 Ga. 709), 1092.
 Waldner v. Pauly (37 Ill. App. 278), 1134.
 Wait v. Kellogg (63 Mich. 138), 665.
 Wait v. Moxwell (4 Pick (Mass.) 87), 519.
 Waidner v. Pauly (141 Ill. 442), 591, 788, 789, 791, 793, 916, 1002.
 Wakefield v. Pennington (9 Ill. App. 347), 592.
 Wakefield v. Sprague (7 Cow. (N. Y.) 164), 934.
 Wager v. Troy Union Ry. Co. (25 N. Y. 526), 250.
 Waggeman v. Peters (22 Ill. 42), 1033.
 Wagener v. Richards (14 Ill. App. 389), 1216.
 Waggoner v. Green (40 Ill. App. 648), 425, 592.
 Wagner v. Aultman (2 Ill. App. 147), 214.
 Walch v. Hettinger (58 Ill. App. 619), 958.
 Walcott v. Holcomb (24 Ill. 331), 521.

[References are to pages, Vol. I., pp. 1-900; Vol. II., pp. 961-1496.]

- Walden v. Davison (11 Wend. (N. Y.) 65), 1046.
 Walden v. Holman (2 L. Ragn. Rep. 1015), 776.
 Waldron v. Alexander (136 Ill. 550), 1107.
 Wales v. Rogue (31 Ill. 464), 255, 1165.
 Walker v. Armour (22 Ill. 658), 276.
 Walker v. Bank of North America (2 Ill. App. 304), 1228.
 Walker v. Brown (28 Ill. 378), 86.
 Walker v. Butler (15 Ill. App. 209), 1211.
 Waller v. Carter (8 Ill. App. 511), 1059.
 Walker v. Choirn (16 Ill. 489), 888.
 Walker v. Cook (33 Ill. App. 561), 102.
 Walker v. Crawford (56 Ill. 444), 1048.
 Walker v. Doane (108 Ill. 236), 1034.
 Walker v. Fields (28 Ga. 237), 998.
 Walker v. Fitts (24 Pick. (Mass.) 191), 293.
 Walker v. Malin & Co. (94 Ill. 596), 1198.
 Walker v. Martin (43 Ill. 508), 212.
 Walker v. Martin (52 Ill. 347), 1143.
 Walker v. Oliver (63 Ill. 199), 1182, 1233, 1234.
 Walker v. Pratt (55 Ill. App. 297), 1253, 1259.
 Walker v. Pritchard (121 Ill. 221), 1195.
 Walker v. Ray (111 Ill. 315), 42, 1000.
 Walker v. Richards (39 N. H. 259), 510.
 Walker v. Rogers (40 Ill. 278), 1006.
 Walker v. Stevens (79 Ill. 193), 1484.
 Walker v. Welch (13 Ill. 674), 301, 515.
 Walker v. Welch (14 Ill. 277), 318, 785.
 Walker v. Welch (14 Ill. 364), 436.
 Wall v. Goodenough (16 Ill. 415), 1427.
 Wallace v. Berdell (101 N. Y. 14), 279.
 Wallace v. Castle (68 N. Y. 370), 290.
 Wallace v. Cox (71 Ill. 548), 406.
 Wallace v. Cleary (5 Ill. App. 384), 1235, 1356.
 Wallace v. Curtiss (36 Ill. 156), 461, 917, 1084, 1097, 1151.
 Wallace v. De Young (98 Ill. 638), 1100.
 Wallace v. Dixon (82 Ill. 202), 1001.
 Wallace v. Espy (68 Ill. 143), 1167.
 Wallace v. Gould (91 Ill. 15), 1222.
 Wallace v. Wallace (8 Ill. App. 69), 874, 875, 1205.
 Wallace v. Wren (32 Ill. 146), 1147.
 Wallahan v. People (40 Ill. 103), 1219, 1224.
 Waller v. Carter (8 Ill. App. 511), 1088.
 Wallis v. Frazier (2 Nott & McCord (S. C.) 180), 510.
 Wallis v. Keeney (88 Ill. 370), 440.
 Wallis v. Shelly (30 Fed. Rep. 748), 81.
 Wallpole v. Carlyle (32 Ind. 415), 1487.
 Walsh v. Aylsworth (46 Ill. App. 516), 1100.
 Walsh v. Horine (36 Ill. 238), 340.
 Walsh v. Shumway (65 Ill. 471), 1479, 1492.
 Walsh v. Ray (38 Ill. 30), 936.
 Walsh v. Welsh (114 Ill. 655), 19, 1282.
 Walsh v. Wright (101 Ill. 178), 1070.
 Walter v. Bierman (59 Ill. 180), 380.
 Walter v. Trustees of Schools (12 Ill. 63), 837, 874.
 Walter v. Rees (4 Moore 34), 416.
 Walton v. Follansbee (131 Ill. 147), 255.
 Walton v. People (28 Ill. App. 645), 1370.
 Walton v. Stephenson (14 Ill. 77), 784.
 Waterman v. Peet (11 Ill. 648), 459.
 Watkins v. Ford (60 Mich. 357), 485.
 Watkins v. White (3 Scam. 549), 157.
 Wann v. M'Goon (2 Scam. (Ill.) 74), 433, 881, 786.
 Ward v. Brown (64 Ill. 307), 149.
 Ward v. C., R. I. & Co. (50 Mich. 552), 665.
 Ward v. Farwell (97 Ill. 595), 985.
 Ward v. Fellers (3 Mich. 281), 886, 895, 896.

[References are to pages, Vol. I., pp 1-980; Vol. II., pp. 981-1496.]

- Ward v. Harrison Machine Works (17 Ill. App. 302), 923.
 Ward v. Johnson (5 Ill. App. 30), 16.
 Ward v. Macauley (4 Term R. 489), 143.
 Ward v. Stout (32 Ill. 399), 911, 912.
 Ward v. Taylor (56 Ill. 494), 95.
 Ware v. Nottinger (35 Ill. 375), 986.
 Warfield v. Watkins (30 Barb. (N. Y.) 395), 107.
 Warmouth v. Cramer (3 Wend. (N. Y.) 394), 751.
 Warne v. Kendall (78 Ill. 598), 339, 340, 350, 352, 354.
 Warner v. Carlton (22 Ill. 415), 1222.
 Warner v. Crane (20 Ill. 148), 832.
 Warner v. Hale (65 Ill. 396), 99.
 Warner v. Kelley (5 Ill. App. 559), 1219.
 Warner v. Matthews (18 Ill. App. 83), 197.
 Warner v. New York Cent. Ry. (52 N. Y. 537), 1116, 1117.
 Warren v. Ball (37 Ill. 76), 902.
 Warren v. Chambers (12 Ill. 124), 806, 817, 874.
 Warren v. Crain (50 Mich. 300), 773.
 Warren v. Dickson (27 Ill. 115), 860.
 Warren v. Lynch (5 Johns (N. Y.) 239), 601.
 Warren v. McCarthy (25 Ill. 102), 112.
 Warren v. The Iscarian Community (16 Ill. 114), 328.
 Warren v. Warren (105 Ill. 568), 101, 1071.
 Washburne v. Phillips (2 Metc. (Mass.) 299), 1317.
 Washburn, Moen & Co. v. Chicago G. W. & F. Co., (109 Ill. 71), 1048.
 Washburn, Moen Mfg. Co. v. Chicago Galv'd Wire Fence Co. (119 Ill. 30), 1280.
 Washington & Balt. Turnpike Co. v. State (19 Md. 239), 109.
 Washington v. Louisville & N. Ry. Co. (136 Ill. 49), 926, 929, 986, 1199.
 Wasson v. Cone (86 Ill. 46), 331, 393.
 Waterbury v. McMillan (46 Mich. 640), 926.
 Waterman v. Bristol (1 Gilm. (Ill.) 593), 391, 398.
 Waterman v. Caton (55 Ill. 94), 1209.
 Waterman v. Chicago & I. Ry. Co. (139 Ill. 658), 1078, 1336.
 Waterman v. Clark (76 Ill. 428), 897.
 Waterman & Hall v. Jones (28 Ill. 54), 1170.
 Waterman v. Raymond (40 Ill. 63), 371.
 Waterman v. Tuttle (18 Ill. 292), 406.
 Waters v. Whitmore (23 Barb. (N. Y.) 505), 1454.
 Watson v. Muirhead (57 Pa. 161), 1487.
 Watson v. Reissig (24 Ill. 281), 947.
 Watson v. Savings Bank (5 Rich. (S. C.) 159), 1465.
 Watson v. Woolverton (41 Ill. 241), 90, 1107.
 Watt v. Kirby (15 Ill. 200), 1005.
 Watt v. Scofield (76 Ill. 261), 161, 1436, 1437.
 Watts v. McLean (28 Ill. App. 537), 1301.
 Watts v. McLean (28 Ill. App. 182), 1310.
 Wattles v. Du Bois (69 Mich. 313), 175.
 Watunka Ry. Co. v. Hill (7 Ala. 222), 111.
 Vaugh v. Suter (3 Ill. App. 271), 982, 1151, 1168.
 Wayne v. Chew (15 Pa. St. 323), 792.
 Wear v. Jacksonville & S. Ry. Co. (24 Ill. 593), 912, 913.
 Wear v. Killen (38 Ill. 259), 384.
 Weare Commission Co. v. Draley (54 Ill. App. 391), 302.
 Weatherford v. Wilson (2 Scam. (Ill.) 253), 904, 908, 1149, 1216.
 Weatherford v. Fishback (3 Scam. (Ill.) 170), 786.
 Weaver v. Croker (49 Ill. 461), 1147.
 Weaver v. Rylander (55 Ill. 529), 1098.
 Webb v. Alton & Marine Fire Ins. Co. (5 Gilm. (Ill.) 223), 901, 1071.
 Webb v. Browning (14 Mo. 354), 1494.
 Webb v. Lasater (4 Scam. (Ill.) 543), 397.

[References are to pages, Vol. I., pp. 1-900; Vol. II., pp. 961-1496.]

- Webb v. Sturtevant (1 Scam. 181), 144.
 Webber v. Indiana Nat. Bank (49 Ill. App. 580), 1110.
 Webber v. Mackey Nisbet & Co. (31 Ill. App. 369), 114, 910.
 Weber v. Dolte (51 Mich. 113), 598.
 Weber v. Mick (131 Ill. 520), 1070.
 Weber v. Anderson (73 Ill. 439), 252.
 Weber Wagon Co. v. Kehl (139 Ill. 644), 1026, 1077, 1090, 1103.
 Webster & Baxter v. Pierce & Barber (35 Ill. 158), 763, 764.
 Webster v. Gilmore (91 Ill. 324), 1195.
 Webster v. Enfield (5 Gilm. (Ill.) 298), 1208.
 Webster v. Vickers (2 Scam. (Ill.) 295), 1277.
 Webster v. Steele (75 Ill. 544), 338, 339, 354.
 Weed v. Lee (50 Barb. (N. Y.) 354), 972.
 Weeks v. Hart (24 Hun. (N. Y.) 181), 1117.
 Wehle v. Butler (61 N. Y. 245), 154.
 Weigley v. Matson (125 Ill. 64), 1171.
 Weinz v. Doppler (17 Ill. 111), 1397.
 Weisbrod v. Chicago & N. W. Ry. Co. (21 Wis. 602), 251.
 Weist v. People (39 Ill. 507), 391.
 Welch v. Byrns (38 Ill. 20), 1299.
 Welch v. Louis (31 Ill. 446), 146, 978.
 Welch v. Marvin (36 Mich. 59), 97.
 Welch v. Palmer (85 Mich. 310), 1471.
 Welch v. Lackett (12 Wis. 270), 166.
 Welch v. Sykes (3 Gilm. (Ill.) 197), 404, 799, 858.
 Welch v. Van Auken (76 Mich. 464), 1240.
 Welch v. Ware (32 Mich. 77), 650.
 Welcome v. Batchelder (23 Me. 85), 1031.
 Welcome v. Boswell (54 Ind. 297), 966.
 Welden v. Burch (12 Ill. 374), 1019.
 Weld v. Hubbard (11 Ill. 573), 451, 462, 609, 909.
 Welker v. Butler (15 Ill. App. 209), 215, 217.
 Welker v. Hinze (16 Ill. App. 327), 346.
 Wells v. Eslam (40 Mich. 218), 1496.
 Wells v. Hogan (Breese (Ill.) 337), 377.
 Wells v. Ipperson (48 Ill. App. 580), 1110, 1115, 1118.
 Wells v. McClenning (23 Ill. 409), 841.
 Wells v. Miller, Admr. (45 Ill. 382), 170.
 Wells v. Parrot (43 Ill. App. 656), 324.
 Wells v. People (44 Ill. 40), 299.
 Wells v. Reynolds (3 Scam. (Ill.) 191), 380, 979.
 Wilhelm v. Haffner (52 Ill. 222), 349, 351.
 Wenona Coal Co. v. Holmquist (152 Ill. 581), 230, 232, 1094, 1096, 1106.
 Wentworth v. People (4 Scam. 550), 152.
 Wenz v. Tirrill (48 Ill. App. 41), 1270.
 Wertz v. May (21 Pa. St. 274), 1066.
 West v. Cartor (25 Ill. App. 245), 826.
 West v. Coleman (108 Ill. 591), 33.
 West v. Frederick (62 Ill. 191), 1415.
 West v. People (3 Ill. App. 377), 1195.
 West v. Schuebly (54 Ill. 523), 291, 309.
 Westchester Fire Ins. Co. v. Foster (90 Ill. 121), 1015.
 West Chicago Alcohol Wks. v. Sheer (8 Ill. App. 367), 1277.
 West Chicago St. R. R. Co. v. Coit (50 Ill. App. 640), 456.
 West Chicago St. Ry. Co. v. Groshon (51 Ill. App. 463), 1025, 1096.
 West Chicago Street Ry. Co. v. Morrison, Adams & Allen Co. (160 Ill. 288), 851.
 West Chicago St. Ry. Co. v. Coit (50 Ill. App. 640), 1153.
 Westcott v. Arbuckle (12 Ill. App. 577), 1412, 1418.
 Westcott v. Kinney (120 Ill. 564), 1197.
 Westgate v. Carr (43 Ill. 450), 69.
 Westlake v. Westlake (34 Ohio St. 621), 224.

[References are to pages, Vol. I., pp. 1-920; Vol. II., pp. 961-1496.]

- Westphal v. Sipe (62 Ill. App. 111), 1221.
- Western Assurance Co. v. Mason (5 Ill. App. 141), 832.
- Western Manf. Mut. Ins. Co. v. Boughton (136 Ill. 317), 1063.
- Western Stone Co. v. Whalen (151 Ill. 472), 1122, 1152.
- Western Stone Co. v. Whalen (51 Ill. App. 512), 1151.
- Western U. Tel. Co. v. Carew (15 Mich. 525), 674.
- Western Union Telegraph Co. v. Chicago, etc., Ry. Co. (86 Ill. 246), 99.
- Western Union Tel. Co. v. Hope (11 Ill. App. 289), 1070.
- Western Union Telegraph Co. v. Hopkins (49 Ind. 223), 1039.
- Western Union Telegraph Co. v. Horsch (9 Ill. App. 309), 894.
- Western Union Telegraph Co. v. Kemp Bros. (55 Ill. App. 583), 1042.
- Western Union Telegraph Co. v. P. & A. Tel. Co. (49 Ill. 90), 1241.
- Western Union R. R. Co. v. Smith (75 Ill. 496), 105.
- Weston v. McDowell (20 Mich. 553), 486.
- Wetherbee v. Fitch (117 Ill. 171), 1485.
- Wetsel v. Mayers (91 Ill. 497), 1437.
- Weyhrich v. Foster (48 Ill. 115), 1103, 1210.
- Wheadon v. Peoria, Pekin, etc., Ry. Co. (42 Ill. 494), 803.
- Wheat v. Bower (42 Ill. App. 600), 178, 323.
- Wheaton v. Johnson (55 Ill. App. 53), 1146.
- Wharton v. Wright (30 Ill. App. 343), 205, 1017.
- Wheelan v. Fish (2 Ill. App. 447), 1420.
- Wheeler v. Irrigating Co. (9 Col. 253), 1293.
- Wheeler v. McCorristen (24 Ill. 42), 852.
- Wheeler v. Mather (56 Ill. 241), 91.
- Wheeler v. Shields (2 Scam. (Ill. 348), 207, 1146.
- Wheeler Chemical Wks. v. Alexander (30 Ill. App. 502), 1208.
- Wheelock v. Rice (1 Doug. (Mich.) 267), 929.
- Whetstone v. Thomas (25 Ill. 361), 1395.
- Whidden v. Seeleye (40 Me. 247), 467.
- Whipple v. Williams (1 Mich. 115), 972.
- Whistler v. Roberts (19 Ill. 274), 181, 183.
- Whitaker v. Miller (83 Ill. 381), 258.
- Whittaker v. Smith (4 Pick (Mass.) 183), 516.
- Whittaker v. Village of Venice (150 Ill. 195), 364, 365.
- Whitbeck v. Hudson Common Council (50 Mich. 86), 1243.
- White v. Bailey (10 Mich. 155), 998, 1054.
- White v. Clayes (32 Ill. 325), 827, 847.
- White v. De Mary (2 N. H. 546), 168.
- White v. Frye (2 Gilm. (Ill.) 65), 369, 370.
- White v. Gray (4 Ill. App. 228), 824.
- White v. Hapeman (43 Mich. 267), 262.
- White v. Herman (62 Ill. 73), 1043.
- White v. Jones (38 Ill. 159), 151, 174, 293, 1170.
- White v. Kent Cir. Judge (47 Mich. 645), 927.
- White v. Merrell (32 Ill. 511), 1048.
- White v. Morton (22 Vt. 15), 293.
- White v. Murkland (71 Ill. 250), 223, 935.
- White v. People (90 Ill. 117), 1080.
- White v. Robinson (60 Ill. 499), 1399.
- White v. Thomas (39 Ill. 227), 479.
- White v. Walker (31 Ill. 422), 94.
- White v. Watkins (23 Ill. 480), 868, 1379.
- White v. White (1 Harr (N. J.) 202), 249.
- White v. Wilson (5 Gilm. 21), 301.
- White v. Wood (8 Cush (Mass.) 413), 1039.
- Whitehead v. Hall (148 Ill. 253), 1071.
- Whitehall v. Smith (24 Ill. 178), 838.
- Whitehurst v. Coleen (53 Ill. 247), 985, 986, 1187.
- Whitford v. Deexel (118 Ill. 600), 254, 262, 1091.
- Whiting v. Fuller (22 Ill. 33), 877.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Whitman v. Weiss (33 Mich. 348), 649.
 Whitney v. Crosby (3 Calnes (N. Y.) 89), 778.
 Whitney v. Turner (1 Scam. 253), 154.
 Whitney v. Wright (15 Wend. (N. Y.) 171), 258.
 Whittemore v. Mason (14 Ill. 392), 1395.
 Whittemore v. Stephens (48 Mich. 537), 929.
 Whitton v. Barringer (67 Ill. 551), 966.
 Wick v. Weber (64 Ill. 167), 970, 971.
 Wickenkamp v. Wickenkamp (77 Ill. 92), 1042, 1061, 1071, 1074.
 Wicker v. Boynton (83 Ill. 545), 967.
 Wicker v. Hotchkiss (62 Ill. 107), 217.
 Wickersham v. Burs (20 Ill. App. 243), 1005.
 Widows & O. Ben. Ass'n v. Powers (30 Ill. App. 82), 1216.
 Widrig v. Tagart (51 Mich. 103), 898.
 Wieland v. Kobick (110 Ill. 16), 260.
 Wieland v. Oberne (20 Ill. App. 118), 307, 889, 898, 1119.
 Wight v. Hoffman (4 Scam. (Ill.) 362), 979.
 Wight v. Meredith (4 Scam. (Ill.) 360), 938, 978, 1167.
 Wight v. People (15 Ill. 417), 1328.
 Wight v. Wallbaum (39 Ill. 554), 4, 5, 12.
 Wight Fire Proof Co. v. Poscekal (130 Ill. 139), 1052, 1069, 1090.
 Wightman v. Tucker (50 Ill. App. 75), 1002.
 Wiggins v. City of Chicago (68 Ill. 372), 1115, 1132.
 Wiggins v. Chance (54 Ill. 175), 144.
 Wiggins v. Downer (67 How. (N. Y.) Pr. 65), 1489.
 Wiggins Ferry Co. v. People (101 Ill. 446), 1147, 1204, 1263.
 Wiggins v. Lask (12 Ill. 132), 254.
 Wilbur v. Gilmore (21 Pick. (Mass.) 250), 785.
 Wilborn v. Odell (29 Ill. 456), 1078, 1115.
 Wilborne v. Blackstone (41 Ill. 264), 595, 876.
 Wilbur v. Hubbard (35 Barb. (N. Y.) 303), 69.
 Wilbur v. Wilbur (129 Ill. 393), 1005, 1101.
 Wilburn v. Haines (53 Ill. 207), 1415.
 Wilcox v. Cossick (2 Mich. 165), 1454.
 Wilcox v. Kinzie (3 Scam. 218), 144.
 Wilcox v. Nichols (1 Price 109), 517.
 Wilcox v. Raddin (7 Ill. App. 594), 1200.
 Wilcox v. Woods (3 Scam. (Ill.) 51), 569, 782, 785.
 Wilcoxon v. Roby (3 Gilm. (Ill.) 475), 116, 1118.
 Wilcus v. Kling (87 Ill. 107).
 Wilday v. McConnell (63 Ill. 279), 417.
 Wilday v. Wight (71 Ill. 374), 823, 916.
 Wilder v. Arwedson (80 Ill. 435), 876.
 Wilder v. Ember (12 Wend. (N. Y.) 191), 471.
 Wilder v. Greenlee (49 Ill. 253), 1141.
 Wilder v. House (40 Ill. 92), 1252.
 Wilder v. House (48 Ill. 279), 1413.
 Wildey v. Fractional School Dist. (25 Mich. 419), 897.
 Wiley v. Sutherland (41 Ill. 25), 1050.
 Wiley v. Town of Brimfield (49 Ill. 306), 1144.
 Wilhelm v. People (72 Ill. 468), 1071.
 Wilkes v. Cotter (28 Ark. 519), 1398.
 Wilkinson v. Gage (40 Ill. App. 603), 772.
 Willinborg v. Murphy (40 Ill. 46), 381, 383, 391.
 Willer v. French (27 Ill. App. 76), 1169, 1171, 1411.
 Williams v. Baker (67 Ill. 238), 785, 967, 1002.
 Williams v. Bank of Illinois (1 Gilm. (Ill.) 667), 116, 1367.
 Williams v. Boyden (33 Ill. App. 477), 846.
 Williams v. Brunton (8 Ill. 600), 249.
 Williams v. Case (79 Ill. 356), 1042.
 Williams v. Chicago Coal Co. (60 Ill. 149), 490.
 Williams v. Dunn (93 Ill. 511), 1004.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Williams v. Granger (4 Day
 (Conn.) 44), 513.
 Williams v. Jarrot (1 Gilm. (Ill.)
 120), 1026, 1028.
 Williams v. People (44 Ill. 478),
 461, 622, 1118.
 Williams v. Mathews (3 Cow. (N.
 Y.) 252), 581.
 Williams v. Miami Powder Co. (36
 Ill. App. 107), 834.
 Williams v. Raper (67 Mich. 427),
 455.
 Williams v. Reynolds (86 Ill. 263),
 1143.
 Williams v. Rutter (40 Ill. 40),
 1257.
 Williams v. Schmidt (54 Ill. 205),
 895, 1386, 1393, 1394.
 Williams v. Shup (12 Ill. App. 454),
 1005, 1082.
 Williams v. Smith (18 N. Y. 550),
 1471.
 Williams v. Smith (3 Scam. (Ill.)
 524), 452.
 Williams v. Smith (3 Scam. (Ill.)
 473), 511.
 Williams v. Smith (6 Cow. (N. Y.)
 166), 992.
 Williams v. Tatnall (29 Ill. 553),
 945.
 Williams v. Vanmeter (19 Ill. 293),
 308, 326, 1373.
 Williams v. Allison (2 East 451),
 504.
 Williamson v. Hogan (46 Ill. 503),
 857, 913.
 Wilmerton v. Sample (42 Ill. App.
 254), 872.
 Wilmington Min. & Mfg. Co. v.
 Lamb (90 Ill. 465), 890.
 Wilson v. Abrahams (1 Hill (N.
 Y.) 207), 1113.
 Wilson v. Baillargeon J. B. Co. (54
 Ill. App. 250), 684.
 Wilson v. Beavau (58 Ill. 232),
 1146.
 Wilson v. Bauman (80 Ill. 493),
 1053.
 Wilson v. Berstrisser (45 Mo. 283),
 1317.
 Wilson v. Chalfant (82 Ill. 218),
 425.
 Wilson v. Challis (39 Ill. App. 227),
 96.
 Wilson v. Dickinson (63 Ga. 682),
 992.
 Wilson v. Dresser (152 Ill. 387),
 1266.
 Wilson v. Greathouse (1 Scam.
 (Ill.) 174), 423.
 Wilson v. Hickson (1 Black (U.
 S.) 231), 113, 119.
 Wilson v. Hakes (36 Ill. App.
 539), 1208.
 Wilson v. Hoffman (54 Mich. 246),
 1036.
 Wilson v. King (83 Ill. 232), 921,
 1072.
 Wilson v. Lyon (51 Ill. 166), 1009.
 Wilson v. McDowell (65 Ill. 522),
 1208, 1211, 1222.
 Wilson v. McKenna (52 Ill. 43),
 40.
 Wilson v. Nettleton (12 Ill. 61),
 1469.
 Wilson v. Nilson (44 Ill. App. 209),
 1160, 1209, 1217.
 Wilson v. People (94 Ill. 426), 17.
 Wilson v. Powers (94 Ill. 299),
 992.
 Wilson v. Powers (131 Mass. 539),
 1051.
 Wilson v. M. & N. Ry. Co. (31
 Minn. 481), 1039.
 Wilson v. Montague (57 Mich. 638),
 292.
 Wilson v. Root (119 Ill. 379), 765.
 Wilson v. Spring (64 Ill. 14), 1484,
 1485.
 Wilson v. South Park Com'rs (70
 Ill. 46), 1043.
 Wilson v. Trustees of Schools (138
 Ill. 285), 278.
 Wilson v. Wagar (26 Mich. 452),
 886, 1060.
 Wilson v. Young (31 Wis. 474),
 135.
 Wilson S. M. Co. v. Lewis (10 Ill.
 App. 191), 115.
 Willard v. Pettitt (54 Ill. App. 257),
 970.
 Willoughby v. Dewy (54 Ill. 266),
 1042.
 Willows v. Reynolds (86 Ill. 263),
 877.
 Wills v. Claffin (92 U. S. 135), 107.
 Wills v. Hollenbeck (37 Mich. 504),
 139.
 Wills v. Mason (4 Scam. (Ill.) 84),
 857.
 Wills v. Noyes 12 Pick. (Mass.)
 324), 177.
 Wimberly v. Hurst (33 Ill. 166),
 257, 258.
 Winchell v. Edwards (57 Ill. 41),
 1375.
 Winchester v. Grosvenor 44 Ill.
 425), 1051, 1143.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Winchester v. Grosvenor (48 Ill. 515), 1283.
 Winchester v. Rounds (55 Ill. 451), 665, 775.
 Wincox v. Woods (3 Scam. (Ill. 51), 759.
 Windett v. Taylor (28 Ill. 238), 82.
 Windheim v. Ohlendorf (3 Ill. App. 436), 1078.
 Wineman v. Hughson (44 Ill. App. 22), 36, 43, 824.
 Wineman v. Oberne (40 Ill. App. 269), 844, 865.
 Wing v. Goodman (75 Ill. 159), 40, 1015.
 Winkleman v. People (50 Ill. 449), 1192, 1462.
 Winkler v. Barthel (6 Ill. App. 111), 299, 300.
 Winkler v. Meister (40 Ill. 349), 131, 144.
 Winnesheik Ins. Co. v. Colsgrafe (53 Ill. 516), 1048.
 Winslow v. Abrams (1 Hill (N. Y.) 207), 1138.
 Winslow v. Covert (52 Ill. App. 63), 1061.
 Winslow v. Newlan (45 Ill. 145), 1073.
 Winslow v. People (117 Ill. 152), 78, 115.
 Winslow v. People (17 Ill. App. 222), 115.
 Winstanley v. People (92 Ill. 402), 255, 1314.
 Winterburn v. Brooks (2 C. & K. 16), 220.
 Wisconsin Cen. Ry. Co. v. Ross (142 Ill. 9), 1090, 1141.
 Wisconsin C. R. R. Co. v. Wiczorek (151 Ill. 579), 448, 459, 921, 1240, 1241.
 Wisdon v. Becker (52 Ill. 342), 868.
 Wise, Admr. v. Twiss, Admr. (54 Ill. 301), 1002.
 Wisner v. Bulkley (15 Wend. (N. Y.) 321), 489.
 Wisner v. Kelley (16 Ill. App. 403), 325.
 Wistman v. Krumweide (30 Minn. 313), 1051.
 Withers v. Comm'rs of Roads (3 Brev. (S. C.) 83), 1318.
 Withers v. Green (9 How. 233), 828.
 Withers v. Kinser (53 Ill. App. 87), 1147.
 Withers v. Knox (4 Ala. 138), 516.
 Witner v. Thistlewood (101 Ill. 450), 20.
 Woe v. People (49 Ill. 410), 1080.
 Woburn v. Henshaw (101 Mass. 193), 1018.
 Woerishoffer v. Lake Erie & W. Ry. Co. (25 Ill. App. 84), 1232.
 Wohlford v. People (148 Ill. 296), 1081.
 Wolbrecht v. Baumgarten (26 Ill. 291), 747.
 Wolcott v. Gibbs (97 Ill. 118), 1072.
 Wolcott v. Heath (78 Ill. 433), 1034, 1100.
 Wolcott v. Van Santvoord (17 Johns (N. Y.) 248), 572, 583.
 Wolf v. Boettcher (64 Ill. 316), 137, 411.
 Wolf v. Shannon (50 Ill. App. 396), 352.
 Wolf v. Willits (35 Ill. 88), 1048.
 Wolf v. Fletemeyer (83 Ill. 418), 1050.
 Wolfe v. Johnson (152 Ill. 280), 968.
 Wolfe v. McClure (79 Ill. 564), 190.
 Wonderly v. Holmes Lumber Co. (56 Mich. 412), 549.
 Wood v. Bulkley (13 Johns (N. Y.) 486), 598.
 Wood & C. Co. v. Smith (50 Mich. 565), 551.
 Wood v. Echternach (65 Ill. 149), 1142.
 Wood v. Hildreth (73 Ill. 525), 1147.
 Wood v. Morton (11 Ill. 547), 258.
 Wood v. Stoddard (2 Johns (N. Y.) 184), 992.
 Wood v. Surrels (89 Ill. 107), 1048.
 Wood v. Thornley (58 Ill. 464), 1472.
 Wood v. Tucker (66 Ill. 277), 386, 387, 391, 395.
 Woods v. Ayres (39 Mich. 345), 100, 886.
 Woods v. Hynes (1 Scam. (Ill.) 103), 826.
 Woodbury v. O'Bear (7 Gray (Mass.) 467), 1055.
 Woodburn v. Henshaw (101 Mass. 193, s. c. 3 Am. Rep. 333) 1472.
 Woodbury v. Manlove (14 Ill. 212), 1375, 1379.
 Woodhull v. Kelly (10 Ill. App. 455), 933, 936.
 Woodhull v. Rosenthal (61 N. Y. 382), 249.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- Woodman v. Howell (45 Ill. 367), 133.
 Woodruff v. Henniman (11 Vt. 292), 506.
 Woodruff v. Matheny (55 Ill. App. 350), 1168.
 Woodruff v. Tyler (5 Gilm. (Ill.) 457), 982.
 Woodward v. Woodward (14 Ill. 466), 180.
 Woodworth v. Fuller (24 Ill. 109), 34.
 Wooley v. Frye (30 Ill. 158), 1222.
 Woolverton v. Sumner (53 Ill. App. 115), 837, 1141.
 Worcester Nat. Bank v. Cheney (87 Ill. 602), 313.
 Worden v. Salter (90 Ill. 160), 108, 1106.
 World's Columbian Exposition v. Scala (55 Ill. App. 207), 923.
 Wormley v. Gregg (65 Ill. 251), 1142.
 Wormley v. Wormley (98 Ill. 544), 40.
 Wormley v. Wormley (96 Ill. 129), 1227.
 Worsley v. Wood (6 Term. Rep. 710), 511.
 Warren v. McHatten (2 Scam. (Ill.) 32), 1168.
 Worth v. Hand (30 Mich. 264), 1298.
 Worthy v. Chalk (10 Rich. (S. C.) 141), 954.
 Woven Cord Bed Spring Co. v. Coxedge (50 Ill. App. 334), 1266.
 Wray v. Chicago B. & Q. Ry. Co. (86 Ill. 424), 1098.
 Wright v. Brosseau (73 Ill. 381), 58, 1097.
 Wright v. Bell (5 Ill. App. 352), 1099.
 Wright v. Bennett (3 Scam. (Ill.) 258), 142, 146.
 Wright v. Curtis (27 Ill. 514), 569.
 Wright v. Dickinson (67 Mich. 580), 789.
 Wright v. English (39 Ill. 178), 1146.
 Wright v. Gay (101 Ill. 233), 1050.
 Wright v. Gillespie (43 Mo. App. 244), 1078.
 Wright v. Gould (73 Ill. 56), 1141.
 Wright v. Grover (27 Ill. 426), 140.
 Wright v. Hatchett (12 Ill. App. 261), 1206.
 Wright v. Highway Com'rs (150 Ill. 138), 1239, 1240.
 Wright v. Lattin (38 Ill. 293), 896.
 Wright v. Matteson (18 How. (U. S.) 56), 257.
 Wright v. Sanders (3 Keyes (N. Y.) 323), 1407.
 Wright v. Smith (76 Ill. 216), 20, 1194.
 Wright v. Smith (82 Ill. 527), 1070.
 Wright v. Tatham (1 Ad. & El. 3), 1028.
 Wrought Iron Bridge Co. v. Com'rs of Highways (101 Ill. 518), 832, 1000, 1127, 1172, 1200.
 Wyatt v. Hendrick (21 Ill. 158), 882.
 Wyllie v. Holland (32 Law Journal Chi'y (Eng.) 782), 1478.
 Wyman v. Yeomans (84 Ill. 403), 1176.
 Wm. Butcher Steel Works v. Atchinson (68 Ill. 421), 98, 99.

Y.

- Yaeger v. City of Henry (39 Ill. App. 21), 418, 1222.
 Yale v. Flanders (4 Wis. 96), 118.
 Yates v. Foot (12 Johns (N. Y.) 1), 31.
 Yates v. Lansing (9 Johns (N. Y.) 394), 152.
 Yates v. Russell (17 Johns (N. Y.) 461), 1404.
 Yazel v. Palmer (88 Ill. 597), 1268.
 Yeasel v. Alexander (58 Ill. 254), 68, 69, 155.
 Yeates v. Boen (2 Strange 1104), 836.
 Yott v. People (91 Ill. 11), 190.
 Young v. Brander (8 Cast 12), 54.
 Young v. Campbell (5 Gilm. (Ill.) 80), 30, 327, 757.
 Young v. Cooper (59 Ill. 121), 298.
 Young v. Detroit, G. H. & M. Ry. Co. (56 Mich. 430), 1073.
 Young v. Earle (28 Ill. 344), 1173.
 Young v. Farwell (146 Ill. 466), 1004.
 Young v. First Nat. Bank of Cairo (51 Ill. 73), 346.
 Young v. Foute (43 Ill. 33), 1029, 1030.
 Young v. Mason (53 Gilm. (Ill.) 55), 383.
 Young v. Matthieson (105 Ill. 26), 1191.
 Young v. Nelson (25 Ill. 565), 300.

[References are to pages, Vol. I., pp. 1-960; Vol. II., pp. 961-1496.]

- | | | | |
|--|-------------|---|----------------|
| Young v. Richardson (4 Ill. App. 364), | 209, 646. | Zeigler v. W. J. & J. H. (63 Ill. 48), | 302. |
| Young v. Silkwood (11 Ill. 36), | 1277. | Zell v. W. B. Co. (10 Ill. App. 335), | 33, 35. |
| Young v. State (65 Ga. 525), | 1472. | Zepp v. Hager (70 Ill. 223), | 425, 1161. |
| Young v. Stearns (91 Ill. 300), | 1195. | Zippp v. Uhland Hain No. 16 (30 Ill. App. 280), | 391. |
| Young v. Wright (1 Campb. 140), | 1484. | Zirkel v. Joliet Opera House Co. (79 Ill. 334), | 834, 843, 870. |
| Youngs v. Youngs (5 Redf. 505), | 1019, 1020. | Ziednoczenie v. Sadecki (41 Ill. App. 329), | 480, 487. |
| Yourt v. Hopkins (24 Ill. 330), | 83. | Zokein v. Lovell (107 Ill. 209), | 1197. |
| Yourt v. Hopkins (24 Ill. 326), | 82. | Zuckerman v. Hawes (146 Ill. 59), | 1229, 1230. |
| Yundt v. Hartrunft (41 Ill. 9), | 135, 1029. | Zuckerman v. Solomon (73 Ill. 130), | 889. |
| Yunt v. Brown (1 Scam. (Ill.) 264), | 364, 374. | Zuckerman v. Sonneuschein (62 Ill. 115), | 204, 205. |
| Z. | | Zuel v. Bowen (78 Ill. 234), | 806. |
| Zabriskie v. Smith (13 N. Y. 322), | 50. | Zugo v. Laughlin (23 Ind. 170), | 1486. |
| Zeigler v. Hughes (55 Ill. 288), | 1479. | | |

GENERAL INDEX.

INDEX.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

A.

ABANDONMENT:

- of award remits partly to original rights, 1184.
- of motion for new trial, 976, note.
- of possession in action of ejectment, 254.
- of premises, ground for distress for rent, 1222.

ABATEMENT OF ACTION:

- for tort, by compromise, 57.
- by disability of plaintiff, 658.
- by disability of defendant, 659.
- death does not cause, in action for damages, 42.
- death of defendant in *mandamus*, not, 1113.
- of forcible entry and detainer, by death of party, 1208.

ABATEMENT OF CAUSE OF ACTION:

- for tort, generally, 46.

ABATEMENT, PLEAS IN:

- distinguished from pleas in bar, 656.
- special motions substituted for, when, 665.
- how classified, 651.
- A plea to the jurisdiction is, to what extent, 653.
- to disability of defendant, 659.
 - of the plaintiff, 657.
- to the count or declaration, 660.
- to the form of the process, generally, 661.
 - for misnomer of parties, 662.
 - for misjoinder of parties, 663.
 - for nonjoinder of parties, 664.
- to action process—suit pending, variance, etc., 665.
- as to misjoinder of plaintiffs in actions for torts, 27.
- for misjoinder of defendants in actions for tort, 44.
- in case of misnomer, 18.
- for misjoinder, not available in tort, 237.
- when husband and wife improperly joined as plaintiffs, 22.
- for non-joinder of defendants in actions on contract, 34.
 - of tenants in common, 27.
- when partners sue in wrong name, 19.
- defendant sued in wrong county, 429.
- to dissolve attachment, 341.
- who cannot interpose in attachment, 306.
- in attachment on ground that debtor is about to remove, etc., 310.
 - on ground that debtor is about fraudulently to conceal, 313.
- for mistake in notice of attachment, 338.
- to contradict return, 446.
- in replevin, what is, 680, note.
- in forcible entry and detainer, 1214.
- for variance in declaration, 487.
- Nul tiel* corporation, 658.
- suit prematurely brought, 665, note.
- when to be filed, 675.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

ABATEMENT, PLEAS IN—Continued.

order in which to be interposed, 656.
 default for want of, 676.
 to question sheriff's return, 665, note.
 requirements of, summarized, 672.
 must show "better writ," 666.
 formal parts of, generally, 667.
 how entitled, 668.
 commencement of, form, 669.
 the body of, 670.
 conclusion of, 671.
 forms of (*Nos. 301-308*), 674.
 demurrer to, 635.
 replication to, by plaintiff, 677.
 issue on, 679, 680.
 judgment on, 681.

see "Plea in Abatement."

ABIDING BY BRIEF:

rule compelling, 1072, note.

ABIDING BY DEMURRER:

to pleading generally, 737, note.
 to judgment, 640.

"ABOUT TO DEPART," ETC.:

as grounds for attachment, 310.

see "Attachment, ground for."

"ABOUT FRAUDULENTLY TO CONCEAL:"

as ground for attachment, 313.

see "Attachment, ground for."

"ABOUT TO REMOVE, ETC.:"

as ground for attachment, 310.

see "Attachment, ground for."

ABSENCE OF ATTORNEY:

no ground for continuance, 791.

see "Attorney at Law."

ABSENCE OF COUNSEL:

grounds for new trial, when, 969.

see "Counsel" or "Attorney."

ABSENCE OF PARTY:

ground for new trial, when, 969.

see "Party."

ABSENCE OF WITNESS:

ground for continuance, when, 791.

ground for continuance, rather than new trial, 969.

ground for new trial, when, 969.

see "Witness."

ABSENCE FROM STATE:

a ground for attachment, 306.

see "Attachment, ground for."

ABSCONDING:

effect of, in garnishment, 362, note.

see "Attachment, ground for."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1278.]

ABSCONDING DEFENDANTS:

in replevin, notice to, 176.

ABSCONDING DEBTOR:

attachment will lie against, 307.

see "Attachment, ground for."

ABSTRACTS AND BRIEF:

time for filing, same as transcript of record, 1061.

see "Brief."

ABSTRACT OF EVIDENCE:

preparing and filing, generally, 1068.

filing, number of copies required, 1068.

objection to irregularity in, 1070.

must be an "abridgment," 1069.

what is not, 1069, note.

what it shall contain, 1069.

when to be filed, default, 1070.

when further one required, 1071.

upon rehearing in upper court, 1091.

see "Practice in Appellate Court."

ABUSE OF LEGAL PROCESS:

liability for, 129.

ABSTRACT OF RECORD:

privilege of attorney to make, 1255.

ABUTTALS:

must be averred in declaration, 486.

avertment of, in declaration in action for injury to land, 583.

ACCEPTOR:

see "Bills of Exchange."

ACCIDENT:

damage caused by, not recoverable, 223.

"ACCORD AND SATISFACTION:"

may be shown under general issue, 692.

pleaded specially in assumpsit, 702.

in debt, 703.

in trover, 707.

see "Pleas."

ACCOUNT, ACTION OF:

nature of, 99.

contrasted with debt, 99.

how classified, 50.

who may maintain it, 100.

when preferable form of action, 102.

when to be begun, 103.

will recover profits, 101.

issue in, 104.

appointment of auditors to hear report, 105.

proceedings before auditors, 106.

special plea in, or notice with general issue, when required, 705.

trial of issues in, 106, 107, 108.

judgment in, how rendered, 109.

appeal or writ of error in, 111.

see "Action of Account."

[The references are to sections: Vol. I., §§ 1-787; Vol. II. §§ 788-1276.]

ACCOUNT BOOK:

How proof made by, 852.
action of "Account" a proper form to recover upon, 100.
see "Books" and "Documents."

ACCOUNT, COPY OF:

to accompany set-off, 725.

"ACCOUNT," DECLARATION IN:

action of, forms generally (*Nos. 180-183*), 581.
tenant in common against co-tenant (*Forms Nos. 180-183*), 581.
tenant in common against co-tenant (*Form No. 180*), 581.
not averring relation of tenants in common (*Form No. 181*), 581.
partner against partner (*Form No. 182*), 581.
against "custodian" to account (*Form No. 183*), 581.
see "Declaration."

"ACCOUNT RENDER:"

action for.

see "Account," "Count," and "Declaration."

ACCOUNT STATED:

count for, in *assumpsit*, 62, 82.
when proper in declaration, 504.
how impeached, 82.
form of (*No. 44*), 509.
copy of, to be filed with declaration (*No. 46*), 512.
see "Count" and "Declaration."

ACCRUING OF ACTION:

for breach of contract, 60.
see "Action" and "Cause of Action."

ACT OF GOD:

excuses breach of contract, 61.

ACT OF LEGISLATURE:

constitutionality of, cannot be questioned by *quo warranto*, 1125.

ACTION:

definition of, 12.
in whose name to be brought, 12.
classification, generally, 12.
replevin is transitory, 170.
and suit, synonymous terms, 12.

ACTIONS, CHOICE OF:

on contract, 55.
in whose name to be begun—See "Plaintiff."
see "Remedies, Choice of."

ACTION OF ACCOUNT:

how classified, 50.
when a preferable form of action, 102.
when to be begun, 103.
appointment of auditors to hear report, 105.
proceedings before auditors, 106.
trial of issues in, 106, 107, 108.
see "Account."

ACTION ON APPEAL BOND:

plea to, *nul tiel* record is bad (*Form No. 340*), 710, note.
see "Action on Bond" and "Bond."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

ACTION OF ASSUMPSIT:

- history of, 49.
- how classified, 50.
- when the only remedy, 55.
- on contract under seal, 59.
- for damages for breach of contract generally, 60.
- common counts in, 62.
- when will lie to recover purchase money paid, 63.
- when will lie for share of profits, 63.
- for money had and received to plaintiff's use, 63.
- for money paid by mistake, 64.
- for money paid without consideration, 65.
- to recover illegal tax paid, 66.
- must be privity of contract to sustain, 67.
- for money voluntarily paid, 68.
- for money paid because of fraud, 69.
- when it will lie for interest, 70.
- for goods bargained and sold, 71.
- for goods sold and delivered, 71.
- to compel payment of another's debt, 72.
- for work, labor, and material, 73.
- on labor contract, in writing, 74.
- for gratuitous services, 75.
- when will lie for *quantum meruit*, 76.
- for professional services, 77.
- for use and occupation, 78.
- against co-tenant for use and occupation, 79.
- for rent on lease, 80.
- for rent, when to be brought, 81.
- for "account stated," 82.
- on bills and notes, 83.
- against guarantor of "payment" or "collection," 84.
- for statutory cause of action, 85.
- against corporations, 86.
- when the only remedy against corporation, 86.
- for fine, penalty, or forfeiture, 87.
- when preferable to "debt," 88.
- will lie on covenant, when only, 97.
- will not lie at suit of tenants in common to land, 101.
- for grain in warehouse, 164.

ACTION OF ATTACHMENT:

- classification of, 50.
- origin and nature of, 291.
- a purely statutory proceeding, strictly construed, 292.
- both in *personam* and *rem*, 293.
- upon what, against whom, and where it will lie, 294.
- upon mortgagee interest, 295.
- as to joint debtors and partners, 296.
- against stockholders in corporations, 297.
- where to be begun, 298.
- affidavit in, generally, 299.
- who shall make, 300.
- when to be made, 301.
- how entitled, 302.
- contents of, 303.
- on a judgment, 304.
- amendment of, 315.
- grounds for, generally, 305.
- that debtor is a non-resident, 306.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

ACTION OF ATTACHMENT—Continued.

- grounds for, that debtor conceals himself, 307.
- that debtor has departed with intent, etc., 308.
- that debtor is about to depart with intent, etc., 309.
- that debtor is about to remove property to the injury of, etc., 310.
- that debtor has within two years fraudulently conveyed, etc., 311.
- that debtor has within two years fraudulently concealed, etc., 312.
- that debtor is about to fraudulently conceal, 313.
- that debt was fraudulently contracted, 314.
- bond for, generally, 316.
- conditions of, form, 317.
- writ of, generally, forms, 318.
- amendment of, 319.
- when to be issued and served, 320.
- issuance to other counties, 321.
- execution, levy, 322.
- possession and release of property, by forthcoming bond, 331.
- release of property by bond to pay judgment, 332.
- proceeding when bond not returned or bond not sufficient, 334.
- form of bond (*No. 7*), 333.
- form of forthcoming bond and bond to pay judgment, 333.
- expense of caring for attached property, 335.
- disposition of perishable property and animals, 336.
- proceeding on return of writ personally served, 337.
- proceedings when writ not personally served—publication of notice—mailing, 338.
- continuance in, for service of publication, 339.
- voluntary appearance in, 340.
- dissolution, on motion, 341.
- irregularities in, ground for dissolution, 341.
- practice and pleading in, 342.
- replevin will not lie for goods taken in, 164.
- plaintiff's declaration in, 343.
- defendant's pleas in, 344.
- interplea by claimant of property, 345.
- judgment and execution in, 346.
- distribution of proceeds, 349.
- in aid of pending suit, 350.
- review of proceedings, 354.
- and garnishment, declaration in, generally, 621.
- see "Declaration."

ACTIONS, BAR TO:

- "*crim. con.*" not barred by criminal action, 216.
- trespass or replevin is not to the other when, 120.
- see "Plea in Bar" and "Limitation of Actions."

ACTION BETWEEN PARTNERS:

- when "account" will lie, 99.

ACTION ON BOND:

- of appeal, in forcible entry and detainer, 1219, note.
- to Appellate or Supreme Court, 1032, note.
- plea to, 703, note.
- for attachment, 317.
- for release of attached property, 332, note.
- to redeliver, 334, note.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

ACTION ON BOND—Continued.

- in replevin, 180.
 - defense to, 181.
 - plea to, 703, note.
 - recovery in, 182.
- to pay judgment, 334, note.
- declaration in, in *capias* cases, 471, note.
 - effect of death of defendant, 473.
- of guardian, plea to, 703, note.
 - see "Bond."

ACTION ON THE CASE:

- how classified, 50.
- see "Trespass on the Case."

ACTION, CAUSE OF:

- what is, 12.
- must be complete before suit begun, 427.
- cannot be split, 53.
- when it accrues, for breach of contract, 60.
- when arises for goods sold, 71.
- when it accrues in case of bailment, 117.
- where it arises in trespass, 133.
- in ejectment, when it arises, 246.
- must be averred in declaration, 486.

ACTIONS, CONSOLIDATION OF:

- generally, 780.

ACTIONS, COMMENCEMENT:

- generally, 426.
- what is, 432.
- time for, 427.
- when premature, will not sustain recovery, 427.
- manner of, 428.
- praecipe*, necessary to, 428.
- place for, 429.
- defendants in different counties, 429.
- when security for costs required, 430.
- process must be purchased by plaintiff, 433.
- by summons, form, 434.
- return of proceeds, 444.
- by *capias ad respondendum*, 449.
 - when allowed, 450.
 - affidavit for, 451.
 - indorsement of allowance, 452.
 - issuance of the writ, 453.
 - bond to be filed by plaintiff, 454.
 - service of writ, arrest, 455.
 - arrest, bail bond by defendant, 456.
 - discharge of defendant, 458.
 - when to stand as a summons, 459.
 - proceedings thereafter, 460.
 - discharge of bail on surrender, 465.
 - new bail after surrender, 468.
 - effect of death of defendant, 473.
- by attorney in his own name, (*Form No. 30*), 498.
- where infant sues (*Form No. 31*), 498.
- where partners sue (*Form No. 32*), 498.
- where surviving partner sues (*Form No. 33*), 498.
- when assignee sues in his own name (*Form No. 34*), 498.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

ACTIONS, COMMENCEMENT—*Continued.*

- when assignee sues in name of assignor (*Form No. 35*), 498.
- when assignee of chose in action, sues in name of assignor for use (*Form No. 36*), 498.
- where an executor sues (*Form No. 37*), 498.
- when administrator sues (*Form No. 38*), 498.
- where a corporation sues (*Form No. 39*), 498.
- when suit begun by a national bank (*Form No. 40*), 498.
- declaration, when to be filed, 548.
- authority of attorney for, 1266.
- see "Commencement," etc.

ACTIONS, FORMS OF:

- classification of, 50.
- ex delicto*, what are, 50.
- ex contractu*, what are, 50.
- mixed, what are, 50
- real, what are, 50.
- personal, what are, 7.
- on account, generally, 99.
- waiving tort and suing in assumpsit, 57.
- substitution of assumpsit for others, 56.
- assumpsit, generally, 49.
- when the only remedy, 55.
- on contract under seal, 59.
- for damages for breach of contract, generally, 60.
- acts excusing breach of contract, 61.
- on contract, "debt," declaration in, 551.
- on right given by statute, 85.
- when statute silent as to remedy, 85.
- to recover penalty, 85.
- on contract, debt, 88.
- on contract, covenant, generally, 95.
- ex delicto*, 112.
- for torts, trespass, 112.
- replevin, generally, 155.
- trespass on the case, 183.
- trover, 136.
- ejectment, 238.
- mixed, ejectment is, 239.
- attachment, generally, 291.
- garnishment, 355.
- determined by averments in body of declaration, 487, 503.
- recital of, in commencement of declaration, 497.
- see "Actions on Contract" and "Actions for Torts."

ACTIONS EX CONTRACTU:

- which are, 12.

ACTIONS ON CONTRACT:

- in the name of one for use of another, 14.
- when obligee dies, 21.
- what plea is proper in, 19.
- plaintiff in case of receivership, 24.
- in case of insolvency, 24.
- in case of assignment, 24.
- in case of infancy, 23.
- in, when female marries, 22.
- in case of insanity or idioy, 25.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

ACTIONS ON CONTRACT—Continued.

- defendants in, as between original parties, 33.
 - in case of assignment, 33.
 - joint or several, 34.
 - where interest assigned, 35.
 - when contractor dies, 36.
 - in case of assignment for benefit of creditors, 37.
- when female contractor marries, 38.
 - in case of infancy, 39.
 - in case of insanity, idiocy, etc., 40.
- in form of "debt," declaration, 551.
- declaration in, in form of debt, the inducement, 554.
 - in form of debt, the consideration, 555.
 - avermment of time, 556.
 - stating contract itself, 558.
 - avermment of performance or readiness to perform, 558.
 - the breach, 560.
 - on a statute, 561.
 - on a statute, conclusion of, 562.
 - assigning the breach (*Forms Nos. 142, 143*), 563.
 - allegations of damages (*Form No. 144*), 564.
 - common counts in (*Form No. 145*), 565.
- in form of covenant, 572.
- new trials in, granted oftener than in action for tort, 972, 973.
- declaration on "Account," generally (*Forms Nos. 180-183*), 581.
- judgment, when several defendants, 994.
- appeal from Appellate Court when more than one thousand dollars involved, 1019.
- review of, when is more than one thousand dollars involved? 1019, note.
- special, defenses to, 19.
- appealed from Appellate Court when more than one thousand dollars involved, 1019.
- when is more than one thousand dollars involved? 1019, note.

ACTION OF COVENANT:

- how classified, 50.
- nature of, 95.
- when it will lie, 96.
- upon leases, a proper form, 96.
- when it will not lie, 97.
- when the particular remedy, 97.

ACTION OF DEBT:

- how classified, 50.
- generally, 88.
- disadvantages of, 88.
- when the proper remedy, 89.
- when not the proper remedy, 90.
- by and against executors, etc., 91.
- on bonds, generally, 92.
- to recover forfeiture or penalty, 93.
- the recovery, 94.
- contrasted with account, 99.

ACTION EX DELICTO:

- what is, 12.
- declarations on, generally, 582.
- see "Action for Torts."

ACTION, ELEMENTS OF:

- what are, 52.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

ACTION OF EJECTMENT:

- does not abate by death of defendant, 36.
- nature and history of, 238.
- real in its nature, 238.
- when and for what property will lie, 240.
- for land under water, 241.
- for land in public highway, 242.
- for land in street or village, 243.
- when it must be begun, 244.
- accrues when *disseizin* occurs, 245.
- when accrues to heir or *devisee*, 245.
- what title or right of possession will support, 246.
- plaintiff must rely on the strength of his own title, 247.
- plaintiff must recover on legal title, 248.
- effect of transferring title during suit, 249.
- plaintiff must prove identical title claimed, 250.
- possessor of deed presumed to have title, 252.
- for title derived from common source, 251.
- color of title in, 253.
- plaintiff's prior possession alone sufficient, 254.
- what prior possession alone sufficient, 255.
- length of possession sufficient against legal title, 256.
- supported by color of title and payment of taxes, 257.
- supported by right of possession alone, 258.
- possession of defendant necessary to be shown, 259.
- ouster need not be shown, 260.
- who can maintain it, 261.
- joint tenant and tenant in common, etc., may maintain, 262.
- by landlord against tenant, 263.
- against whom maintainable, 264.
- defendant, when premises unoccupied, 265.
- death of plaintiff, effect of, 266.
- death of defendant, effect of on suit, 267.
- what title or possession will defeat, 268.
- defense to be legal, not equitable, 269.
- adverse possession, 270.
- adverse possession by tenant in common, 271.
- outstanding title, 272.
- verdict in, generally, 273.
- form of, 274.
- where plaintiff's right expires, 275.
- judgment in, generally, 276.
- effect of, 277.
- writ of possession in, 278.
- recovery of rents and profits in, 279, 280.
- form of suggestion of damages in, 280.
- suggestion of damages, defense to, 282.
- joinder of issue in, suggestion of damages, 283.
- suggestion of damages, rights of parties on trial, 284.
- defendant's exemption, 285.
- recovery of value of improvements by defendant, 286.
- appointment of commissioners to assess value of improvements, 286, 287, 288, 289.
- limitation of statute relating to, 290.
- declaration in, rules regarding, 320.
- see "Ejectment."

ACTION OF FORCIBLE ENTRY AND DETAINER:

- classification of, 50.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

ACTION OF FORCIBLE ENTRY AND DETAINER—Continued.

- definition and nature of, 1205.
- forcible entry forbidden, 1206.
- when maintainable, 1207.
- what detainer unlawful, 1207, note.
- title to land not tried in, 1207.
- right to gather crops after, 1207, note.
- plaintiff in, 1208.
- abatement of by death of party, 1208.
- defendants to, who to make, 1209.
- demand in writing to preceed, 1210.
- commencement of, complaint, 1211.
- summons in, when returnable (*Form No. 397*), 1212.
- is a local, 1212.
- summons, service of, publication, 1213.
- pleadings in, 1214.
- trial, how conducted, 1215.
- two questions to be determined on, 1215.
- form of verdict in, 1215.
- possession necessary to sustain, 1215, note.
- judgment in, for the whole, 1216.
- judgment in, damages cannot be awarded, 1216, note.
- terminates right to sue for rent, 1216, note.
- judgment in, for a part, 1217.
- judgment by confession not entered in, 1217, note.
- review of, 1219.
- cannot be pleaded in abatement, when, 665.
- see "Forcible Entry and Detainer."

ACTION OF GARNISHMENT:

- classification of, 50.
- definition and nature, 355.
- how writ procured and served, 357.
- service and return of writ, 358.
- what may be reached by, 359.
- what may not be reached by, 360.
- parties necessary to, 361.
- who may be garnishee, 362.
- interpleader in, 363.
- interplea in, trial of claimant's rights, 364.
- position occupied by garnishee, 365.
- interrogatories to be filed, 366.
- when answer of garnishee must be filed, 367.
- garnishee must set up his defense, 369.
- answer in must show exempt character of fund or property, 368.
- should claim set-off, 370.
- considered as evidence, 371.
- proceedings when answer unsatisfactory, 372.
- second or supplemental answer, 373.
- judgment in, when final, 374.
- costs and fees, 375.
- conditions on default, 376.
- form and effect of, 377.
- execution on judgment, when to issue, 378.
- surrender of property on execution, 379.
- execution in, when property subject to loan, 380.
- on property subject to lease, when plaintiff may perform conditions, 381.
- proceedings when garnishee refuses to surrender property, 382.
- sale of property in, application of proceeds, 383.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

ACTION OF GARNISHMENT—Continued.

- equitable powers of courts in, relating to sales and leases, 384.
- garnishee with lien may take title at sale, 385.
- appeals in, how taken, 386.
- exemption rights of non-resident, 387.
- transfer of claims for prohibited, 387.
- oppressive, statute concerning, 387.
- transferring claims for, penalty of, 388.
- see also "Attachment."

ACTION, GIST OF:

- what is, 51.
- on penal bond, 93.
- in trover, 142.
- for slander, is malice, 192.
- of malicious prosecution, 201.
- against municipal corporation for damages, is negligence, 228.
- of trespass, for seizing property, 591, note.
- in trespass *quare clausum fregit*, 592, note.
- in forcible entry and detainer, 1210.

ACTION, GROUND OF:

- what is, 12.
- see "Grounds."

ACTION, HISTORY OF:

- in ejectment, 238.
- see "History."

ACTIONS, JOINDER OF:

- when allowable, 53.

ACTION ON JUDGMENT:

- debt the proper form, 89.
- defenses to (*Form No. 321*), 710, note.
- privileged communication will not sustain, 194.
- defense to, 195, 196.
- see "Judgment."

ACTIONS, LIMITATIONS OF:

- determined by form, 49.
- on lease for rent, 81.
- by surety against principal, 85.
- in form of account, 103.
- in trespass, 134.
- in replevin, 169.
- for libel and slander, 198.
- malicious prosecution, 207.
- for false imprisonment, 212.
- trespass on the case for injury to personal property, 236.
- in ejectment, 244.
- for criminal conversation, 217.
- in ejectment, 245.
- distress for rent, six months, 1222.
- see "Statute of Limitation."

ACTION, LOCAL:

- attachment is, as to land, 294.
- when trespass is, 133.
- actions regarding water courses are, 615, note.
- forcible entry and detainer is, 1212.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

ACTIONS, MIXED:
what are, 50.

ACTION, NATURE OF:
in ejectment, 238.

ACTION FOR NEGLIGENCE:
defense to, plea of diligence (*Form No. 350*), 710.

ACTION ON NEGOTIABLE INSTRUMENT:
denial of execution of, 711.

ACTIONS ON NOTES:
who to bring, 20, 83.
"debt" may be maintained, 89.
setoff in, 724.
plea of usury to (*Form No. 337*), 710, note.
see "Negotiable Instruments" and "Notes."

ACTION ON ORDINANCE:
debt, proper form, when, 89.

ACTION, PARTIES TO:
generally, 12.
on contracts under seal, 59.
on notes, 83.
character of, how stated in declaration (*Form No. 152*), 567, note.
see "Parties."

ACTION FOR PENALTY:
form of, to recover, 85.
debt, the proper form, 89.
when case the proper form, 183.
on *habeas corpus*, 1161, note.
see "Penalties."

ACTIONS, PERSONAL:
what are, 50.
attachment is to certain extent, 293.
attachment is because of personal service, 337.

ACTION, PLEAS TO:
see "Pleas in Bar."

ACTION, PREMATURE:
plea in abatement for, 665, note.

ACTIONS, REAL:
what are, 50.

ACTION IN REM:
attachment is to certain extent, 293.
attachment is by virtue of levy, 337.

ACTION FOR RENT:
assumpsit proper when, 78.
when to be brought on lease, 81.
terminated by forcible entry and detainer, 1216, note.
see "Rent" and "Covenant."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

ACTION OF REPLEVIN:

- how classified, 50.
- when concurrent with action for trespass, 120.
- nature of, 155.
- how begun, 155.
- when it will lie, generally, 156.
- title necessary to support, 157.
- by vendee when title has passed, 158.
- for injury to goods held on condition, title to remain in vendor, 159.
- for goods sold, title not to pass, etc., 159.
- for goods, possession obtained through fraud, etc., 160.
- on rescission of contract of sale of goods, tender necessary, 160.
- for goods delivered by mistake, 160.
- by and against co-tenant, partner, 161.
- for distress of cattle damage feasant, 162.
- against officer for unlawful seizure under process, 163.
- when it will not lie generally, 164.
- wrongful detention necessary to sustain, 164.
- identification of property necessary to, 164.
- for property held under tax levy, 165.
- demand in, who must make, 165.
- when demand necessary before suit, 166.
- when demand unnecessary, 168.
- when to be begun, 169.
- where to be brought, 170.
- affidavit in, 171.
- the writ, 172.
- the bond in, 173.
- return of bond with writ, 174.
- execution of writ in, 175.
- bond of indemnity in, 175.
- pleading in, 177.
- judgment, verdict, 178.
- suit on bond, 180.
- will not lie for goods sold on misrepresentation, 233.
- will not lie for attached property by claimant, 345.
- see "Replevin."

ACTION, SECOND:

- prevented by *supersedeas* on writ of error, 1051, note.

ACTIONS, SURVIVAL OF:

- generally, 21.
- under statute and at common law, 29.
- in trover, 147.
- see "Trover" and "Survival."

ACTIONS FOR TORTS:

- plaintiffs in, generally, 26.
- who to join as, 27.
- when interest assigned, 28.
- when a party dies, 29.
- in case of marriage, 30.
- in case of infancy, 31.
- in case of insanity, 32.
- defendants as between original parties, 41.
- in case of death, 42.
- for acts of animals, 43.

[The references are to sections: Vol. I., §§ 1-797; Vol. II., §§ 788-1276.]

ACTIONS FOR TORTS—Continued.

- defendants as between original parties, who to be joined or omitted, 44.
 - where interest is assigned, 45.
 - if wrong doer dies, 46.
 - when wrong doer marries, 47.
 - in case of infant wrong doer, 48.
- abatement of by compromise, 57.
- not waived if *assumpsit* dismissed, 57.
- trespass, 112.
- classification of, 112.
- defense in, 131.
- attachment in aid of, 351.
- declaration in generally, 582.
 - statement of plaintiff's right or interest in subject matter, 584.
 - averments of matter or thing affected, 583.
 - avermment of defendant's obligation or duty, 585.
 - avermment of injury, when immediate, 586.
 - avermment of injury, when consequent, 587.
 - variance between declaration and proof, 588.
 - avermment of damages, 589.
 - replevin (*Form No. 203*), 593.
 - trover (*Forms Nos. 204-207*), 594.
 - case, 595.
 - against bailees, case (*Forms Nos. 208-210*), 596.
 - for negligent driving, case (*Forms Nos. 211-212*), 597.
 - against common carriers for negligence, case (*Forms Nos. 213-216*), 598.
 - against railroad companies for negligence, case (*Forms Nos. 217-224*), 599.
 - against municipal corporation for negligence, case (*Forms Nos. 225-230*), 600.
 - declaration in case for (*Form No. 231*), 601.
 - regarding animals, case (*Forms Nos. 234-237*), 603.
- declaration in case upon warranty (*Form No. 238*), 604.
- fraud and deceit (*Forms Nos. 239-243*), 605.
 - criminal conversation (*Forms Nos. 244-246*), 606.
 - for malicious prosecution and false imprisonment (*Forms Nos. 247-250*), 607.
 - for seduction, case (*Form No. 251*), 608.
- action for tort, declaration in case for enticing away workmen (*Form No. 252*), 609.
- negligence, in practice of profession (*Forms Nos. 253-255*), 610.
 - for waste (*Forms Nos. 256-257*), 611.
 - for negligence of officer (*Forms Nos. 258-261*), 612.
 - for negligence regarding boats and vessels (*Forms Nos. 262-265*), 613.
 - for negligence of warehouse men (*Form No. 266*), 614.
 - for negligence regarding water course (*Forms Nos. 267-270*), 615.
 - for obstructing highway (*Forms Nos. 271-272*), 616.
 - for neglect to produce documents on notice, etc., (*Form No. 274*), 617.
 - for libel (*Forms Nos. 275-281*), 618.
 - for slander (*Forms Nos. 282-291*), 619.
- justification in, must be specially pleaded (*Form No. 348*), 710, note.
- for slander, proof in, 818, note.
- for malicious prosecution, proof in, 818, note.
- judgment, when several defendants, 994.
- new trials in, granted less seldom than in actions on contract, 972, 973.
- see "Torts."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

ACTION, TRANSITORY:

when trespass is, 133.

ACTION OF TRESPASS:

how classified, 50.

generally, 112.

nature of, 113.

when the proper form, 114.

for injury only, 115.

when it will lie for taking fish, 116.

for injuries to personal property, 116.

possession or right of, necessary to sustain, 117.

when tenants in common may maintain, 117.

for injury by animals, 118.

concurrent with trover, when, 119.

when concurrent with action for replevin, 120.

for injuries to real estate, 121.

possession necessary to support, 123.

gist of, injury to possession, 123.

for cutting trees, 124.

for injury to orchard, 125.

for injury to garden, yard or field, 126.

for injury to land by domestic animals, 127.

for injury to land by wild animals, 128.

for injury under color of legal proceedings, 129.

against judicial officer, 130.

against one or more trespassers, 131.

waiver of, and suing in *assumpsit*, 132.

when to be begun, 133, 134.

concurrent with trover, when, 137.

will lie against officer for property held under tax levy, 165.

landlord liable to, after distress for rent, when, 1221, note.

for fire escaping from engine, proof in, 818, note.

see "Trespass."

ACTION OF TRESPASS ON THE CASE:

nature of, 183.

for damages to reputation, 184.

for slander, generally, 185.

words actionable in themselves, 186.

words not actionable, may become so, 187.

when words actionable in themselves, not, 188.

of title to land, 189.

words charging adultery, 190.

accusing one of false swearing, 191.

gist of action, 192.

words must have been understood, 193.

liability, generally, 194.

publication in good faith, 195.

publication in newspapers, 196.

when punishable as contempt of court, 197.

slander and libel, when action to be begun, 198.

for malicious prosecution, 198.

falsity of the charge, 200.

malicious prosecution, malice and probable cause must concur, 201.

what is probable cause, 202.

when malice will be inferred, 203.

advice of counsel as a defense, 204.

damages resulting from, 205.

of civil action, 206.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

ACTION OF TRESPASS ON THE CASE—Continued.

- malicious prosecution, when to be begun, 207.
- for false imprisonment, 208.
 - what constitutes, 209.
 - wherein it is false, 210.
 - pleading and proof in, 211.
- for assault and battery, 213.
- for seduction, 214.
- for enticing servant to leave employment, 215.
- for criminal conversation, 216.
 - when to be begun, 217.
- for breach of promise of marriage, 218.
- for damages resulting from negligence, 219.
- negligence, when a fact or law, 221.
 - what is "slight," what is "gross," 222.
- for negligence, what will sustain recovery, 223.
 - contributory negligence, rule, 224.
 - when contributory rule will not apply, 226.
 - causing death, 227.
 - of municipal corporation, 228.
 - of servants, 229.
- for contributory negligence of servant, 225.
- for injury caused by intoxicating liquor, 230.
- for injury to property, 231.
 - occasioned by improper custody and use, 232.
- for damages occasioned by fraud and deceit, 233.
- for damages occasioned by waste, 234.
- for nuisance, 235.
- for injury to the person, when to be begun, 236.
- for injury to property, when to be begun, 236.
- for goods fraudulently sold, may be begun before price due, 237.
- for obstruction of the public highway, 242.
- advantages over other forms of action, 237.

ACTION, TRIAL OF:

- when begun by *capias*, 460.
- see "Trial."

ACTION OF TROVER:

- how classified, 50.
- nature of, 136.
- equitable in its nature, 152.
- gist of, the finding, 136.
- bars trespass, 136.
- concurrent with trespass, when, 137.
- conversion, what constitutes, 138.
- when it will lie, 139.
- when it will lie at suit of bailee, 140.
- rests on strength of plaintiff's right, 141.
- purpose of, 142.
- application of the remedy, 143.
- against one who has acquired no title, 144.
- at suit of a wife, 145.
- by and against tenants in common, 146.
- by and against executors, etc., 147.
- by mortgagee of chattels, 148.
- demand necessary before suit, when, 149.
- demand not necessary when, 150.
- demand in, by and of whom made, 151.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 781-1276.]

ACTION OF TROVER—Continued.

- amount of damages recoverable in, 152.
- will lie though property returned, 152.
- new trial in, 153.
- judgment in, 154.
- by and against co-tenant, partner, 161.
- for grain in warehouse, 164.
- will lie for property seized under tax levy, 165.
- for money lost at gaming, declaration for (*Form No. 204*), 594, note.

ACTION FOR USE:

- on contracts under seal, 59.
- set-off in, 724, note.
- see "Use," etc.

ACTIONABLE DAMAGES:

- recoverable only in trespass when, 114.
- see "Damages."

AD DAMNUM CLAUSE:

- in declaration controls recovery in, 524.
- increased after verdict, 524.
- effect on judgment in attachment, 347.
- amendment of, 487.
- see "Declaration."

ADDITIONAL PLEAS:

- right to file generally, 718.
- see "Pleas."

ADDITIONAL COUNTS:

- to declaration may be added any time before judgment, 525.
- see "Counts" and "Declaration."

ADJOURNMENT:

- of county court, 10.
- of city courts, 11.
- of circuit court, 9.
- of courts from day to day, 6.
- see "Courts."

ADMINISTERING OATHS:

- disability of counsel from, 1262.
- see "Oaths" and "Attorneys."

ADMINISTRATION:

- plea of (*Form No. 338*), 710.

ADMINISTRATORS:

- as defendants in actions on notes assigned, 35.
- form of declaration by, on promise to intestate (*No. 55*), 513.
- laying debt to intestate on promise to plaintiff (*No. 56*), 513.
- on cause of action arising after death of intestate (*No. 57*), 515.
- on promise by intestate (*No. 58*), 513.
- laying debt from intestate, promise by administrator (*No. 59*), 513.
- on cause of action arising after death of intestate (*No. 60*), 513.
- see "Executors," etc.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

ADMINISTRATOR'S BOND:

form of action to be brought upon, 91.

see "Bonds."

ADMISSION OF AFFIDAVIT:

in evidence, instead of continuance, 793.

ADMISSION TO THE BAR:

see "Admission to Practice Law."

"ADMISSIONS:"

as evidence, generally, 847.

what are not evidence, 847, note.

of attorney, how far evidence, 847, 1268.

facts not denied by plea, 822.

by plea of general issue, 691, 692.

by demurrer to replication, 738, note.

by demurrer to evidence, admits what, 921.

by judgment by default, 995.

by *similiter*, 734, note.

ADMISSION OF EVIDENCE:

objection to, rule governing, 895.

error in, how far cured by striking out, 898, 902.

how far cured by instruction, 939.

ground for new trial, when, 974.

see "Evidence" and "Error."

ADMISSION TO PRACTICE OF LAW:

rule governing, 1233.

who intitled to, 1234.

how procured, 1235.

upon examination, 1236.

upon diploma issued by a law school, 1237.

oath required (*Form No. 403*), 1240.

roll of names, 1241.

license, by whom issued, 1242.

a judgment of the court, 1243.

in United States Supreme Court, form of oath (*No. 404*), 1244.

after suspension or removal, 1251.

ADULTERY:

words charging is slander, 190.

ADVANCEMENT IN LAW:

illustrated by liability of attorneys to arrest, 1253.

ADVERSE POSSESSION:

as defense to ejectment, generally, 270.

by tenant in common, 271.

see "Ejectment."

ADVERTISEMENT:

for service of process upon corporation, 441.

ADVICE OF COUNSEL:

as defense in malicious prosecution, 204.

see "Malicious Prosecution."

ADVISEMENT:

taking case under, rule, 991.

taking case under in upper court, record of, 1096.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1278.]

AFFIRMATION OF WITNESS:
instead of oath (*Form No. 362*), 838.

AFFIRMANCE OF JUDGMENT:
what implied by, 1020, note.
see "Judgment."

ADVOCATE:
definition of, 1231.
see "Lawyer" and "Attorney at Law."

AGE OF CONSENT:
in child, 214, note.

AGENCY:
is matter of proof and not of pleading, 596, note.

AGENT:
when may sue in his own name, 16.
may not testify when, 826, 827.
may make affidavit in attachment, 300.
principal liable for tort of, when, 41.
as defendants in actions on contract, 33.
of corporation, who is not to receive service of process, 441, note.
possession by, sufficient to sustain trespass, 117.
declaration by and against, forms of in trespass on the case, 595.
in *assumpsit* for not accounting for goods etc., entrusted to him to
sell (*No. 61*), 526.
in *assumpsit* for not using due care in selling goods (*Form No.*
62), 526.
in *assumpsit* for not obeying orders in selling goods (*Form No.*
63), 526.
against, in *assumpsit* for selling part under price, not accounting
for, delivering, etc. (*Form No. 64*), 526.
against in *assumpsit*, warehouseman for not forwarding goods,
etc. (*Form No. 65*), 526.
against, in *assumpsit*, warehouseman for not forwarding goods,
(*Form No. 66*), 526.
in *assumpsit* on implied promise that he had authority to sell, etc.
(*Form No. 67*), 526.
del credere, declaration against in *assumpsit* on his guaranty (*Form*
No. 68), 526.
forwarding.
see "Warehouseman."

AFFIDAVIT, CAPTION TO:
necessity for, 713.
entitling, necessity for, 713.
when to be entitled, in the cause, 550, note.
should be signed by affiant, 171, note.
the words "before me" necessary in *jurat*, 171, note.
attestation added by amendment, 550, note.
admission of, in evidence, instead of continuance, 793.
requisites of, to support motion for, 793.
on application for admission to the bar, 1236.

AFFIDAVIT, AMENDMENT OF:
of plaintiff's claim, 550.
in replevin, 171.
for continuance, 793, note.
see "Amendment."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

AFFIDAVIT IN ATTACHMENT:

formal parts, etc., 299.
 who shall make, 300.
 when to be made, 301.
 how entitled, 302.
 contents of, 303.
 form of (*No. 4*), 303.
 amendment of, 315.
 insufficiency of, grounds for dissolution, 341.
 in attachment on a judgment, 304.
 in attachment in aid, 351.
 see "Attachment."

AFFIDAVIT FOR CAPIAS:

form of (*No. 23*), 451.
 see "*Capias ad respondendum*."

AFFIDAVIT FOR CONTINUANCE:

admitted as evidence instead of granting continuance, 791, 792, note.
 see "Continuances."

AFFIDAVIT OF CLAIM:

to be filed with declaration, general rule governing, 550.
 effect of omission, 550.
 what it must contain, 550.
 who may make, 550.
 amendment of, 550.
 form of (*No. 141*), 550.
 when objection to be made, 895, note.
 may be filed after plea, when, 712, note.
 prima facie proof, 801.
 see "Declaration."

AFFIDAVITS, COUNTER:

to motion to set aside default, 802.
 when motion made to set aside judgment confessed, 999.
 see "Motions."

AFFIDAVIT DENYING EXECUTION OF WRITTEN INSTRUMENT:

and affidavit of merits distinguished, 711, 712.
 see "Declaration" and "Affidavit of Merits."

AFFIDAVIT, FORM OF:

in replevin (*No. 1*), 171.
 for attachment on ground of fraudulent conveyance, 311, note.
 in garnishment on judgment (*No. 8*), 357.
 of plaintiff's claim to be filed with declaration (*No. 141*), 550.
 denying execution or assignment of written instrument (*No. 351*), 711.
 for placing case on short cause calendar (*No. 358*), 783.
 for continuance (*No. 360*), 793.
 see "Form of Affidavit."

AFFIDAVIT IN GARNISHMENT:

form of, on judgment (*No. 8*), 357.
 see "Garnishment" and "Form of Affidavit."

AFFIDAVITS OF JURORS:

not received to contradict verdict, 949, 968.
 to sustain verdict, 968.
 see "Jurors."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

AFFIDAVIT OF MERITS:

- to be filed with plea, general rules, 712.
- requisites of, 713.
- and affidavit denying execution of written instrument distinguished, 711, 712.
- right to file plea without, 712, note.
- extension of time to file, 712.
- objection to, when to be made, 895, note.
- amendment of, 712.
- to be filed with plea (*No. 352*), 713.
- see "Pleas."

AFFIDAVIT OF SERVICE:

- of motion (*Form No. 357*), 773.
- see "Service."

AFFIDAVIT IN SUPPORT OF MOTION:

- when required, 774.
- for continuance, 791, 793.
- to set aside judgment, 999, 1007.
- to set aside award, 1195.
- no part of record without bill of exceptions, 1023, note.
- in upper court, when required, 1095.
- see "Motions."

AFFIDAVIT FOR QUO WARRANTO:

- in support, 1127.
- in defense, 1127.
- see "Quo Warranto."

AFFIDAVIT FOR NEW TRIAL:

- on ground of absence or illness of counsel, 969.
- on ground of surprise, 970.
- on ground of newly discovered evidence, requisites of, 971.
- see "New Trial."

AFFIDAVIT OF TRUTH OF PLEA:

- required when dilatory, 673.
- form of, of plea in abatement, (*No. 302*), 674.
- see "Pleas" and "Verification."

AFFIDAVIT IN REPLEVIN:

- rule governing, 155, 171.
- made on information and belief, 171, note.
- must contain description of property, 171.
- must be sworn to, 171, note.
- statement of, venue in, 171, note.
- and writ, effect of variance in, 171.
- objection to, when to be urged, 171.
- form of, 171.

AGGRAVATION OF SLANDER:

- when plea of justification is (*Form No. 348*), 710, note.
- see "Slander."

"AGREED:."

- and not "promosed," to be used in declaration in debt, 503, 553.
- see "Declaration."

AGREED CASE:

- in lieu of bill of exceptions, rule regarding, 1029.
- see "Bill of Exceptions."

[The references are to sections: Vol. I., §§ 1-737; Vol. II., §§ 738-1276.]

AGREEMENT TO ARBITRATE:

revokable at pleasure when, 1184.

(*Form No. 388*), 1182.

see "Arbitration and Award."

AIDING AND ABETTING:

assault, effect of, 115.

ALIA ENORMIA:

averment of in declaration (*Form No. 184*), 590, note.

see "Declaration."

ALIAS SUMMONS:

when may be issued in commencement of suit, 435.

see "Summons."

ALIAS WRIT:

in replevin, 172.

of *scire facias* on writ of error, issuance of, 1054.

see "Writ."

ALLEGATIONS:

necessary in action on note, 83.

see "Averment" and "Declaration."

ALLOWANCE:

of *capias ad res.*, endorsement of, 452.

Form of (No. 24), 452.

see "*Capias Ad Respondendum.*"

ALTERNATIVE JUDGMENT:

in replevin, 178.

see "Judgment" and "Replevin."

ALTERNATIVE WRIT:

of *mandamus* superseded by petition, 1108.

see "Mandamus" and "Writ."

AMBIGUITY:

in written instrument, how explained, 868.

see "Evidence" and "Proof."

AMEND:

leave to, on demurrer, 737, note.

see "Demurrer."

AMENDMENTS:

statute of, and jeofails, 740.

discretion of court regarding must be sound, 742.

permission for, on judgment on demurrer, 640.

when refusal an error in law, 742, note.

unnecessary in declaration as to name of parties, when, 483.

how made, 746.

for what and when may be procured, 741.

order of court for must be procured, 744.

motion for, necessity of, 744.

when cause for continuance, 745, 791, note.

continuance for procuring, 1058.

on terms, terms must be equitable, 742.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

AMENDMENTS—*Continued.*

- lost pleadings supplied by, 747.
- after demurrer, proper when, 638.
- effected by judgment, generally, 1000.
- by plaintiff, when judgment confessed in vacation set aside, 999, note.
- effected by verdict, 950.
- after judgment, when allowable, 743.
- supplied by the court, 751.
- after motion for new trial overruled, 976, note.
- new pleadings admitted after, 746.
- in *quo warranto* proceedings, 1129.
- in replevin, 177.

AMENDMENT OF AFFIDAVIT:

- in replevin, 171.
- for attachment, 315.
- attestation added by, 550, note.
- of plaintiff's claim, 550.
- of merits, 712.
- for continuance, 793, note.
- see "Affidavit."

AMENDMENT, OF BILL OF PARTICULARS:

- see "Bill of Particulars."

AMENDMENT OF BILL OF EXCEPTIONS:

- rule governing, 1028.
- proposed, 1024.
- see "Exceptions" and "Bill of Exceptions."

AMENDMENT OF BOND:

- of appeal from justices court, 419.
- in forcible entry and detainer, 1219, note.
- to appellate or supreme court, 1034.
- see "Bond."

AMENDMENT OF COMPLAINT:

- in forcible entry and detainer, 1211, note.
- see "Forcible Entry and Detainer."

AMENDMENT TO DECLARATION:

- rules relating to, 741.
- new plea after, 746.
- as to names of defendants, when allowed, 487.
- for variance, when to be made, 487.
- in matter of substance, when allowed, 487.
- for failing to allege representative capacity, 513, note.
- in distress for rent, 1226.
- see "Declaration."

AMENDMENT OF JUDGMENT:

- as to facts, 1002.
- as to form, by judge's minutes after expiration of term, 900.
- see "Judgment."

AMENDMENT OF PETITION:

- or answer, in *mandamus*, 1110.
- see "Mandamus."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

AMENDMENT OF PLEA

when uncertain, 715.
in abatement, not generally allowed, 671.
see "Plea."

AMENDMENTS OF PLEADINGS:

generally, 740.
to cure variance in proof, 819.
amendment of sworn pleadings, 746.
see "Declaration" "Demurrer" and "Plea."

AMENDMENT OF PROCEEDINGS:

on appeal from justices court, 419.
see "Appeal" and "Removal of Causes."

AMENDMENT OF RECORD:

power, in term time, 6, 1058.
after term, 9, note.
after term, how made, 743.
after judgment, 743, 1058.
cannot be made by bill of exceptions, 1023.
procured by writ of *certiorari*, 1044.
supersedens no obstacle to, 1058, note.
by trial court, 1058, note.
cost, terms, 1058, note.
see "Record."

AMENDMENT OF RETURN:

generally, 448, 748.
of summons, when may be made without consent of court, 436.
see "Return."

AMENDMENT OF SUMMONS:

generally, 434.
see "Summons."

AMENDMENT OF VENIRE:

generally, 749.
see "Jury" and "Venire."

AMENDMENT BY VERDICT:

to what extent effected, 750.
of Irregularities of, on change of venue, 768.
see "Verdict" and "Jury."

AMENDMENT OF WRIT:

in attachment, 319.
see "Writ."

AMOUNT:

variance in proof of, 819, note.
see "Evidence" and "Proof."

ANCIENT LIGHTS:

see "Lights."

ANIMALS:

duty of owner of, 43.
to keep enclosed, 127.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1278.]

ANIMALS—Continued.

- reason for owner's liability, 128.
- trespass of, who liable for, 127.
- trespass to and by, declarations in case for (*Forms Nos. 234-237*), 603.
- liability for act of, in driving along highway, 43.
- of a tame nature, which are, 43.
 - trespass for injury to, 116.
 - liability for, 43.
 - trespass for injury to, 116.
- of a wild nature, who liable for acts of, 43.
 - liability for trespass of, 128.
- killing of, when justifiable, 118.
- domestic, trespass for injury to, 118.
 - liability for injury done by, 118.
 - trespass for injury to land by, 127.
- liability of railroad for killing, 231.
- attached, disposition of, 336.
- declaration in trespass for injury by chasing (*Form No. 194*), 591, note.
- negligence in keeping bull, declaration in case for (*Form No. 236*), 603.
- taken "damage feasant," plea in action for, 708.
- number of, variance in proof of, 819, note.
- when trespass will lie for injury to, 116.
- joinder of defendants for damages by, 44.
 - see also "Domestic Animals."

ANSWER TO FORCIBLE ENTRY AND DETAINER:

- writ of restitution (*Form No. 398*), 1218.
- see "Forcible Entry and Detainer."

ANSWER OF GARNISHEE:

- taken as true unless questioned, 365.
- must be in writing, etc., 367.
- when must be filed, 367.
- must show exempt character of fund or property, 368.
- must assert his defenses, 369.
- will prevail unless questioned by plaintiff, 369.
- questioned by demurrer, replication, etc., of plaintiff, 369.
- should claim set-off, 370.
- must not be evasive or uncertain, 371.
- considered as evidence, 371.
- issue on, 372.
- proceedings, when unsatisfactory, 372.
- second or supplemental, 373.
- see "Garnishment."

ANSWER IN MANDAMUS:

- construction of, 1110.
- demurrer to, 1110.
- pleas, 1110.
- amendment of, 1110.
- see "Mandamus."

APPEAL:

- right of, did not exist at common law, 1013.
- who may obtain, 1014.
 - joint defendant not entitled to, on his default, 995.
- what reviewed on, generally, 1013.
- none of interlocutory orders, 1013, note.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

APPEAL—Continued.

- cannot be taken from order sustaining demurrer, 640, note.
- when *certiorari* preferable to, 393.
- when may be taken to county court, 10.
- from county court to circuit court, 10, note.
- trials of, 10, note.
- from county court to supreme court, 10, note.
- from city courts, 11.
- in action of account, 111.
- in replevin, 1019, note.
- from attachment proceedings, 354.
- in garnishment, how taken, 386.
- from *quo warranto* proceedings, 1137.
- from *habeas corpus*, not granted, 1158.
- from arbitration and award, 1197.
- from forcible entry and detainer, 1219, 1019, note.
- dissolution of, in forcible entry and detainer, 1219, note.
- from proceedings to disbar attorneys, 1251.
- costs on, division of, 1011.
- jurisdiction on, given by appearance, 418.
- when acquired by upper court, 420.
- see, also, "Review" and "Writ of Error."

APPEAL TO APPELLATE OR SUPREME COURT:

- appeal and writ of error, two methods of obtaining review, 1015.
- when it will lie to the supreme court, generally, 7.
- jurisdiction of appellate court in, 8.
- to what court may be had, 1016.
- when from trial court to supreme court, cases enumerated, 1017.
- goes to grand division in which pending, 1017.
- when from trial court to appellate court, 1018.
- how procured, last resort, 1019.
- when from appellate court to supreme court, 1019.
- when not from appellate court to supreme court, 1020.
- when there are several parties, 1030.
- who may take, 1030.
- review by writ of error, after time for appeal expired, 1031.
- when may be taken, 1031.
- how prayed, practice, 1031.
- when latter alone available, 1031, 1038.
- amendment of record procured by *certiorari*, 1058.
- transcript of record, clerk may be directed what to include in, 1060.
- of what it must consist, 1058.
- when cause removed from appellate to supreme court, 1059.
- when to be filed, placing case on docket, 1061.
- time for filing transcript, etc., 1061.
- assignment of error, 1062.
- in supreme court when reviewing appellate court decision, 1063.
- (*Form No. 373*), 1064.
- cross-errors, 1065.
- motion to dismiss in upper court must be made before joinder in error, 1065, note.
- joinder in error, effect of omission, 1066.
- time to plead when defendant does not join, 1067.
- abstract of evidence, preparing and filing, 1068.
- what it shall contain, 1069.
- when to be filed, default, 1070.
- further abstract, 1071.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 778-1276.]

APPEAL TO APPELLATE OR SUPREME COURT—*Continued.*

- brief, preparing and filing, 1072.
 - when to be filed, 1073.
 - number of copies to be filed, 1074.
- docketing and hearing cases, 1075.
 - argument of counsel, 1076.
 - no oral argument heard on motion for rehearing, 1077.
 - time allowed for oral argument, 1078.
- judgment, generally, 1079.
 - of affirmance, execution, 1080.
 - of reversal in whole, execution, 1081.
 - of reversal in part, execution, 1082.
 - of dismissal, execution, 1083.
- motion to dismiss, in supreme court, 1083, note.
- remanding cause, retrial, when unnecessary, 1084.
- practice on retrial, 1085.
 - petition for, 1086.
 - notice, filing, 1087.
 - no argument permitted in support of petition for, 1088.
 - supersedeas or stay of proceedings, 1089.
 - redocketing case, 1090.
 - record, abstract, brief, and argument, 1091.
 - closing argument of petitioner, 1093.
 - reply to petition, 1092.
 - oral arguments, conclusion, 1094.
- motions in courts of review, 1095.
- change of venue in courts of review, 1096.
- second, practice, 1084, note.
 - see, also, "Review."

APPEALS FROM JUSTICE'S COURT:

- new plaintiff may be joined on, 409.
- on judgment regarding penalty, 409, note.
- cannot be from confession of judgment, 409.
- who may take, and when, 409.
- must be on final judgment, 409.
- on judgment regarding penalty, 409, note.
- what is a "judgment" from which appeal will lie, 410.
- to what court may be taken, 411.
- time for taking from, 412.
- within what time to be taken, 412.
- when to be taken in forcible entry and detainer cases, 412.
- how to be taken, filing bond, 413.
- how made a supersedeas, 413.
- practice in supersedeas, 413.
- form of bond (*No. 14*), 414.
- in forcible entry and detainer, 415.
- filing transcript of justice, 416.
- walverer of irregularities by taking, 417-418.
- amendment of proceedings on, 419.
- when jurisdiction acquired by upper court, 420.
- dismissal of, 421.
 - for want of prosecution, 421.
- motion to vacate, when to be made, 422.
- setting aside dismissal, 422.
- pleading required in, 423.
- jurisdiction of court on, no greater than justices' court, 424.

[The references are to sections: Vol. I., §§ 1-797; Vol. II., §§ 788-1276.]

APPEALS FROM JUSTICE'S COURT—Continued.

trial of, 424.
damages and costs, 425.

APPEALS FROM COUNTY COURT:

to circuit court, 1016, note.

APPEAL FROM CIRCUIT COURT TO SUPREME COURT:

after appeal from county court, 1016, note.

APPEAL BOND:

from justice court, when to be filed, 413.
objections to, when to be made, 414.
how to be executed, 414.
form (*No. 14*), 414.
new discharges old, 419, note.
action on, plea to, 703, note.
debt will lie upon, 92.
in forcible entry and detainer (*Form No. 399*), 1219.
condition of, 1219.
amendment of, 1219, note.
action on, 1219, note.
from county court, 10, note.
appellate or supreme court court to fix, practice, 1031.
when to be filed, 1032.
conditions of, 1032.
form of (*No. 370*), 1032.
when not required, 1032, note.
when not for payment of money, 1032, note.
presumption of power of attorney to sign as surety, 1032, note.
security may be approved by clerk, 1033.
approval of security, when unnecessary, 1033.
insufficient, effect, amendment, 1034.
irregularity in, waived by stipulation, 1034, note.
sureties on, *soire facias* against, 1169.

APPEARANCE:

of defendant, effect of, generally, 628, 629.
personal, equivalent to personal service in attachment, 292.
what is not, 628, note.
when to be entered, 630.
limitation of, in suit, how effected, 631.
by appealing from justice court, 418.
effected by demurrer, 629, 630, 633.
by bond to pay judgment in attachment, 332.
in attachment, a forthcoming bond is, 331.
filing plea or giving bond is, 340.
general, of defendant, equivalent to service of process, 436, 439.
after appeal from justice' court, 417.
of counsel, rule governing, 1266.
"special," to move to quash attachment allowed, 292.
after appeal from justice's court, 417.
in attachment, effect of, 340.
of defendant, not a submission to jurisdiction, 439.
of counsel, rule governing, 1266.
how made, 631.
voluntary, equivalent to personal service in attachment, 292, 340.
entry of, by attorney, liability when unauthorized, 1263.
by counsel, generally, rule governing, 1266.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 783-1270.]

APPEARANCE—Continued.

withdrawal of, by attorney, 1267.
by mistake, how set aside, 629.
on writ of error, 1055.

APPEARANCE AND RETAINER:

appearance, generally, 1266.
client's right to counsel, 1264.
contract of retainer, 1265.
death ends; contract of, 1265.
withdrawal of appearance, substitution of attorneys, 1267.
of attorney not necessary, party may manage his own case, 1244,
1268, note.
see "Attorney and Client."

APPELLANT:

which party is, 12.
see also "Parties."

APPELLATE COURTS:

number of, 2.
jurisdiction of, 8.
appeal to, when must be taken, 1018.
when appeal will lie to, after supreme court, 1019.
finding of, on questions of fact, final when, 1019.
when cases reviewed by, not reviewed in supreme court, 1020.
pleading and practice in, same as supreme court, 1022.
who may appeal to, 1030.
when appeal may be taken to, 1031.
appeal bond to, 1032.
security may be approved by clerk, 1033.
security, when approval unnecessary, 1033.
effect when insufficient, amendment, 1034.
appeal to, filing the record, 1035.
writ of error from, generally, 1036.
definition and nature of, 1037.
time for begins to run at entry of final judgment, 1038.
what the record must show, 1038.
when it will lie, 1038.
when it will not lie, 1039.
within what time may be sued out, 1041.
by and against whom to be sued out, 1040.
dismissal of, 1042.
appeal to, time for filing transcript, etc., 1061.
assignment of error, when judgment reviewed in supreme court,
1063.
judgment of, must be incorporated into record for review in su-
preme court, 1059.
see, also, "Courts" and "Jurisdiction."

APPELLATE JURISDICTION:

what is, 5.
of supreme court, 7.
see "Jurisdiction."

APPELLEE:

which party is, 12.
see, also, "Parties."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

APPLICATION FOR MANDAMUS:

see "Petition" and "Mandamus."

APPLICATION FOR CONTINUANCE:

see "Motion for Continuance."

APPLICATION OF PROCEEDS:

of sale in garnishment, 383.

see "Garnishment" and "Sale."

APPLICATION FOR SUPERSEDEAS:

on writ of error, practice, 1051.

see "Writ of Error" and "Supersedeas."

APPOINTMENT OF AUDITORS:

to hear report in action of account, 105.

see "Action of Account" and "Account."

APPOINTMENT OF REFEREE:

his power, etc., 1199.

see "Referees and References."

APPOINTMENT OF SPECIAL DEPUTY:

form, 436.

see "Officers," "Deputies," and "Sheriffs."

APPROVAL OF SECURITY:

in appellate or supreme court, by clerk, 1032.

on bond in replevin, 173.

see "Bond" and "Sureties."

APPORTIONMENT OF COSTS:

rule, 1011.

see "Costs."

ARBITRAMENT:

may be shown under general issue, 692.

pleaded specially in *assumpsit*, 702.

pleaded specially in debt, 703.

see "Arbitration and Award."

ARBITRATION:

who may submit to, 1181.

arbitrators must be sworn, 1182.

at common law, matters not in suit, 1182.

agreement to make, revocable at pleasure when, 1183.

(*Form No. 388*), 1182.

submission to at common law, who may make, 1182.

under the statute, in suits pending, 1183.

effect of, award, 1184.

award conclusive and why, 1184.

abandonment of award, remits party to original rights, 1184.

impeachment for fraud, 1184.

who may be chosen as arbitrators, 1185.

continuances on, 1186.

duty of arbitrators, to appoint a hearing, continuances, 1186.

arbitrators must be put on oath, 1187.

award must be made on day set for hearing, 1188.

witnesses, subpoenaed for, 1188.

hearing, etc., 1188.

proceedings at, 1188.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

ARBITRATION—*Continued.*

- arbitrators, compensation of, 1188, note.
- extent of, 1189.
- form of (*No. 389*), 1189.
- filing award in court, 1190.
- judgment on award, 1191.
- judgment on, for other than the payment of money, 1192.
- award set aside for fraud, 1193.
- mistake in award, 1193.
- award, requisites of, 1189.
- publication of, 1189.
- correction of irregularities in form, 1194.
- how attacked, 1195.
- time to set aside or modify, 1195.
- affect of setting aside, 1196.
- review of, 1197.

ARBITRATION AND AWARD:

- origin and nature of, 1180.
- award controlled by submission, 1181.
- form of averment of in special plea or notice with general issue (*No. 320*), 710.
- see "Arbitration" and "Arbitrators."

ARBITRATORS:

- authority of rest on agreement, 1180.
- must be sworn, 1182.
- competency of, 1185.
- who may be chosen as, 1185.
- duty of, to appoint a hearing, continuances, 1186.
- must be put on oath, 1187.
- compensation of, 1188, note.
- misconduct of, award set aside for, 1193.
- see "Arbitration."

ARGUMENT OF COUNSEL:

- client entitled to as a matter of right, 806, 1256.
- privilege regarding, 1256.
- should be restricted to evidence and case, 1256.
- reading of books in, 854.
- limitation of time for, 906.
- may be excepted to and assigned for error, 907.
- scope of, 907.
- not to read law to jury, 907.
- exceptions to, when may be taken, 908.
- error in, how availed of, 908.
- where several united, 909.
- improper remarks in, ground for new trial, when, 967.
- reviewed only by aid of bill of exceptions, 1023.
- in upper court, may be waived, 1076.
- rule governing, 1076.
- oral, time allowed for, 1078.
- upon rehearing in upper court, 1091.
- oral, on rehearing, conclusion, 1094.
- oral, not permitted, on motion for rehearing, 1077, 1088.
- closing argument of petitioner, 1093.
- exceptions to ruling of court on objections to, 1256.
- see "Opening Statement."

ARGUMENT TO JURY:

- by counsel, rule governing, 906, 907.

[The references are to sections: Vol. I., §§ 1-787: Vol. II., §§ 788-1276.]

ARGUMENT OF DEMURRER:

generally, 639.

see "Demurrer."

ARREST:

liability of attorney to, 1253.

privilege of attorney from, 1253.

see "False Imprisonment."

ARREST OF DEFENDANT:

in civil cases, 455.

on *capias ad respondendum*, 455.

on criminal warrant discharges bail in *capias* cases, 460.

on *capias* proceedings surety may arrest defendant until surrendered, 469.

see "Capias," etc.

ARREST OF JUDGMENT:

wrong name of plaintiffs ground for, 19.

for misjoinder of plaintiffs, 19.

misjoinder of plaintiffs ground for, in actions for torts, 27.

misjoinder of defendant in torts, ground for, 44.

for insufficiency of declaration, 482.

motion for, nature of, 979.

and new trial compared, 979.

motion for, supported by points in writing, 981.

when to be made, 980.

how to be made, 981.

for insufficient declaration 633, note.

for variance in proof, 819.

not entertained after demurrer, 640, note.

after overruling motion for new trial, 976.

will be granted when, 979.

when not granted for irregularities, 750.

effect of granting, 983.

exceptions to ruling, when unnecessary, 982.

ARTISTIC DECLARATION:

requisites of, 482.

see "Pleading" and "Declaration."

ASSAULT:

upon daughter, declaration in trespass for (*Form No. 191*), 590.

upon wife, declaration for, in trespass at suit of husband and wife

(*Form No. 190*), 590.

declaration for in trespass (*Form No. 189*), 590.

with firearms, declaration for, trespass (*Form No. 185*), 590.

see "Trespass" and "Declaration."

ASSAULT AND BATTERY:

who to sue for damages, 26.

plaintiffs in action for, when interest assigned, 28.

who to join as plaintiffs in action in, 27.

damages recoverable in trespass, 115.

railroad company liable for, by employe, 213.

action on case for, 213.

justification of, 213.

declaration on, in trespass (*Form No. 184*), 590.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

ASSESSMENT OF DAMAGES:

- in action on penal bond, 93.
- in replevin, 179.
- in default of defendant, 801.
- in ejectment, when plaintiff's right expires, 275.
- on suggestion in ejectment, 283.
- for improvements in ejectment, 286.
- on plea in abatement, 681.

ASSESSMENTS:

see "Tax" and "Special Assessments."

ASSIGNEE:

- equitable, in whose name to sue, 14.
- when to be plaintiffs, 24.
- as defendants in action on contract, 37.
- of real estate, when liable for nuisance, 45.
- when may sue on note, 83.
- of note may sue in his own name, 13.
- when may be sued, 83.
- liability of, 83.
- entitled to note after payment, 83.

ASSIGNMENTS:

- actions in cases of, 20.
- plaintiffs in cases of, 24.
- for benefit of creditors, who to sue in case of, 21.
- defendants in case of, 37.
- effect on defendant in tort cases, 45.
- of cause of action in tort cases, 45.
- fraudulent, as ground for attachment, 311, 313.
- averment of, in declaration for rent, 575, note.
- breach in declaration, 521.
- favored by intendment, 523.
- effect of omission, 523.
- form of in, 523.
- in declaration in debt, 560.
- (*Forms Nos. 142, 143*), 563.
- claims for garnishment prohibited, 387.
- penalty, 388.
- of contract, defendants in case of, 35.
- of instrument, denial of, plea must be verified, 711.
- of written instrument, denial when set-off, 725.
- of leases, averment of in declaration for rent, 575, note.
- of mortgages, need not be acknowledged, 1174, note.
- of note, to plaintiff, when necessary, 13.
- defendants in case of, 35.
- of rent, who to sue for, 24, note.

ASSIGNMENT OF ERROR:

- for insufficiency of declaration, 482.
- for variance in proof, 819.
- on bill of exceptions, only way to procure review of evidence, 844.
- inspection by jury, 893.
- argument of counsel, 907.
- not necessary on *certiorari*, 1048.
- objections otherwise waived, 1062.
- rule governing, 1062.
- equivalent to declaration in trial court, 1062.
- omission of, practice, 1062, note.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

ASSIGNMENT OF ERROR—*Continued.*

- leave to, *instanter*, 1062, note.
- who may make, 1062, 1062, note.
- who cannot make, 1062, note.
- not when committed by party himself, 1062.
- when there are several parties, 1062.
- no intendment indulged, 1062.
- statute of limitations does not effect, 1062, note.
- in supreme court when reviewing appellate court decision, 1063.
- form of (*No. 373*), 1063.
- when error is not assigned will not be considered, 1063, note.
- cross errors, 1065.
- rule governing, 1065.
- equivalent to plea of defendant in trial court, 1065.
- upon what may be made, 1065.
- see "Error" and "Writ of Error."

ASSOCIATIONS:

- under what name may sue, 13.
- as defendants in actions on contract, 33.
- religions, not interfered with by *mandamus*, generally, 1098, note.
- see "Partnerships," "Societies" and "Corporations."

ASSUMPSIT:

- history of the action, 49.
- action of, how classified, 50.
- express, what is, 54.
- what the word means, 54.
- definition of, 54.
- kinds of, 54.
- special, what is, 54.
- implied, what is, 54.
- arises in favor of surety, when, 84, note.

ASSUMPSIT, INDEBITATUS:

- when it lies, generally, 60.
- when the proper form of action, 505.
- action of, when the only remedy, 55.
- substitution for other actions, 56.
- or case, which preferable remedy, 595.
- and debt, difference between, 54.
- difference in declaration, 595.
- distinction between, declaration, 88, 503.
- when concurrent remedies, 88.
- concurrent remedy with covenant, when, 59, 96.
- covenant preferable to, when, 97.
- waiving tort, and suing in, 57.
- action of, on contract under seal, 59.
- for goods bargained and sold, generally, 60.
- common counts in, generally, 62, 504.
- common counts in, lie only for payment of money, 60, note.
- for hire of property, generally, 60.
- for work and labor performed, 60.
- for goods sold and delivered, 60.
- action of, damages for breach of contract, generally, 60.
- for breach of promise of marriage, 60.
- for money paid by mistake, 60.
- to recover money for illegal tax, 60.
- to recover money lost by, 60.
- will lie against stakeholder, 60.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

ASSUMPSIT, INDEBITATUS—Continued.

- when trespass, preferable, 60, note.
- for money had and received, when will lie, 63.
- action of, for money had and received to plaintiff's use, 63.
 - when will lie to recover purchase money paid, 63.
 - when will lie for share of profits, 63.
 - for money paid by mistake, 64.
 - for money paid without consideration, 65.
 - to recover illegal tax paid, 66.
 - must be privity of contract to sustain, 67.
 - for money voluntarily paid, 68.
 - for money paid because of fraud, 69.
 - when it will, for interest, 70.
 - for goods bargained and sold, 71.
 - for goods sold and delivered, 71.
 - to compel payment of another's debt, 72.
 - for work, labor and material, 73.
 - on labor contract in writing, 74.
 - for gratuitous services, 75.
 - when will lie for *quantum meruit*, 76.
 - for professional services, 77.
 - for use and occupation, 78.
 - against co-tenant for use and occupation, 79.
 - for rent on a lease, 80.
 - for rent, when to be brought, 81.
 - for "account stated," 82.
 - on bills and notes, 83.
 - against guarantor of "payment" or "collection," 84.
 - for statutory cause of action, 85.
 - against corporations, 86.
 - when the only remedy against corporation, 86.
 - for fine, penalty, or forfeiture, 87.
 - when preferable to "debt," 88.
 - will lie on covenant, when only, 97.
 - will not lie at suit of tenants, in common to land, 101.
 - for grain in warehouse, 164.
- disadvantage of, 237.
- for fraud and deceit, action on case preferable to, 237.
- declaration in, generally, 503.
 - how distinguished from debt, 503.
 - special count required, when, 504.
- common counts, generally, 504.
 - sufficient when, 504.
 - indebitatus* count, 505.
 - form of *indebitatus* count (No. 41), 506.
 - quantum meruit* count, 507.
 - quantum meruit* count, form of (No. 42), 507.
 - quantum valebant* count (Form No. 43), 508.
 - "account stated," 509.
- statement of causes of action recoverable in common counts, 510.
 - goods sold and delivered (I), 510.
 - goods bargained and sold (II), 510.
 - for crops sold to the defendant (III), 510.
 - for fixtures (IV), 510.
 - for real estate sold and conveyed (V), 510.
 - for labor and services (VI), 510.
 - for labor and services of horses, carriages, etc. (VIIa), 510.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

ASSUMPSIT, INDEBITATUS—Continued.

- declaration in statement, for labor and material (VII), 510.
 - for money lent (VIII), 510.
 - for money paid to defendant's use (IX), 510.
 - for money had and received (X), 510.
 - for interest (XI), 510.
 - for use and occupation (XII), 510.
 - for board and lodging (XIII), 510.
 - for hire of horses, carriages, etc. (XIV), 510.
 - for pasturage, etc. (XV), 510.
 - for boarding and stabling horses, cattle, etc. (XVI), 510.
 - for necessities (XVII), 510.
 - for physician's bills (XVIII), 510.
 - for attorney's fees (XIX), 510.
 - for wages and salary (XX), 510.
 - for warehouse-room, storage, etc. (XXI), 510.
 - for dockage of ships and vessels (XXII), 510.
 - for freight or carriage of goods by land (XXIII), 510.
 - for freight or carriage of goods by water (XXIV), 510.
 - freight of goods, another form (XXV), 510.
- to recover rent, must contain special count, 510.
- common counts consolidated, 511.
- copy of instrument in writing or account sued on (*Form No. 46*), 512.
- form of copy of account sued on (*No. 46*), 512.
- form of, by a surviving partner on promise to both partners (*No. 47*), 513.
 - by a surviving partner on promise to him to pay debts due firm before death of member (*No. 48*), 513.
- indebitatus* count against surviving partner on promise of both (*No. 49*), 513.
- indebitatus* count against surviving partner on his promise after death of his partner (*No. 50*), 513.
- indebitatus* count by an executor on promise to testator (*No. 51*), 513.
- indebitatus* count by executor on promise to him as such (*No. 52*), 513.
- indebitatus* account against an executor on promise to testator (*No. 53*), 513.
- indebitatus* count against an executor on promise by him as such (*No. 54*), 513.
- form of, by administrator on promise to intestate (*No. 55*), 513.
 - by administrator, laying debt to intestate and promise to plaintiff (*No. 56*), 513.
 - by administrator, on cause of action arising after death of intestate (*No. 57*), 513.
 - against administrator, on promise by intestate (*No. 58*), 513.
 - against an administrator laying debt from to intestate and promise by administrator (*No. 59*), 513.
 - against administrator with cause of action arising after death of intestate (*No. 60*), 513.
- special counts, when required, 514.
 - six points to be observed, 514.
 - the "inducement," 515.
 - the "consideration," 516.
 - the "promise," 517.
 - necessary averments, generally, 518.
 - averment of notice, 519.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

ASSUMPSIT, INDEBITATUS—Continued.

- declaration in special averment of request, 520.
 - averment of breach, 521.
 - averment of two breaches, 522.
 - form of assigning breach, 523.
 - averment of damage, 524.
 - joinder of, 525.
 - against agents (*Forms Nos. 61-68*), 526.
- form of against agent for selling part under price, not accounting, not delivering, etc. (*No. 64*), 526.
- against forwarding agent, a warehouseman, for not forwarding goods, etc. (*No. 65*), 526.
- against forwarding agent for lack of care and not forwarding as directed (*No. 66*), 526.
- against agent on implied promise that he had authority to sell, etc. (*No. 67*), 526.
- against *del credere* agent on his guaranty (*No. 68*), 526.
- on awards (*Forms Nos. 69-70*), 527.
- on an award made on parol submission, time for making prolonged (*No. 70*), 527.
- against bailee (*Form No. 71*), 528.
- against bailee for reward for not using due care in repairing, etc., and not returning on request (*No. 71*), 528.
- against common carriers (*Forms Nos. 72-75*), 529.
- by common carrier against consignee for not receiving goods, etc. (*No. 72*), 529.
- against common carriers for gross neglect and loss of goods (*No. 73*), 529.
- against common carrier for carelessness and delay in delivery (*No. 74*), 529.
- against common carrier of passengers for negligent injury, etc. (*No. 75*), 529.
- against guarantor or surety (*Forms Nos. 76-79*), 530.
- on a guaranty of the price of goods to be supplied to a third person (*Nos. 76-77*), 530.
- on guaranty of house rent (*No. 78*), 530.
- on guaranty of debt of third person, consideration running to defendant (*No. 79*), 530.
- against hirer of goods, etc., for carelessness (*No. 80*), 531.
- against tenant (*Forms Nos. 81-84*), 532.
- against tenant for nonpayment of rent, lease under seal (*No. 81*), 532.
- against tenant for not keeping premises in repair (*No. 82*), 532.
- against tenant for not using premises in tenant-like manner (*No. 83*), 532.
- against tenant of farm for not cultivating according to custom (*No. 84*), 532.
- on breach of promise of marriage (*Nos. 85-87*), 533.
- for breach of promise of marriage on request (*No. 85*), 533.
- for breach of promise of marriage where defendant has married another person (*No. 86*), 533.
- for breach of promise of marriage within a reasonable time, no request made (*No. 87*), 533.
- for discharge from service (*No. 88*), 534.
- for discharge from service before expiration of time (*No. 88*), 534.
- to recover reward offered by advertisement for discovery of offender (*No. 89*), 535.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

ASSUMPSIT, INDEBITATUS—Continued.

- declaration, form for goods sold (*Nos. 90-97*), 536.
 - for goods sold at market price, vendee not accepting (*No. 90*), 536.
 - for timber sold and not taken (*No. 91*), 536.
 - for articles taken on trial to be returned or paid for at certain time (*No. 92*), 536.
 - against vender for not delivery (*Nos. 93-94*), 536.
 - for not delivering goods at particular place within a reasonable time (*No. 95*), 536.
 - for non-delivery of goods where plaintiff procured others at higher price (*No. 96*), 536.
 - for sum deposited, to be returned, if goods unsatisfactory (*No. 97*), 536.
 - for stock subscriptions (*No. 98*), 537.
 - for hire of storage room (*No. 99*), 538.
 - on warranty of chattels (*Nos. 100-103*), 539.
 - for breach of warranty of horse (*No. 100*), 539.
 - breach of warranty that goods equal sample (*No. 101*), 539.
 - on warranty that goods were fit for purpose intended (*No. 102*), 539.
 - on warranty of horse in exchange (*No. 103*), 539.
 - for money in exchange of chattels (*No. 104*), 540.
 - on promise to pay difference in exchange of horses (*No. 104*), 540.
 - on building or labor contract (*Nos. 105-106*), 541.
 - on building contract, non-performance of part, negligence as to residue (*No. 105*), 541.
 - for discharging plaintiff before completing work (*No. 106*), 541.
 - on corporation by laws (*No. 107*), 542.
 - for professional services (*No. 108*), 543.
 - for doctor's bill (*No. 108*), 543.
 - on insurance policy (*Nos. 109-111*), 544.
 - on fire insurance policy (*Nos. 109-110*), 544.
 - on life insurance policy (*No. 111*), 544.
 - on negotiable instrument, "payable in money" (*Nos. 112-139*), 545.
 - on promissory note, payee against maker (*No. 112*), 545.
 - on promissory note, indorsee against maker (*No. 113*), 545.
 - on promissory note, second (or subsequent), indorsee against maker (*No. 114*), 545.
 - on promissory note, indorsee against payee or other indorser (*No. 115*), 545.
 - on promissory note, holder against maker and indorsers (*No. 116*), 545.
 - on promissory note made payable at particular place, payee against maker (*No. 117*), 545.
 - on promissory note payable in installments, all due (*No. 118*), 545.
 - on promissory note payable in installments, not all due (*No. 119*), 545.
 - on promissory note payable to bearer (*No. 120*), 545.
 - on promissory note, surviving payee against maker (*No. 121*), 545.
 - on contract in writing, payable in trade, time and place not specified (*No. 122*), 545.
 - on contract in writing, payable in trade, time and place specified (*No. 122, second form*), 545.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

ASSUMPSIT, INDEBITATUS—Continued.

- declaration, form on contract in writing, payable in trade, price, time and place agreed upon (*No. 122, third form*), 545.
- on bill of exchange, drawer being payee, against acceptor (*No. 123*), 545.
- on bill of exchange, drawer not being payee, against acceptor (*No. 124*), 545.
- on bill of exchange, payee not being drawer, against acceptor (*No. 125*), 545.
- on bill of exchange, indorsee against maker (*No. 126*), 545.
- on bill of exchange, payee against drawer, for non-acceptance (*No. 127*), 545.
- on bill of exchange, indorsee against drawer, for non-acceptance (*No. 128*), 545.
- on bill of exchange, indorsee against indorser, for non-acceptance (*No. 129*), 545.
- on bill of exchange, indorsee against drawer for default in payment by drawee (*No. 130*), 545.
- on bill of exchange, indorsee against indorser, for default of drawee (*No. 131*), 545.
- on bill of exchange, holder against drawer and indorser (*No. 132*), 545.
- on bill of exchange, indorsee against drawer, bill drawn and accepted payable at particular place (*No. 133*), 545.
- on bill of exchange, drawer against acceptor, on condition (*No. 134*), 545.
- on bill of exchange against drawer, default of payment, drawee not found (*No. 135*), 545.
- on bill of exchange, indorsee against drawer where drawee is dead (*No. 136*), 545.
- on bill of exchange, indorsee against drawer where presentment waived (*No. 137*), 545.
- on bill of exchange, executor of drawer on promise to testator (*No. 138*), 545.
- on bill of exchange, executor of drawer against acceptor on promise to plaintiff as executor (*No. 139*), 545.
- on bill of exchange, executor of indorser against drawer (*No. 138*), 545, note.
- plea in, general issue, what may be shown under, 692.
- plea of *non est factum*, not proper on interest coupons, 692, note.
- special plea in, or notice with general issue, when required, 702.
- judgment in, form of, 993, note.
- see "Forms," "Pleas" and "Judgment."

ATTACHMENT:

- of the person, may issue in action of account, 102.
- for contempt, for refusal to make return, 447.
- will lie to judge to enforce *mandamus*, 1099, 1115.
- writ of *habeas corpus* enforced by, 1150, note.
- statute, construction of, 292.
- and garnishment compared, 355.
- a dual proceeding, 337.
- two character of, 293.
- of partnership property, 296.
- bond, generally, 316.
- bond, debt will lie upon, 92.
- bond in, insufficiency of, ground for dissolution, 341.
- service of process in, insufficiency of, ground for dissolution, 341.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276]

ATTACHMENT—Continued.

- pleading in, the declaration, 343.
- and garnishment, declaration in action of, generally, 621.
- set-off in, 724.
- judgment in, when defendant personally served, 346.
- when defendant not personally served, 347.
- remittitur, 347.
- execution in, when defendant personally served, 346.
- when defendant not personally served, 347.
- judgment in, execution levy thereon, 348.
- interplea in by claimant of property, 345.
- intervention in, burden of proof, 820, note.
- pending in another state, pleaded in abatement, 665, note.
- may be shown under general issue, 692.
- malicious, action on case for, 206.
- of crop, cannot be made until landlord's right set off, 1220, note.
- dissolution of, by bond to pay judgment, 332.
- on motion, 341.
- on plea in abatement, 341.

ATTACHMENT, ACTION OF:

- classification of, 50.
- origin and nature of, 291.
- a purely statutory proceeding, strictly construed, 292.
- both *in personam* and *in rem.*, 293.
- a proceeding *in rem.* by virtue of the levy, 337.
- upon what, against whom, and where it will lie, 294.
- upon mortgagee's interest, 295.
- as to joint debtors and partners, 296.
- summons in, on joint debtors and partners, 296.
- against stockholders in corporations, 297.
- of land, certificate of levy, 328.
- where to be begun, 298.
- affidavit in, generally, 299.
- formal parts, etc., 299.
- who shall make, 300.
- when to be made, 301.
- how entitled, 302.
- contents of, 303.
- form of (*No. 4*), 303.
- on a judgment, 304.
- amendment of, 315.
- grounds for, generally, 305.
- that debtor is a nonresident, 306.
- nonresidence as, 306.
- absence from state as, 306.
- that debtor conceals himself, 307.
- that debtor has departed with intent, etc., 308.
- that debtor is about to depart with intent, etc., 309.
- that debtor is about to remove property to the injury of, etc., 310.
- that debtor has within two years fraudulently conveyed, etc., 311.
- that debtor has, within two years, fraudulently concealed, etc., 312.
- that debtor is about fraudulently to conceal, etc., 313.
- that debt was fraudulently contracted, 314.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

ATTACHMENT, ACTION OF—*Continued.*

- bond for, generally, 316.
 - conditions of, form, 317.
 - form of (*No. 5*), 317.
 - generally, form, 318.
 - form of (*No. 6*), 318.
 - amendment of, 319.
 - when to be issued and served, 320.
 - issuance to other counties, 321.
 - execution, levy, 322.
- practice and pleading in, 342.
- plaintiff's declaration in, 343.
- defendant's pleas in, 344.
- interplea by claimant of property, 345.
- judgment and execution in, 346.
- custodian in, 323.
- replevin will not lie for goods taken in, 164.
- appearance of defendant in, a forthcoming bond is, 331.
- possession and release of property by forthcoming bond, 331.
- release of property by bond to pay judgment, 332.
- form of forthcoming bond and bond to pay judgment, 333.
- release of property, form of bond (*No. 7*), 333.
- release of property by bond, proceeding when bond not returned or not sufficient, 334.
- expense for caring for attached property, 335.
- possession of, expense of caring for, 335.
- perishable property in, deposit of proceeds, 336.
- disposition of perishable property and animals, 336.
- proceedings on return of writ personally served, 337.
- a proceeding *in personam* because of personal service, 337.
- proceedings when writ not personally served, publication of notice, mailing, 338.
- continuance in, when writ not personally served, 339.
- continuance in, for service or publication, 339.
- voluntary appearance in, 340.
- appearance equivalent to personal service of, 340.
- filing plea or giving bond is an, 340.
- motion to quash, may be made on "special appearance," 340.
- cannot be based on mistake in notice, 338.
- dissolution on motion, 341.
- for insufficient bond, 316.
- affidavit in, insufficiency of, ground for dissolution, 341.
- grounds for, denial of, 341.
- irregularities in, ground for dissolution, 341.
- distribution of proceeds, 349.
- judgment in, when there has been no personal service, 329.
- review of proceedings, 354.
- appeal in cases of, 354.
- writ of error in cases of, 354.

ATTACHMENT IN AID:

- of pending suit, 350.
 - what is, 350.
 - when it may be begun, 350.
- of action for tort, 351.
 - affidavit in, 351.
 - declaration in, 350, note.
- return of, proceedings on, 353.
- of *scire facias*, 352, 1165.
- judgment in, 353.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

ATTACHMENT LEVY:

- how to be made, 323.
- on corporate stock, 324.
- where to be made, 325.
- not to be made an exempt property, 326.
- lien created by, 327.
- on land, certificate of, 328.

ATTACHMENT LIEN:

- when in aid of pending suit, 353.
- created by levy, 327.
- see "Lien."

ATTACHMENT WRIT:

- amendment of, 319.
- execution of, how levy to be made, 323.
- levy on corporate stock, 324.
- where levy should be made, 325.
- no levy on exempt property, 326.
- lien created by, 327.
- certificate of levy on land, 328.
- service upon defendant personally, return, 329.
- effect of death of defendant after personal service, 330.
- proceedings on return of, not served, continuance, 339.
- insufficiency of, ground for dissolution, 341.
- see "Writ," etc.

ATTENDANCE OF WITNESSES:

- on arbitration, how compelled, 1188.
- see "Witnesses" and "Compelling Attendance."

ATTESTED COPIES:

- as evidence, 859.
- see "Copies."

ATTORNEY AND CLIENT:

- privileged communications of, 832.
- definition of terms, 1231.
- relation of, must exist that communication be privileged, 1257.
- rules of principal and agent apply, 1268.
- ends with completion of act to be performed, 1268.
- former trustee of latter, when, 1269.
- liabilities and duties of former to latter, generally, 1269, 1273.
- liability of former to latter in management of case, 1270.
- liabilities and duties of former to latter in collection of money, 1271.
- liabilities of former to latter in purchase of land, 1272.
- liabilities of latter to former, compensation, 1274.
- proving retainer, 1275.
- recourse of latter against former for negligence, 1268, note.
- implied agreement of latter to compensate former 1274.

ATTORNEY IN FACT:

- definition of, 1231.

ATTORNEY'S FEES:

- recovery of, in suit on replevin bond, 182.
- in action on attorney's bond, 317.
- declaration in common court for, (XIX), 510.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 88-1276.]

ATTORNEY'S FEES—*Continued.*

- included in judgment confessed, when, 996, note.
- liability of client for, 1274.
- taxed as costs, when, 1274.
- cannot be recovered by one not licensed, 1274.
- taxed as cost in suits for wages, 1274, note.
- how determined and proved, 1275.
- lien for, rule, 1276.
- see "Attorney."

ATTORNEY AT LAW:

- definition of, 1231.
- nature of his office, 1232.
- to hold his office during good behavior, 1232.
- of other states, courtesy extended to, 1232, note.
- who may not practice as an, 1233, note.
- presumption regarding admission to practice, 1233.
- authority conferred on by license to practice, 1233.
- admission to practice, necessity of, 1233.
 - who may be licensed, 1234.
 - how procured, 1235.
 - upon examination, 1236.
 - upon diploma issued by a law school, 1237.
 - upon a license granted in another state, 1238.
 - certificate of moral character, 1239.
 - requisite oath (*Form No. 403*), 1240.
- roll of names, 1241.
 - where and how kept, 1241.
- license, by whom issued, 1242.
 - a judgment of the court, 1243.
- an officer of the court licensing him, 1243.
- party to suit need not be represented by, 1244.
- admission to practice in the United States Supreme Court, 1244.
- party not compelled to retain, may manage his own case, 1244, 1268, note.
- summary jurisdiction of court over, 1245.
- liability of, generally, 1245.
- liability of, in regard to legal process, 129.
- power of court to strike name from roll, 1246.
- striking name from roll for mal-conduct in office, 1246.
- striking name from roll, complaint, who can make, 1246.
- removal of, who can procure, 1246.
- power of court to suspend from practice for a time, 1247.
- striking name from roll, must have opportunity to be heard, 1248.
- striking name from roll, practice, complaint, 1249.
- suspending, practice, complaint, show cause, summons, 1249.
- effect of removal or suspension from practice, 1250.
- restoration to practice after suspension or removal, 1251.
- privileges and exemptions of, generally, 1252.
 - from arrest, liability to, 1253.
 - from serving as juror, 1254.
 - regarding examination of records, etc., 1255.
 - in argument, 1256.
- privileged communication with client, 1257.
 - extends to whom, 1257.
- disability of because of his profession, 1258, 1259, 1260, 1261, 1262.
 - from becoming bail or surety, 1258.
 - from acting on both sides, 1259.
 - from buying demands for suit, 1260.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

ATTORNEY AT LAW—Continued.

- disability as a witness in the case, 1261.
- from administering oath in the case, 1262.
- as a witness, generally, 832.
- admission of, how far evidence, 847.
- may make affidavit in attachment, 300.
- powers of, in attachment to dispose of perishable property, 336.
- liability of to third persons, 1263.
- retainer and appearance, rule governing, 1264.
- contract of retainer, 1265.
- what contract with not champertons, 1265.
- duty to client does not cease with judgment, 1265.
- appearance of for client, generally, 1266.
- withdrawal of appearance, substitution, 1267.
- substitution of, 1267.
- liability of, for negligence in managing case, 1268.
- stipulation of, how far binding, 1268.
- authority and powers, management of case, satisfaction, 1268.
- in regard to assignment of judgment, 1268.
 - to satisfy judgment, 1268.
 - to compromise cause, 1268.
 - to make admission for client, 1268.
- recourse of client against for negligence, 1268, note.
- authority to receive service of notice in appealed cases, 1268, note.
- to dispose of perishable property of client, 1268, note.
- duties and liabilities of to client, must counsel against wasting estate, 1269, note.
 - to client, generally, 1269.
 - trustee of client, when, 1269, 1272, 1275, note.
 - of law firm to client, 1269.
 - in management of case, 1270.
 - in examination of witness, relevant questions, 841.
 - to remain in court till jury discharged, 1270.
 - in collection of money, 1271.
 - in purchase of land, 1272.
- liability of client to, compensation, 1274.
- absence of, ground for new trial, when, 969.
 - no ground for continuance, 791.
- not to administer oaths, when, 673.
- papers entrusted to in confidence, rule regarding, 832.
- duties and liabilities of in the investigation of title, 1273.
- negligence of in examining title, declaration in case for (*Form No.* 254), 610.
- negligence of in defending case, declaration in case for (*Form No.* 255), 610.
- how contract of retainer proved, 1275.
- lien for services, 1276.
- argument of—See "Argument of Counsel."

ATTORNEY, LETTER OF:

- an instrument under seal, 1231.

ATTORNEY, POWER OF:

- an instrument under seal, 1231.

ATTORNEY, WARRANT OF:

- to confess judgment, when required, 996.
- form, what sufficient, 996, note.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

ATTORNEY, WARRANT OF—*Continued.*

partner cannot execute, 996, note.
affidavit of execution of, 997, note.
becomes part of the record on confession of judgment, 998.
to confess judgment, when void renders judgment void, 999.
not required in ordinary cases, 1266.

AVERMENTS IN DECLARATION:

determine the form of action, 487, 503.
sufficient when, 481.
of necessary facts, 481.
when must be sustained by proof, 516.
must support proof to be offered, 525.
of inducement, 515.
of consideration, 516.
of names of parties, 517.
of promise, 517.
of time, unnecessary in, when, 484.
of time and place, when sufficient, 485, note.
time and place, 518.
of place or location, must contain, 485.
of "Place" in declaration, necessity for, 526, note.
of location in action of replevin, 593, note.
of notice, 518.
of contract, two methods used, 517.
form of in, 518.
of performance, 518.
of readiness to perform, 518.
of readiness to perform, in declaration illustrated, 489.
of legal effect in written instrument, 518.
of notice, form of, 519.
of request, 520.
of breach, 521.
of breach, two, 522.
of damages, 524.
damage, in declaration illustrated, 489.
of damages, form of, 524.
negative, when proper, 487.
of exceptions, in declaration on statutory remedy, 481.
representative character in commencement, rule regarding, 498.
of corporate existence of national bank in commencement, 498.
in actions for torts, what necessary, 583.
of number, in action for tort, 583.
of quantity, in action for tort, 583.
of quality, in action for injury to land, 583.
of "breaking and entering," in action for injury to land, 583.
of injury from tort, 584.
of injury, when consequent, 587.
of value, for tort, 584.
of plaintiff's right or interest in subject matter, 584.
of duty of defendant, 585.
of damages from tort, 589.
in debt, of inducement, 554.
of cause of action, in declaration in debt, 553.
of consideration, 555.
of breach in, 553.
of time, 556.
of specialty contract, in debt, 558.
of performance or readiness to perform, 559.
of breach, in debt, 560.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1278.]

AVERMENTS IN DECLARATION—Continued.

- necessary in action on note, 83.
- in action for false imprisonment, 211.
- for trover, what necessary, 594.
- on the case, 595.
- to recover penalty, 85.
- of intercourse in crim. con., 606, note.
- of assignment against assignee for rent, 575, note.
- of delivery, when necessary (*Form No. 125*), 545, note.
- on written instrument not payable in money (*Form No. 122*), 545, note.
- of presentment of bill of exchange (*Forms Nos. 124-128*), 545, note.
- of notice to defendant in suit on bill of exchange (*Form No. 127*), 545, note.
- of damages in declaration in debt (*Form No. 144*), 564.
- of damages in declaration of covenant (*Form No. 163*), 574.
- of negligence in declaration against R. R. Co. (*Form No. 224*), 599 note.
- of publication of libel necessary in declaration (*Form No. 277*), 618, note.
- of special damages in declaration for libel (*Form No. 278*), 618.
- necessary in declaration.
- see "Requisites of."

AVERMENT IN PLEA:

- form of, in plea of general issue in *assumpsit* (*No. 309*), 692.
- in plea of general issue in debt (*No. 310*), 693.
- in plea of general issue in covenant (*No. 311*), 694.
- in plea of general issue in trespass (*No. 312*), 695.
- in plea of general issue in trover (*No. 313*), 696.
- in plea of general issue in replevin (*No. 314*), 697.
- in plea of general issue in case (*No. 315*), 698.
- in special pleas or notice in writing with general issue (*Nos. 319-350*), 710.

AVOIDANCE:

- matter in, must be pleaded specially, 692.
- see "Pleas" and "Confession and Avoidance."

AVOWRY:

- in replevin, rules regarding, 708.
- see "Replevin."

AWARD:

- requisites of, 1189.
- publication of, what is, 1189.
- can be no broader than submission, 1189.
- form of, on arbitration (*No. 389*), 1189.
- filing in court, 1190.
- declaration on, in *assumpsit* (*Form No. 69*), 527.
- judgment on, 1191.
- mistake in, proceeding, 1193.
- set aside for fraud, 1193.
- irregularities in form, correction of, 1194.
- validity of, how attacked, 1195.
- time to make motion to set aside or modify, 1195.
- effect of setting aside, 1196.
- review of, 1197.
- see "Arbitration and Award."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

AUCTIONEER:

possession by, sufficient to sustain trespass, 117.
see "Possession" and "Trespass."

AUDITORS:

in action of account, appointment of to hear report, 105.
oath to, 105.
to administer oath, 107.
fees of, 109.
report of, 109.

AUDITOR OF TOWNSHIP:

mandamus will not lie to, when, 1102, note.
see "Mandamus" and "Auditors."

"AUTHENTICATED COPY, ETC.":

of writ of error, of what it must consist, 1058.
see "Transcript" and "Writ of Error."

AUTHENTICATION:

certificate of, of transcript of record, 1058.
see "Transcript," "Verification," etc.

AVERAGE:

verdict cannot be determined by, 943, note.
in arriving at verdict, ground for a new trial, 968.
see "Verdict" and "Jury."

AUTHORITY OF ATTORNEYS:

at law, generally, 1252.
see "Attorneys at Law."

B.**BAIL:**

special in *capias* cases, 456.
proceedings concerning, 461, 462, 463.
surrender of defendant by, 462, 463, 464.
bond, form of, for release of defendant held by *capias* (No. 27), 456.
by defendant held on *capias* (Form No. 27), 456.
liability of officer in regard to, 457.
declaration on, taken by a justice of the peace (Form No. 159), 569.
suit on, 470.
discharge of, on surrender of defendant in *capias* cases, 465.
by arrest of defendant on criminal warrant, 466.
new, on surrender in *capias* cases, 468.
scire facias, against, 1168.
scire facias cannot be procured against, 473.
lawyer cannot become for client, 1258.
see "Surety."

BAILEE:

negligence of, when trespass will lie for, 117.
may maintain action of trespass, when, 117.
when may maintain trover, 140.
rights of in action of trover, 152.
may maintain replevin when, 156.
in replevin, damages of, 179.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

BAILEE—Continued.

- declaration by, forms in action on the case, 595.
- against in case (*Forms Nos. 208-210*), 596.
- for negligence (*Form No. 208*), 596.
- without reward for negligence and non-delivery (*Form No. 209*), 596.
- for immoderately driving a horse (*Form No. 210*), 596.
- see, also, "Common Carriers."

BAILIFFS:

- may maintain action of account, 100.
- see "Account," also "Officers."

BAILMENT:

- contract of, when gratuitous, cannot be recovered upon, 75.
- when action of trespass accrues in case of, 117.
- see "Contracts."

BAGGAGE:

- lost, contents of proved by wife of plaintiff, 828.
- see "Common Carriers."

BANK:

- see "National Bank."

BANK DEPOSIT:

- when *assumpsit* will lie for, 67.
- see "Assumpsit."

BANKRUPT:

- commencement of declaration in case of, 499.
- see "Insolvent."

BANKRUPTCY:

- pleaded specially in *assumpsit*, 702.
- see "Assumpsit" and "Pleas."

BAR:

- members of, what officers of court are in England, 1231.
- see "Attorneys at Law."

BAR TO ACTIONS:

- trover bars trespass, 136.
- trespass on replevin, is not to the other when, 120.
- "Crim. Con." not barred by criminal action, 216.
- see "Limitations of."

BAR, PLEAS IN:

- distinguished from pleas in abatement, 656.
- see "Pleas."

BARGAIN AND SALE:

- of goods, declaration on common counts for (*II*), 510.
- see "Sale."

BARRATRY AND MAINTENANCE:

- rule relating to, 1260, note.
- see "Champerty" and "Maintenance."

[The references are to sections: Vol. I., §§ 1-787; Vol. II. §§ 788-1276.]

BARRISTER:

definition of, 1231.

see "Lawyer."

BEEES:

trespass for injury to, 116.

see "Trespass" and "Animals."

"BEFORE ME:"

necessary to *jurat*, 171, note.

see "Jurat" and "Verification."

BEGINNING:

see "Commencement."

BELIEF:

see "Information and Belief."

BELL:

ringing, duty of railroad regarding, 118.

declaration in case against railroad company for not ringing (*Form No. 219*), 599.

see "Declaration."

BEST EVIDENCE:

must be produced, 821, 846.

what is, 846.

see "Evidence."

BETS:

recoverable in *assumpsit*, 60, 65.

see "Wager."

"BETTER WRIT:"

plea in abatement must show, 666.

see "Abatement" and "Writ."

"BEYOND A REASONABLE DOUBT:"

proof of, not required in civil case even in proof that defendant is guilty of a crime, 821.

see "Evidence" and "Proof."

BIBLE:

law of married women in, 22.

see "Married Women" and "Wife."

BICYCLE:

declaration for injury by and to, trespass (*Forms Nos. 186, 196, 197*), 590, 591.

declaration in case for injury to and by (*Forms Nos. 211-212*), 597.

declaration in case for injury to by obstruction in street (*Forms Nos. 228, 229*), 600.

see "Vehicles."

BILL OF EXCHANGE:

declaration on, in *assumpsit*, drawer being payee against acceptor (*No. 123*), 545.

drawer, not being payee, against acceptor (*Form No. 124*), 545.

averment of delivery necessary (*Form No. 125*), 545, note.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

BILL OF EXCHANGE—Continued.

declaration on, payee, not being drawer, against acceptor (*Form No. 125*), 545.

indorsee against maker (*Form No. 126*), 545.

payee against drawer for non-acceptance (*Form No. 127*), 545.

indorsee against drawer for non-acceptance (*Form No. 128*), 545.

indorsee against indorser for non-acceptance (*Form No. 129*), 545.

indorsee against drawer for default in payment by drawee (*Form No. 130*), 545.

indorsee against indorser for default of drawee (*Form No. 131*), 545.

holder against drawer and indorser (*Form No. 132*), 545.

indorsee against drawer, bill drawn and accepted, payable at particular place (*Form No. 133*), 545.

drawer against acceptor on condition (*Form No. 134*), 545.

against drawer, default of payment, drawee not found (*Form No. 135*), 545.

indorsee against drawer where drawee is dead (*Form No. 136*), 545.

indorsee against drawer where presentment waived (*Form No. 137*), 545.

executor of drawer on promise to testator (*No. 138*), 545.

executor of indorser against drawer (*Form No. 138*), 545, note.

executor of drawer against acceptor on promise to plaintiff as executor (*Form No. 139*), 545.

see "Declaration," "Forms" and "Negotiable Instruments."

BILL OF EXCEPTIONS:

origin, nature and purpose, 1021.

definition of, 1021.

when not required, 1021.

same rule applies in supreme and appellate courts, 1022.

requisites of, 1023.

what not to be incorporated in, 1023.

what must be preserved in, 1023.

when must contain all of the evidence, 1023.

certificate of judge to, conclusive, 1023, note.

record cannot be corrected by, 1023.

otion for new trial and rulings on must be preserved in, 1023.

amendments proposed to, 1024.

signing, sealing and settling, 1025.

cannot be settled by stipulation of counsel or parties, 1028, 1025, note.

signing by other judge, when allowed, 1025, note.

signing when trial judge dies, 1025, note.

seal may be affixed to, by amendment, 1025, note.

judge compelled to sign by *mandamus*, when 1025, note.

preparation, time for, 1025.

party has right to aid of judge, 1025, note.

extension of time for, 1025.

time for preparing, cannot be extended by stipulation, 1025.

who cannot file, 1025, note.

danger of delay in preparing, 1025, note.

filing, etc., 1026.

becomes part of record, when, 1026.

striking from the files, 1026.

filing, time for, how extended, 1026.

how construed, presumptions, 1027.

recitations in, take preference over other recitations in record, 1027, note.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

BILL OF EXCEPTIONS—Continued.

- imports a variety, 1027, note.
- omissions in, cannot be supplied by pleadings, 1027, note.
- conclusive as to matters of fact, 1027, note.
- amendment of, rule governing, 1028.
- cannot be signed, settled or amended by stipulation, 1028, 1025, note.
- striking amended bills from files, 1028, note.
- agreed case in lieu of, rule regarding, 1029.
- necessary to raise objection, that copy of instrument no part of declaration, 546.
- only way to procure review of evidence, 844.
- necessary to preserve objection to evidence, 897.
- original, may be incorporated into, 1026, note, 1058, note.
- signing may be compelled by *mandamus*, 1099, note.
- form of, to evidence (*No. 365*), 1024.
 - to instructions (*No. 365*), 1024.
 - on refusal of non-suit (*No. 367*), 1024.
 - to denial of motion for new trial (*No. 365*), 1024.
 - to denial of motion for new trial on ground that verdict contrary to evidence (*No. 366*), 1024.
 - amendments proposed to (*No. 369*), 1024.
 - on refusal of a continuance (*No. 368*), 1024.
 - see "Error" and "Exceptions."

BILL OF PARTICULARS:

- definition of, 641.
- considered a plea, 641.
- purpose and effect of, 642.
- when required, 643.
- how procured, 644.
- form of (*No. 299*), 645.
- "more specific," may be ordered, 646.
- of set-off may be demanded, 646, 726.
- amendment of, 648.
- proceedings on failure to furnish, 649.
- mandamus* will lie to correct improper order for, 650.
- proceedings where improperly ordered, 650.

BILLS AND NOTES:

- assumpsit* upon, 83.
- see "Notes" and "Negotiable Instruments."

BIRDS:

- liability for acts of, 43.
- see "Animals" and "Trespass."

BOARDING HOUSE KEEPER:

- see "Inn Keeper."
- see "Declaration," "Assumpsit" and "Form."

BOARD AND LODGING:

- declaration in common counts for (*XIII*), 510.
- see "Assumpsit," "Declaration" and "Form."

BOARDING AND STABLING:

- horses, cattle, etc., declaration, common counts for (*XVI*), 510.
- see "Declaration," "Assumpsit" and "Forms."

BOAT:

- cutting rope and loosening, declaration in trespass for (*Form No. 198*), 591.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

BOAT—Continued.

untying, etc., declaration in case for (*Form No. 265*), 613.
 declaration in case for running down (*Form No. 263*), 613.
 see also "Ships," etc.

BOARD OF COUNTY COMMISSIONERS:

mandamus will lie to, when, 1101.
 see "Officers" and "Municipal Corporations."

BOARD OF EDUCATION:

mandamus will lie to, when, 1105.
 see "Officers" and "Municipal Corporations."

BODILY INJURY:

proof of, by inspection in court, 892.
 see "Proof," "Evidence," "Inspection" and "Injury."

BODY OF DECLARATION:

illustrated, 489.
 how construed, 502.
 necessary elements of, 502.
 on specialty contract, 554.
 see "Declaration."

BODY OF PLEA:

in abatement, 670.
 in bar, 689.
 see "Pleas."

BONDS:

plaintiff in suit on, 13.
 forfeited, collectible by *assumpsit*, when, 87.
 for penalty named in statute, debt will lie upon, 93.
 when damages, the gist of the action on, 93.
 see "Action on Bond."

BOND, ACTION ON:

in replevin, recovery in, 182.
 for attachment, 317.
 in *capias* cases, effect of death of defendant, 473.
 of replevin, plea to, 703, note.
 of appeal to appellate or supreme court, 1032, note.
 declaration in, executed in name different from true name, 483.
 on common money (*Form No. 146*), 566.
 in debt for payment of money, setting out conditions (*Form No. 147*), 566.
 in debt, when assigned (*Form No. 148*), 566.
 in debt, when several (*Form No. 179*), 566.
 surviving obligee against surviving obligor (*Form No. 150*), 566.
 in debt, assignee of obligee against obligor (*Form No. 151*), 566.
 license, for use of person injured, etc. (*Form No. 160*), 570.
 see "Action on Bond."

BOND OF ADMINISTRATORS, ETC.:

form of action to be brought upon, 91.
 see "Executors," etc.

BOND OF APPEAL:

from county court, 10, note.
 from justices' court, when to be filed, 413.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

BOND OF APPEAL—Continued.

- from justices' court, objections to, when to be made, 414.
- new, when may be filed, 414.
- how to be executed, 414.
- form (*No. 14*), 414.
- amendment of, on an appeal from justices' court, 419.
- debt, will lie upon, 92.
- form of, in forcible entry and detainer (*No. 16*) 415.
- new, discharges old, 419, note.
- declaration on, in debt (*Form No. 153*), 567.
- action on, plea to, 703, note.
- action of, plea to, *nul tiel record* is bad (*Form No. 340*), 710, note.
- sureties on, *scire facias* against, 1169.
- condition of, in forcible entry and detainer, 1219.
- in forcible entry and detainer (*Form No. 399*), 1219.
- action on, in forcible entry and detainer, 1219, note.
- amendment of, in forcible entry and detainer, 1219, note.
- see "Appeal" and "Removal of Causes."

BOND FOR APPEAL, TO APPELLATE OR SUPREME COURT:

- to be fixed by court, practice, 1031.
- conditions of, 1032.
- form of (*No. 370*), 1032.
- when to be filed, 1032.
- when not required, 1032, note.
- when not for payment of money, 1032, note.
- presumption of authority of attorney to sign as surety, 1032, note.
- security may be approved by clerk, 1033.
- approval of security, when unnecessary, 1033.
- insufficient, effect, amendment, 1034.
- irregularity in, waived by stipulation, 1034, note.
- see "Appeal," "Writ of Error" and "Review."

BOND FOR ATTACHMENT:

- generally, 316.
- conditions of, form, 317.
- insufficiency of, grounds for dissolution, 341.
- debt will lie upon, 92.
- see "Attachment."

BOND, BAIL:

- liability of officer in regard to, 457.
- suit on, 470.
- see "Bail," "Sureties" and "Officer."

BOND FOR CAPIAS AD RESPONDENDUM:

- form, 454.
- see "Capias ad Respondendum."

BOND FOR CERTIORARI:

- and form (*No. 12*), 398.
- see "Certiorari."

BOND FOR COSTS:

- in attachment cases, when required, 316, note.
- execution of, 430.
- by non-resident on writ of error, 1051, note.
- see "Costs" and "Security for Costs."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

BOND OF EXECUTORS, ETC.:

declaration on, by distributee (*Form No. 154*), 567.
see "Executors, Etc."

BOND OF GUARDIAN:

action on, plea to, 703, note.
see "Action on Bond" and "Guardians."

BOND OF INDEMNITY:

in action of replevin, 175.
declaration on, in debt to secure fidelity of employe (*Form No. 152*), 567.
plea to action on (*Form No. 339*), 710.
see "Indemnity" and "Security."

BOND OF OFFICERS:

debt will lie upon, 92.
see "Officers" and "Action on Bond."

BOND TO RELEASE ATTACHED PROPERTY:

generally, 331.
form of, 333.
exceptions to, 334.
proceedings, when not returned or not sufficient, 334.
to pay judgment, 332, 334, note.
to redeliver, action on, 334, note.
see "Attachment."

BOND FOR RELEASE OF DEFENDANT:

held on *capias* (*Form No. 27*), 456.
see "*Capias ad Respondendum*."

BOND FOR RELEASE OF PROPERTY:

on distress for rent, 1229.
see "Distress for Rent."

BOND IN REPLEVIN:

debt will lie upon, 92.
action on, value of property as stated, 171.
purpose of, 173.
recitals in, 173.
return of, with writ, 174.
proceedings, 180.
declaration on (*Form No. 156*), 567.
against sheriff in case regarding (*Form No. 260*), 612.
see "Replevin" and "Action on Bond."

BOND OF SHERIFF:

debt will lie upon, 92.
declaration on (*Form No. 155*), 567.
see "Action on Bond" and "Officers."

BOND, SUIT ON:

in *capias* cases, 470-471.
in replevin, defense to, 181.
see "Action on Bond," etc.

BOND FOR SUPERSEDEAS:

on writ of error, 1051, note.
form of, to justices' court (*No. 14*), 414.
see "Supersedeas."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1278.]

BOND, SURETIES ON:

- action against, 180.
- for release of defendant held on *capias*, 456.
- see "Sureties."

BOOK ACCOUNT:

- may be recovered by action in form of account, 100.
- statute of limitations as a defense to, form of plea (*No. 326*), 710.
- how proof made by, 850, 852.
- see "Evidence," "Proof" and "Documents."

BOOKS:

- entries in, as evidence, 850.
- proof by, must be book of original entry, 852.
- scientific, 854.
- statutes of this state, 855.
- statutes of other states, 856.
- of corporations, how shown in evidence, 850.
- reading in cross-examination, etc., 854.
- reading of, in argument of counsel, 854.
- see "Evidence" and "Proof."

BOOK OF ORIGINAL ENTRY:

- what is, 852.

BOOKS AND PAPERS:

- production of, before auditors in action of account, 106.
- see "Documents."

BORROWER:

- not liable to action for hire, when, 75.
- see "Bailees."

BREACH:

- averment of, in declaration, 521.
- illustrated, 489.
- in debt, 553, 560.
- averment of two, in declaration, 522, 560.
- assignment of, in declaration, effect of omission, 523.
- form of, 523.
- in declaration in debt (*Forms Nos. 142-143*), 563.
- favoured by intentment, 523.
- special form of, 526, note.
- see "Averment" and "Declaration."

BREACH OF CONTRACT:

- assumpsit* for damages, generally, 60.
- damages, must be natural sequence, 61.
- damages for, action against corporation, 86.
- see "Assumpsit" and "Contract."

BREACH OF DUTY:

- of officer, debt will lie upon bond, 92.
- see "Officer" and "Trespass."

BREACH OF PROMISE:

- of marriage, *assumpsit* will lie for, 60.
- action on the case for, 218.
- on request, declaration in *assumpsit* (*Form No. 85*), 533.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

BREACH OF PROMISE—Continued.

declaration in *assumpsit*, where defendant has married another person (*Form No. 86*), 533.
within a reasonable time, in request made (*Form No. 87*), 533.
see "Assumpsit," "Case" and "Declaration."

BREACH OF WARRANTY:

action on the case for damages occasioned by, 233.
declaration in *assumpsit*, warranty of horse (*Form No. 100*), 539.
that goods equal sample (*Form No. 101*), 539.
that goods were fit for purpose intended (*Form No. 102*), 539.
in exchange of horses (*Form No. 103*), 539.
declaration on, in covenant, grantee against grantor (*Form No. 171*), 577.
assignee of grantee against previous grantor (*Form No. 172*), 577.
grantee against grantor in deed of conveyance (*Form No. 173*), 577.
devisee of grantee against grantor (*Form No. 174*), 577.
of quantity of land (*Form No. 175*), 577.
after settlement of estate, grantee against heir of grantor (*Form No. 176*), 577.
against incumbrances (*Form No. 177*), 578.
for quiet enjoyment (*Form No. 178*), 579.
of seizin and power to convey (*Form No. 179*), 580.
declaration in case for (*Form No. 238*), 604.
plea in action for (*Form No. 342*), 710.
see "Assumpsit," "Covenant" and "Declaration."

BREAKING:

the close, 121-123.
outer door in executing writ, 175.
see "Trespass," "Officer" and "Service."

"BREAKING AND ENTERING:"

averment of, in declaration in action for injury to land, 583.
see "Declaration" and "Averment."

BRIDGES:

when real estate, 122.
action on case for injuries caused by conditions of, 228.
construction of, *mandamus* will lie to compel, when, 1103.

BRIEF:

in upper court, what it shall contain, 1072.
how to be prepared, 1072.
required to be printed, 1072.
type written not sufficient, 1072, note.
must call attention to errors assigned, 1072.
preparing and filing, generally, 1072.
when to be filed, 1073.
time for filing same as transcript of record, 1061.
extension of time for filing, 1073.
supplemental brief, 1073, note.
number of copies to be filed, 1074.
party must abide by, 1072, note.
reply brief, 1072, note.
upon rehearing, 1061.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

BUILDING CONTRACT:

declaration on, in *assumpsit*, non-performance of part, negligence as to residue (*Form No. 105*), 541.
for discharging plaintiff before completing work (*Form No. 106*), 541.
see "Contract."

BULL:

negligence in keeping, declaration in case for (*Form No. 236*), 603.
see "Animals" and "Trespass."

BURDEN OF PROOF:

in action for destroyed chattel, bailed, 75, note.
in trespass for injury to animals, 118.
in suit on replevin bond, 181.
of diligence in negligence cases, 220.
on plaintiff in ejectment, 247.
on intervention in attachment, 820, note.
on trial of interplea, 364.
on garnishee to establish exemption, when only, 368.
in garnishment upon plaintiff, 371.
on issue on garnishee's answer, 372.
in action on bond in *capias* cases, 471, note.
of corporate existence, 658.
on an affirmative plea, 820.
when plea verified, 711.
on plea of payment (*Form No. 322*), 710, note.
on plea of want of consideration (*Form No. 331*), 710, note.
replication to plea, 820.
on set-off, 722, 726, note.
on recoupment, 731, note.
regarding satisfaction, 820.
regarding release, 820.
regarding payment, 820.
regarding infancy, 820.
regarding license, 820.
regarding limitation, 820.
regarding justification, 820.
regarding exemption, 820.
regarding estoppel, 820.
regarding fraud, 820.
regarding duress, 820.
regarding new promise, 820.
regarding set-off, 820.
regarding sufficiency of bail, 457.
in *quo warranto* proceeding, 1132, 1135, 820, note.
of fraud in award on arbitration, 1193.
of fairness between attorney and client, 1269, 1275.
of attorney's undertaking, 1274.
see "Evidence" and "Proof."

BUYING DEMANDS:

for suit, disability of attorney from, 1260.

C.**CALENDAR:**

short cause, duty of clerk to prepare, 782.
how case placed upon, 783.
affidavit for placing case on (*Form No. 358*), 783.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

CALENDAR—Continued.

- short cause, proceedings to have case stricken from, 784.
- day to be set aside for trial of, 785.
- trial to occupy one hour only, 786.
- continuance of, 787.
- call of and opening of court, 788.
- placing cause on, out of its order, 797.
- calling case out of its order on, 797.
- cases on, undisposed of at end of term, continued by operation of law, 797.
- placing *certiorari* case on, for review, 1049.
- calling cases on, in upper court, 1075.
- see "Docket" and "Trial."

CALL OF CALENDAR:

- and opening court, 788.
- see "Calendar," "Docket" and "Trial."

CALLING CASE:

- out of its order on calendar, 797.
- on calendar in upper court, 1075.
- see "Calendar," "Docket" and "Trial."

CALL OF DOCKET:

- case presumed to be called in its order, 1027, note.
- in upper court, 1075.
- see "Docket" and "Trial."

CANNON:

- negligence of municipal corporation regarding use of, in streets, 600, note.

CAPACITY:

- want of, form of plea (*No. 329*), 710.
- see "Defenses" and "Pleas."

CAPIAS AD RESPONDENDUM:

- nature of, 449.
- form of affidavit for (*No. 23*), 451.
- allowance of, indorsement of, 452.
- form of writ (*No. 25*), 453.
- bond for, form, 454.
- writ of, service, arrest, 455.
- discharge on *habeas corpus*, 455.
- release of defendant from arrest, 456.
- commencement of declaration in suits begun by, 500.
- writ of, when to issue against body, 1005.
- may issue in action of account, 102.
- to stand as a summons, when, 459.
- see "Commencement of Action by."

CAPTAIN OF VESSEL:

- declaration against, for negligence in care of goods, case (*Form No. 213*), 598.
- see "Trespass," "Boats" and "Ships."

CAPTION, TO AFFIDAVIT:

- when required, 713, 550, note.
- see "affidavit."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

CAPTION OF WRIT:

"in the name of the people, etc." 434, note.
see "Writ."

CARE, DEGREE OF:

required to be proven in negligence cases, 220.
required of children and others of weak mind, 226.
required of person passing over public way, 228.
see "Diligence," "Due Care" and "Negligence."

CARE, PLEA OF:

on part of common carrier (*Form No. 350*), 710.
see "Common Carriers" and "Pleas."

CARE AND DILIGENCE:

synonymous terms, 222.
see "Diligence," "Due Care" and "Negligence."

CARELESSNESS:

action for trespass, 114.
see "Negligence" and "Trespass."

CARRIAGES:

declaration in common counts, for use of (*Via*), 510.
horses, etc., hire of, declaration in common counts for (*XIV*), 510.
see "Vehicles" and "Assumpsit."

CARRIAGE OF GOODS:

by water, declaration in common counts for (*XXIV*), 510.
by land, declaration in common counts for (*XXIII*), 510.
see "Common Carriers" and "Declaration."

CARRIERS:

not liable for act of God, 61.
may maintain action of trespass, when, 117.
possession of, will sustain trespass of at suit of owner, 117.
of freight are insurers, 61.
of passengers, when liable in trespass, 115.
degree of care required of, 220.
see "Common Carriers," "Diligence" and "Due Care."

"CARRYING DEMURRER BACK:"

rule, 739.
see "Demurrer."

CASE, ACTION OF:

how classified, 50, 112.
and *assumpsit*, difference in declaration, 595.
or *assumpsit*, choice of remedies, 595.
and trespass, compared, 114, 183.
and trespass, concurrent remedies, 135.
or trespass, special plea in, or notice with general issue, when
required, 706.
trespass on, by statute includes trespass, 113.
see "Trespass on the Case" and "Trespass."

[The references are to sections: Vol. I., §§ 1-77; Vol. II., §§ 788-1276.]

CASE, DECLARATION IN:

- general rules, 582.
- form of, by agents, 593.
 - against bailee for negligence (*No. 208*), 596.
 - without reward for negligence and non-delivery (*No. 209*), 596.
 - for immoderately driving horse (*No. 210*), 596.
 - for negligent driving against plaintiff's carriage (*No. 211*), 597.
 - by employer against employe for careless driving (*No. 212*), 597.
 - by owner of vessel against captain for negligence in care of goods (*No. 213*), 598.
 - against common carrier by land for negligence (*No. 214*), 598.
 - for negligently unloading goods (*No. 215*), 598.
 - against inn keeper for loss of chattel (*No. 216*), 598.
 - against railroad company for negligence in running train across highway (*No. 217*), 599.
 - by an administrator for negligence, causing death (*No. 218*), 599.
 - for not ringing bell, etc., (*No. 219*), 599.
 - for negligence regarding escape of fire (*No. 220*), 599.
 - for not fencing road (*No. 221*), 599.
 - for not maintaining cattle guards (*No. 222*), 599.
 - for injury to passenger (*No. 223*), 599.
 - for injury to person by collision (*No. 224*), 599.
 - against municipal corporation for negligence regarding sidewalk (*No. 225*), 600.
 - for digging away bank and injuring plaintiff's wall (*No. 227*), 600.
 - for obstructing street (*Nos. 228-229*), 600.
 - for injury by intoxicated person (*No. 230*), 600.
 - for negligence in kindling fire (*No. 232*), 602.
 - regarding partition fence (*No. 233*), 602.
 - for keeping ferocious dog (*No. 234*), 603.
 - for keeping dog accustomed to bite sheep, etc. (*No. 235*), 603.
 - for injury to plaintiff by defendant's bull (*No. 236*), 603.
 - for shooting dog (*No. 237*), 603.
 - upon warranty (*No. 238*), 604.
 - for fraud in sale of horse (*No. 239*), 605.
 - in selling goods (*No. 240*), 605.
 - for selling unmerchantable goods deceitfully packed (*No. 241*), 605.
 - for deceit in exchange of horses (*No. 242*), 605.
 - for misrepresentation of person's honesty (*No. 243*), 605.
 - for criminal conversation (*No. 244*), 606.
 - for enticing away wife, etc. (*Nos. 245-246*), 606.
 - for malicious prosecution and false imprisonment (*No. 247*), 607.
 - for maliciously causing arrest (*Nos. 248-249*), 607.
 - for malicious prosecution of civil case (*No. 250*), 607.
 - for seduction (*No. 251*), 608.
 - for enticing away workmen (*No. 252*), 609.
 - against physician for negligence (*No. 253*), 610.
 - against attorney for negligence in examining title (*No. 254*), 610.
 - for negligence in defending case (*No. 255*), 610.
 - for waste by cutting trees, etc. (*No. 256*), 611.
 - for waste by injuring premises (*No. 257*), 611.
 - against sheriff for false return (*No. 258*), 612.
 - for not levying (*No. 259*), 612.
 - for taking insufficient bond in replevin (*No. 260*), 612.
 - for excessive levy, etc. (*No. 261*), 612.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

CASE, DECLARATION IN—Continued.

- form of, for negligence in running foul of vessel (No. 262), 613.
- in running down boat (No. 263), 613.
- against steamboat owner for causing dangerous swell in river, etc. (No. 264), 613.
- for untying boat (No. 265), 613.
- against warehouseman for not forwarding goods (No. 266), 614.
- for diverting water course (Nos. 267-268), 615.
- for overflowing meadow (No. 269), 615.
- against commissioners of highways for overflowing land by ditch (No. 270), 615.
- for obstructing public way by vessel (No. 271), 616.
- for obstructing private way (No. 272), 616.
- for obstructing window lights (No. 273), 616.
- for neglecting to produce papers (No. 274), 617.
- for libel, general form (No. 275), 618.
 - directly charging offense, not requiring inducement (No. 275), 618.
 - not directly charging offense, requiring inducement (No. 276), 618.
 - not directly charging plaintiff with perjury, requiring inducement (No. 277), 618.
 - averment of special damages (No. 278), 618.
 - contained in letter from employer (No. 279), 618.
 - published in newspaper (No. 280), 618.
 - by letter intimating insolvency (No. 281), 618.
- for slander, directly charging offense and not requiring inducement (No. 282), 619.
- not directly charging offense, requiring inducement (No. 283), 619.
 - by accusation of false swearing (No. 284), 619.
 - of school mistress (No. 285), 619.
 - in charging want of chastity (No. 286), 619.
 - regarding profession (No. 287), 619.
 - imputing dishonesty, etc. (Nos. 288-289), 619.
 - imputing insolvency (No. 290), 619.
 - in foreign language (No. 291), 619.
- see "Declaration" and "Forms."

CASE, PLEA IN:

- general issue, what may be shown under. 698.
- see "Trespass on the Case," "Pleas" and "Forms."

CASTING LOTS:

- to arrive at verdict, ground for new trial, 968.
- see "Jury" and "Verdict."

CATTLE:

- when owner liable for acts of. 43.
- horses, etc., declaration in *assumpsit* for boarding and stabling (XVI), 510.
- declaration in trespass for injury by chasing (Form No. 194), 591.
- declaration in case for (Form No. 233), 602.
- distress of, damage feasant, replevin for, 162.
- see "Animals" and "Trespass."

CATTLE GUARDS:

- declaration in case against railway company for not maintaining (Form No. 222), 599.
- see "Declaration" and "Forms."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

CAUSE FOR ATTACHMENT:

see Attachment" and "Grounds for."

CAUSE OF ACTION:

definition of, 12.
when it survives, 28.
for damages, from death by wrongful act, survives, 29.
of husband for injury to wife, 30.
what survives on contracts, 36.
for damages, does not abate by the death, 42.
assignment of, in tort cases, 45.
survival of, in tort cases, 46.
requisites of, what are, 52.
consideration necessary to, 54.
splitting, not allowed, 53.
when arises for goods sold, 71.
statutory, *assumpsit* will lie for, when, 85.
when it arises in trespass, 133.
must be complete before suit begun, 427.
elements of, 477.
declaration must state, 480.
must be averred in declaration, 486.
statement of, recoverable under common counts, 510.
misjoinder of, in declaration demurrable, 525.
averment of, in declaration in "debt," 553.
consolidation of, generally, 780.
merger of, into judgment, 987.

CAUSE PENDING:

ground for continuance, 791.
see "Continuance."

CAUSES, REMOVAL OF:

from justices' court by *certiorari*, 391.
by appeal from justice, 409.
see "Review" and "Appeal"

CAUSES, CONSOLIDATION OF:

when allowable, 53.
general rule, 780.
how procured, 781.
continued by operation of law, 796.

"CERTIORARI:"

definition of, 391.
jurisdiction of supreme court in, 7.
jurisdiction of appellate court in, 8.
from justices' court, 391.
writ of, may issue in vacation, 9, note.
city courts may issue, 11.

CERTIORARI, WRIT OF:

to justice's court, nature and purpose, 392.
what may be reviewed by, 393.
who may issue, 394.
when city courts may issue, 394, note.
removal by, who may procure, 395.
removal by, when it may be obtained, 396.
how obtained, petition, 397.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

CERTIORARI, WRIT OF—Continued.

- to justice's court, motion to quash, 397.
- allowance of (*Form No. 11*), 397.
- circumstances, warranting the issuance of, 397, note.
- circumstances not warranting the issuance of, 397, note.
- bond, form for (*No 12*), 398.
- form (*No. 13*), 400.
- justice's return, 400.
- effect of, to stay proceedings, 401.
- effect of, does not vitiate sale on execution, 402.
- effect of, judgment for damages after execution of sale, 403.
- trial or hearing upon, evidence, 404.
- judgment upon, to justice, 405.
- costs on, when awarded, 406.
- effect of death of parties to, 407.
- execution upon judgment, 408.
- when cases reviewed by, in appellate and supreme court, 1019, note.
- preferable to writ of error, when, 1038.
- will issue to compel clerk to send up true record, 1044, note.
- petition for, form of (*No. 371*), 1047.
- from appellate or supreme court, when a discretionary writ, 1043.
- definition, nature and purpose, 1043.
- when it may be obtained, 1044.
- from which, 1045.
- the procedure, 1046.
- form of petition (*No. 371*), 1047.
- assignment of error is not necessary, 1048.
- noticing cause for hearing and placing same on calendar, 1049.
- judgment, 1050.
- see "Writ" and "Removal."

CERTAINTY:

- required in declaration, in statement of promise, 487, 517.
- see "Declaration," "Pleading" and "Variance."

CERTIFICATE:

- of authentication of transcript of record, 1058.
- of importance, from appellate court to procure review, 1019.
- of levy of attachment on land, 328.
- of moral character for admission to practice law, 1239.
- of stock, trover will lie for conversion of, 143.
- that writ of error to operate as *supersedeas* (*Form No. 372*), 1052.

CERTIFIED TRANSCRIPT OF RECORD:

- necessary to procure *supersedeas*, 1040.
- see "Record" and "Transcript."

CHALLENGE OF JURY:

- generally, 806.
- to array, what is, 806.
- may be excused without, 807.
- when improper, ground for *venire facias de novo*, 962.
- peremptory, rule relating to, 806.
- to the polls, what is, 806.
- see "Jury."

CHAMPERTY:

- abolished by statute, 1260, note.
- what contract with attorney not tainted with, 1265.
- see also "Barratry" and "Maintenance."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

CHANCERY COURTS:

what are, 2.
see "Courts."

CHANGE OF VENUE:

when granted, 760.
application for, requisites, 761.
by whom to be made, 761.
when prejudice or undue influence the ground relied on, 762.
when shall be made, 763.
to what court granted, 764.
order for, conditions, expenses, 765.
transmitting papers, etc., 766.
filing papers and docketing cause, 767.
irregularities of, cured by verdict, 768.
in courts of review, 1096.
cannot be compelled by *mandamus*, 1099.
in *quo warranto* proceedings, 1132, note.
see "Venue."

CHARACTER:

of pleas, determined by commencement and conclusion, 667.
in which party sues or is sued, not in issue unless specially denied,
499.
of defendant, how stated in declaration, 501.
of official, how stated in declaration (*Form No. 152*), 567, note.
of plaintiff, admitted by plea of general issue, 692.
certificate of, for admission to practice law, 1239.

CHARGE TO THE JURY:

how construed, 937.
see "Instructions to the jury."

CHARTS:

as evidence, 853.
see "Documents."

CHATTELS:

mortgagee of, may maintain trover, when, 148.
conversion of, declaration in trover for (*Forms Nos. 204-207*), 594.
see "Personal Property."

CHATTEL MORTGAGE:

who to bring replevin when assigned, 28.
will sustain trover, when, 148.

CHASING SHEEP:

declaration for, in trespass (*Form No. 194*), 591.
see "Declaration" and "Sheep."

CHASTITY:

accusing female of want of, slander, declaration in case for (*No. 286*), 619.
see "Slander" and "Declaration."

CHICAGO FIRE:

not act of God to excuse breach of contract, 61, note.
see "Act of God" and "Fire."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

CHILD:

- services due to parent, slight, sufficient to maintain action for seduction, 214.
- confining to its injury is false impression, 210.
- see "Minor" and "Infants."

CHILDREN:

- recovery for services rendered parent, 75.
- rule of contributory negligence as applied to, 226.
- liability in trespass, 115.
- as witnesses, rules regarding, 829.
- right of custody of, determined by *habeas corpus*, 1141.
- see "Infants" and "Minors."

CHINAMAN:

- oath to, how administered, 838, note.

CHOICE OF ACTIONS:

- on contract, 55.
- assumpsit* or trespass, 60, note.
- see "Choice of Remedies."

CHOICE OF PLEADINGS:

- plea in abatement or special motion, 665.
- see "Pleas" and "Defenses."

CHOICE OF REMEDIES:

- for goods sold and delivered, 71.
- against corporations, 86.
- to collect fine, penalty or forfeiture, 87.
- when debt preferable, 88, 89, 90.
- when covenant especially proper, 97.
- for tenants in common to land, 101, 102.
- action of account or bill in chancery, 110.
- trespass or case, 114, 135, 183.
- trespass or case for injury to property, 117.
- trespass or trover, 117, 119.
- trespass and replevin, 120.
- waiver of tort and suing in *assumpsit*, 132.
- trover or trespass, 137.
- not trover, but trespass, for injury to crops by animals, 143.
- replevin or trespass, 155.
- trover preferable to replevin for grain in warehouse, 164.
- for property taken on tax levy, 165.
- for injury to property, 231.
- for goods sold on misrepresentation, 233.
- "case" preferable, when and why, 237.
- ejectment or forcible entry and detainer, 240, 263.
- ejectment or case for injury to highway, 242.
- ejectment or case, 260.
- attachment or garnishment of stockholders' interest, 297.
- attachment or garnishment, 355.
- certiorari* or appeal or writ of error, 393.
- replevin or trover, 593.
- assumpsit* or case, 595.
- appeal or writ of error, 1031, 1038.
- certiorari* rather than writ of error, when, 1038.
- mandamus* or injunction, 1097, note.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

CHOICE OF REMEDIES—Continued.

- mandamus* or *quo warranto*, 1098.
- mandamus* or writ of error, 1099.
- prohibition or injunction, 1117.
- prohibition or *mandamus*, 1118.
- mandamus* or indictment to remove obstruction to highway, 1102.
- scire facias* or *quo warranto* to try the legality of corporations, 1167.
- forcible entry and detainer or writ of possession under decree, 1207, note.
- see "Actions" and "Forms of Actions."

CHOSES IN ACTION:

- who to sue upon, 14.
- who to sue upon, when assigned, 20, note.
- for torts, when assignable, 28.
- survive, when assignable, 28.
- form of declaration in trover to recover (*Nos. 204-207*), 594.
- description of, declaration in trover for (*Form No. 205*), 594.
- see "Causes of Action" and "Actions."

CHRISTIAN NAME:

- use of, alone in summons, 434.
- see "Names."

CHURCHES:

- powers of, 2, note.

CHURCH SOCIETIES:

- not interfered with by *mandamus*, generally, 1098, note.
- see "Corporation."

CIRCUIT COURTS:

- number of, 2.
- several branches of, 9.
- judges of may sit in city courts, 11.
- powers of, in vacation, 9.
- may issue writ of, *scire facias*, 389.
- may issue writ of prohibition, 389.
- may issue writ of *mandamus*, 389.
- may issue writ of *ne exeat*, 389.
- may issue writ of *habeas corpus*, 389.
- jurisdiction of, to issue writs of *quo warranto*, *habeas corpus*, and other writs in vacation, 389.
- on appeal from justice, 411.
- appeal from to supreme court after appeal from county court, 1016, note.
- see "Courts."

CIRCUMSTANCES:

- proof of in trespass, 115.
- see "Evidence" and "Proof."

CIRCUMVENTION:

- see "Fraud."

CITATION:

- see "Notice" and "Warrant."

[The references are to sections: Vol. I., §§ 1-757; Vol. II., §§ 781-1270.]

"CITIZEN:"

definition of as used in declaration for libel, 618, note.

CITY COURTS:

number of, 2.
jurisdiction of, 11.
judges of may sit in circuit courts, 11.
judgments of, 11.
adjournment of, 11.
when may be created, 11.
powers of regarding original writs, 389.
jurisdiction of to hear appeal from justice, 411.
see "Courts."

CITY ORDINANCES:

how proven, 855.
see "Ordinance."

CIVIL ACTION:

malicious prosecution of, 206.
see "Action" and "Malicious Prosecution."

CIVIL CASES:

proof in, preponderance only required, 821.
see "Actions," "Evidence" and "Proof."

CIVIL COURTS:

what are, 2.
see "Courts."

CLAIM, AFFIDAVIT OF:

to be filed with declaration, 550.
amendment of, 550.
effect of omission, 550.
what it must contain, 550.
form of (*No. 141*), 550.
prima facie proof, 801.
when objection to, to be made, 895, note.
see "Affidavit" and "Demand."

CLAIM OF EXEMPTION:

may be raised in attachment, 326.
see "Exemptions" and "Attachment."

CLAIM FOR WAGES:

not to be assigned for garnishment when, 388.
see "Assignments" and "Garnishment."

CLAIMANT OF PROPERTY:

see "Interpleader."

CLASSIFICATION OF ACTIONS:

generally, 12, 50.
of *assumpsit*, 54.
for torts, 112.
replevin is transitory, 170.
ejectment real in its nature, 238.
of garnishment, 356.
see "Actions."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

CLASSIFICATION OF COURTS:

see "Courts."

CLASSIFICATION OF JUDGMENT:

generally, 988.

according to their nature, 989.

see "Judgments."

CLASSIFICATION OF "THINGS:"

generally, 4.

see "Res" and "Property."

CLERICAL MISTAKE:

in plea, how corrected, 688.

see "Irregularities," "Informalities" and "Amendments."

CLIENT:

duties and liabilities of attorney to, must counsel against wasting estate, 1269, note.

entitled to argument of counsel as a matter of right, 1256.

privileged communications of with attorney, 832.

definition of terms, 1231.

see "Attorney and Client."

CLOSE:

definition of, 121, 123.

what is a breaking of, 121, 123.

description of in declaration in action for injury to land, 583.

COGNOVIT:

when void renders judgment void, 999.

of defendant, when unnecessary, 624.

desiring not to appear (*Form No. 295*), 624.

who has been served (*No. 295*), 624, note.

see "Confession of Judgment" and "Warrant of Attorney."

COLLATERAL ATTACK:

on judgment, general rule, 1007.

"COLLECTION:"

effect of guaranty of, 84.

of costs provided for by statute, practice, 1012.

COLLECTION OF MONEY:

duty of attorney to client in, 1271.

see "Attorney and Client."

COLLATERAL PROMISE:

what action will lie upon, 90.

see "New Promise."

COLLISION:

declaration in case against railway company for injury to person by (*Form No. 224*), 599.

COLOR OF LEGAL PROCEEDINGS:

trespass for damages, 115.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

COLOR OF TITLE:

- payment of taxes in ejectment, 244.
- proof of, in action of ejectment, 253.
- to defeat action of ejectment, 253, note.
- and payment of taxes will support ejectment, 257.
- deed from client to attorney not, 1272, 1269, note.
- see "Ejectment."

"COMES AND DEFENDS, ETC.:"

- significance of, 688.
- see "Pleas."

COMMENCEMENT OF ACTIONS:

- generally, 426.
- time for, 427.
- when premature will not sustain recovery, 427.
- manner of, 428.
- præcipe necessary to, 428.
- place for, 429.
- defendants in different counties, 429.
- when security of costs required, 430.
- by poor person, 431.
- what is, 432.
- process must be purchased by plaintiff, 433.
- by summons, form, 434.
- return of process, 444.
- by *capias ad respondendum*, 449.
 - when allowed, 450.
 - affidavit for, 451.
 - endorsement of allowance, 452.
 - issuance of the writ, 453.
 - bond to be filed by plaintiff, 454.
 - service of writ, arrest, 455.
 - arrest, bail, bond by defendant, 456.
 - discharge of defendant, 458.
 - when to stand as a summons, 459.
 - proceedings thereafter, 460.
 - discharge of bail on surrender, 465.
 - new bail after surrender, 468.
 - effect of death of defendant, 473.
- by attorney in his own name (*Form No. 30*), 498.
- where infant sues (*Form No. 31*), 498.
- where partners sue (*Form No. 32*), 498.
- where surviving partner sues (*Form No. 33*), 498.
- when assignee sues in his own name (*Form No. 34*), 498.
- when assignee sues in name of assignor (*Form No. 35*), 498.
- when assignee of choses in action sues in name of assignor for use (*Form No. 36*), 498.
- where an executor sue (*Form No. 37*), 498.
- when an administrator sues (*Form No. 38*), 498.
- where a corporation sues (*Form No. 39*), 498.
- in suit begun by national bank (*Form No. 40*), 498.
- declaration when to be filed, 548.
 - how to be filed, 548.
- for forcible entry and detainer, complaint, 1211.
- authority of attorney for, 1266.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

COMMENCEMENT OF DECLARATION:

- illustrated, 489.
- what it contains, generally, 494.
- must name parties to the suit, 495.
- statement of manner in which defendant brought into court may now be admitted, 496.
- recital of form of action, 497.
- where public officer a party, 499.
- in suits begun by *capias*, 500.
- how character in which defendant is sued should be stated, 501.
- in form of "debt," 552.
- in case, 595.
- see "Declaration" and "Forms."

COMMENCEMENT OF PLEA:

- in abatement, 669.
- in bar, 688.
- see "Pleas" and "Forms."

COMMENCEMENT AND CONCLUSION OF PLEAS:

- determine their character, 667.
- special pleas, form of (*No. 318*), 710.
- see "Pleas" and "Forms."

COMMISSIONERS:

- power of, on assessment of value of improvements in ejectment, 287.
- oath of, for assessment of value on improvements in ejectment, 287.
- report on assessment of value of improvements in ejectment, 287, 288.
- see "Auditors" and "Officers."

COMMISSIONERS OF HIGHWAYS:

- declaration in case against, for overflowing land by ditch (*Form No. 270*), 615.
- mandamus* will lie to, when, 1101, 1102.
- see "Officers."

COMMITMENT:

- for refusal to take oath in action of account, 107.
- see "Contempt."

COMMITMENT OF PRISONER:

- new, on *habeas corpus*, 1154.

COMMITMENT OF WITNESS:

- for refusal to testify in action of account, 107.
- see "Contempt" and "Witnesses."

COMMON CARRIERS:

- negligence of, what excuses, 61.
- not liable for act of God, 61.
- possession of, will sustain trespass at suit of owner, 117.
- of passengers, degree of care required of, 220.
- when liable in trespass, 115.
- liable for want of reasonable diligence (*Form No. 223*), 599. note.
- declaration by, in *assumpsit* against consignee for not receiving goods, etc. (*Form No. 72*), 529.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

COMMON CARRIERS—Continued.

- declaration against in *assumpsit* for gross neglect and loss of goods (Form No. 73), 529.
- for carelessness and delay in delivery (Form No. 74), 529.
- for negligent injury, etc. (Form No. 75), 529.
- for negligence, case (Forms Nos. 213-216), 598.
- in unloading goods (Form No. 215), 598.
- plea of diligence by (Form No. 350), 710.

COMMON COUNTS:

- number of, 62.
- lie only for money demand, 62.
- when lie in *assumpsit*, 62.
- to recover purchase money paid, 63.
- for money had and received, 63.
- equitable in their nature, 63.
- for money had and received to plaintiff's use, 63.
- will lie for interest, 70.
- for goods sold and delivered, 71.
- to compel payment of another's debt, 72.
- for work, labor and material, 73.
- in *assumpsit* "account stated," 82.
- when will lie for *quantum meruit*, 76.
- indebitatus*, 505.
- will only lie when money due, 505.
- quantum meruit* count, 507.
- quantum velibant* count, 508.
- account stated, 509.
- in *assumpsit*, lie only for payment of money, 60, note.
- on bills and notes, 83.
- generally, 504.
- see "Assumpsit" and "Declaration."
- in declaration, when sufficient, 503.
- against municipal corporations, 504.
- indebitatus* count, for what available, 505.
- / founded on promise to pay money, 505.
- must aver express promise, 505.
- statement of causes of action recoverable in, 510.
- for crops sold to the defendant (III), 510.
- for real estate sold and conveyed (V), 510.
- for fixtures (IV), 510.
- for labor and services (VI), 510.
- for labor and services of horses and carriages, etc. (VIa), 510.
- for labor and material (VII), 510.
- for money lent (VIII), 510.
- for money paid to defendant's use (IX), 510.
- for money had and received (X), 510.
- for interest (XI), 510.
- for use and occupation (XII), 510.
- for board and lodging (XIII), 510.
- for hire of horses, carriages, etc. (XIV), 510.
- for pasturage, etc. (XV), 510.
- for boarding and stabling horses, cattle, etc. (XVI), 510.
- for necessaries (XVII), 510.
- for physician's fees (XVIII), 510.
- for attorney's fees (XIX), 510.
- for wages and salary (XX), 510.
- for warehouse room, storage, etc. (XXI), 510.
- for dockage of ships and vessels (XXII), 510.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

COMMON COUNTS—Continued.

- in declaration, for freight or carriage of goods by land (XXIII), 510.
- for freight or carriage of goods by water (XXIV), 510.
- freight or goods, another form (XXV), 510.
- in debt (*Form No. 145*), 565.
- consolidated in, declaration, 511.
- form of (*No. 45*), 512.
- in action of debt (*Form No. 145*), 565.
- see "Declaration."

COMMUNICATION:

- privileged, of physician or surgeon, 830.
- of minister or priest, 831.
- what, in slanderous words, 189, note.
- of attorney and client, 832.
- may be waived by party, 833.
- between attorney and client, rule governing, 1257.
- to whom it extends, 1257.
- extends to documents, 1257.
- ends with death of client, 1257.
- see "Evidence."

"COMPARATIVE" NEGLIGENCE:

- doctrine of, abrogated in this state, 223.
- see "Negligence."

COMPENSATION OF COUNSEL:

- liability of client for, 1274.
- lien for, rule, 1276.
- of assistant counsel, liability of client for, 1274.
- see "Fees."

COMPENSATION OF ARBITRATORS, 1188, note.

- see "Fees" and "Arbitrators."

COMPETENCY OF ARBITRATORS, 1185.

- see "Arbitrators."

COMPETENCY OF WITNESSES:

- see "Evidence" and "Witnesses."

COMPLAINT:

- in action for forcible entry and detainer, 1211.
- in action of replevin, 155.
- in proceedings to disbar attorneys, 1249.
- amendment of, in forcible entry and detainer, 1211, note.
- see "Declaration" and "Petition."

COMPROMISE:

- as shown in evidence, 847.
- authority of attorney to make for client, 1268.
- of trover, effect of on title, 154.

COMPUTATION OF TIME:

- in service of summons, 436.
- see "Time."

CONCEAL:

- "about fraudulently to" as ground for attachment, 313.
- see "Attachment."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276]

CONCEALED DEFENDANTS:

in replevin, notice to, 176.

CONCEALED DEBTOR:

attachment will lie against, 307.

see "Attachment" and "Grounds."

CONCEALMENT:

definition of in attachment, 307.

fraudulent as ground for attachment, 312.

CONCLUDE TO THE COUNTRY:

when replication to plea in abatement must, 677.

see "Pleas" and "Forms."

CONCLUSION:

declaration must not aver, 482.

in declaration illustrated, 489.

of declaration in debt "against the form of the statute, etc.," 562.

in covenant, (*Form No. 162*), 573.

of plea, in abatement, 671.

in bar, 690.

importance of, rule, 701.

of replication to plea in abatement, 677.

of rejoinder of defendant to plea in abatement, 678.

what is in plea, 690.

to special pleas, form of (*No. 318*), 710.

and commencement of pleas determine their character, 667.

CONCLUSIVENESS:

of verdict, rule, 949.

of judgment, general rule regarding, 987, note.

of judgment of sister state, 987, note.

CONCURRENT CONSIDERATION:

averment of in declaration, 516.

CONCURRENT REMEDIES:

mandamus and another, 1108.

forcible entry and detainer or writ of possession under decree, 1207.

note.

trespass or case, 135.

see "Choice of remedy."

CONCURRENT JURISDICTION:

of state and federal courts, 4.

see "Jurisdiction."

CONDITION OF BOND OF APPEAL:

in forcible entry and detainer, 1219.

see "Bonds," etc.

CONDITIONS PERFORMED:

by plaintiff on property subject to lien in garnishment, 381.

form of averment of, in special plea or notice with general issue (*No. 343*), 710.

plea of (*Form No. 343*), 710.

see "Pleas" and "Performance."

CONDITIONAL JUDGMENT:

how made final in garnishment, 376.

see "Judgment."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

CONDITIONAL SALE:

when *assumpsit* will lie upon, 71, note.
of goods trover to recover breach of, 144.
replevin for goods sold on, 159.
see "Sale."

CONDUCT OF COURT:

erroneous, ground for new trial, when, 974.

CONDUCT OF JURY:

rule relating to, 943.
may be sent back to determine verdict, 946, 955.
return and statement of verdict, 946.
when "tampered" with, grounds for a new trial, 967.
ground for new trial, 968.
error in, ground for *venire facias de novo*, 962.
see "Jury."

CONFESSION AND AVOIDANCE:

plea of, in forcible entry and detainer, 1214.
when replication to plea in abatement must be in, 677.
see "Pleas" and "Forms."

CONFESSION OF JUDGMENT:

general rule regarding, 996.
by defendant in open court, 624.
warrant for (*Form No. 296*), 624.
cannot be appealed from, 409.
power of guardian to make, 39.
cannot be made forcible entry and detainer, 996, 1217, note.
may be entered in vacation, 996.
in vacation, defense to on leave to plead, 999, note.
in vacation, when set aside, plaintiff may amend, 999, note.
consolidation of notes for, 996, note.
attorney's fee included in, when, 996, note.
conditions on which entered, practice, 997.
affidavit of warrant of attorney and that maker is alive, 997, note.
jurisdiction of person, how acquired on, 997, note.
presumptions entertained regarding, 997, note.
proof and presumptions on, 998.
presumption favoring, 1000, note.
how set aside, practice, 999.
motion to set aside, where and by whom made, 999.
what court may set aside, 999.
entered in term time, how set aside, 999.

CONFLICT OF JURISDICTION:

between state and federal court in *habeas corpus*, 1141.
generally, 6.
see "Jurisdiction."

CONSENT:

age of in child, 214, note.
rule abolished in ejectment, 238.

CONSEQUENTIAL DAMAGES:

action on the case for, 213.
see "Damages," "Exemplary Damages," and "Vindictive Damages."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

CONSERVATOR:

in case of insanity or idioecy, 25.
commencement of suit by, what name to use, 498.

CONSIDERATION:

necessary to contract, 54.
avermment of in declaration, on "promissory note" payable in other than money (*Form No. 122*), 545, note.
avermment of in declaration in debt, 555.
executed, avermment of in declaration, 516.
concurrent, avermment of in declaration, 516.
lack of, *assumpsit* to recover money so paid, 65.
failure of, pleaded specially in debt, 703.
want of or failure of as a defense, form of pleas (*No. 331*), 710.

CONSIDERATION IN DECLARATION:

illustrated, 489.
necessity for, 516.
see "Declaration."

CONSOLIDATION OF CAUSES:

generally, 780.
procedure to procure, 781.
when allowable, 53.

CONSOLIDATION OF COMMON COUNTS:

declaration in, 511.
in action of debt (*Form No. 145*), 565.
see "Declaration" and "Counts."

CONSIGNEE:

may maintain action of trespass when, 117.

CONSTITUTION:

cases involving construction of, appeal directly to supreme court, 1017.
cases relating to construction of, what are, 1017, note.
see "Appeal" and "Review."

CONSTITUTIONAL RIGHTS:

guaranteed, applicable in attachment, 294.

CONSTITUTIONALITY:

of legislative act can not be questioned by *quo warranto*, 1125.

CONSTRUCTION:

rules of, regarding attachments, 292.
of answer in *mandamus*, 1110.
of attachment statute, 292.
of bridge, *mandamus* will lie to compel when, 1103.
of charge to jury, 937.
of constitution, cases involving appealed directly to supreme court, 1017.
of declaration most strongly against pleader, 85.
of information in *quo warranto*, 1129.
of petition for *mandamus*, rule, 1108.
of sewer, compelled by *mandamus* when, 1104.

CONSTRUCTIVE POSSESSION:

sufficient to sustain trespass when, 117, 592, note.
see "Possession" and "Trespass."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

CONSULTATION, WRIT OF:

when to issue on judgment on writ of prohibition, 1123.

CONTEMPT OF COURT:

authority to fine for, 6.

what is, 6, note.

when libel punishable as, 197.

garnishee guilty of, on refusal to surrender property, 382.

for refusal to make return, 447.

mandamus may be enforced by, 1115.

witnesses on arbitration liable for, when, 1188.

see "Attachment, for."

CONTENTS:

of written instrument, how proved, 846.

of documents—See "Documents," contents of.

CONTESTED MOTIONS:

hearing of arguments, 776.

see "Special Motions" and "Motions."

CONTINUANCES:

generally, 789.

of short causes, 787.

by operation of law, 795.

oral agreement for, not binding, 795.

on stipulation, 795.

on writ of error, when to operate as *supersedeas*, 1056.

for procuring amendment of record, 1058.

of court when no judge in attendance, 788, note.

of trial, general rule, 789.

causes for, 791.

discretionary with court, 790.

of hearing before auditors, in action of account, 106.

before referee, 1200.

CONTINUANCE, MOTION FOR:

granted because copy of instrument sued on omitted in declaration, 546.

granted with costs for default in filing declaration, 549.

to make amendment, 745.

when amendment cause for, 745.

affidavit to support, 791.

amendment ground for when, 791, note.

when to be made, 792.

when second to be made, 792.

how to be made, 793.

review of ruling on, 794.

when necessary, 791.

when writ not personally served, 339.

affidavit to support, 793.

form of affidavit for (*No. 360*), 793.

absence of witness ground for, rather than for new trial, 969.

CONTINUANCE, ORDER FOR:

how reversed, 794.

not set aside without notice to adversary, 798.

CONTINUENDO:

use of, in declaration in trespass, 592, note.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

CONTINGENCY:

must be set forth in declaration, 559.

CONTINGENT FEE:

attorney may receive, 1265.

"CONTRACT:"

commensurate with duty, 57.

what necessary to, 54.

breach of, *assumpsit* for damages generally, 60.

damages must be natural sequence, 61.

of bailment, when gratuitous cannot be recovered for, 75.

between partners, when may be enforced by suit at law, 19, note.

part performed, pleading and proof in *assumpsit* on, 60.

executory, requires special count to obtain a recovery, 514.

not to be performed within one year. statute of frauds, form of plea (No. 323), 710.

avermert of in declaration, two methods used, 517.

statement of in declaration either in terms or substance, 503.

actions on, in name of one for use of another, 14.

what pleas proper in, 19.

when obligee dies, 21.

plaintiffs, in cases of insolvency, 24.

in case of assignment, 24.

in case of receivership, 24.

in, when female marries, 22.

in case of infancy, 23.

in case of insanity or idiocy, 25.

defendants, in case of assignment, 33.

as between original parties, 33.

joint or several, 34.

where interest assigned, 35.

when contractor dies, 36.

in case of assignments, for benefit of creditors, 37.

where female contractor marries, 38.

in case of infancy, 39.

in case of insanity, idiocy, etc., 40.

in form of "debt," declaration, 551.

see "Actions" and "Forms of actions."

assignment of, defendants in case of, 35.

declaration on, *assumpsit*, generally, 503.

common counts sufficient when, 504.

form of *indebitatus* count (No. 41), 506.

when party sues or is sued in representative capacity, 513.

special count, 514.

in form of "debt," 551.

fraudulent, a ground for attachment, 314.

illegal, cannot be enforced, 65.

immoral, cannot be enforced, 65.

oral, how proved, 870.

parole, may be made by corporation, 86.

privity of, necessary to sustain "debt," 90.

privity of, necessary to *assumpsit*, 67.

recision of, when allowable for fraud, 69.

for sale of goods, 71.

"specially" debt maintainable upon, 92.

plaintiffs in action on, 13.

require special count in declaration to sustain recovery, 514.

recovery on common counts, 505.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

"CONTRACT"—Continued.

- under seal *assumpsit* on, 59.
- debt a proper form of action, 92.
- in writing, proof of when lost, 74.
- for labor, etc., *assumpsit* upon, 74.
- how set forth in declaration in debt, 558.
- payable in trade, declaration on, in *assumpsit*, time and place not specified (*Form No. 122*), 545.
- payable in trade, declaration on, in *assumpsit*, time and place specified (*Form No. 122, 2d form*), 545.
- payable in trade declaration on, in *assumpsit* price, time and place agreed upon (*Form No. 122, 3d form*), 545.
- how set forth in declaration, 517.
- declaration on averments necessary, 481.
- for labor—See "Labor Contract."

CONTRADICTION OF RETURN, 446.
see "Return."

CONTRIBUTORY NEGLIGENCE:
of servant, action on the case for, 225.
rule regarding, 224.
rule of, will not apply, when, 226.
of one using machinery, 225.
see "Negligence."

CONVERSION:
what constitutes, 138.
of goods, form of declaration in trover for (*No. 204*), 594.
see "Trover."

CONVEYANCE:
fraudulent as ground for attachment, 311.

COPARCENERS:
of real estate, when to join as plaintiffs, 27.
amendment of law relating to, 27.
may maintain action of account, 100.
of land, "Account" will lie at suit of, 101.
see "Joint Tenants, "Tenants in Common" and "Partners."

COPARTNERS:
see "Partners."

COPIES:
attested as evidence, 859.
see "Attestation" and "Verification."

COPY:
authenticated on writ of error, of what to consist, 1058.

COPY OF ACCOUNT SUED ON:
with declaration, 546.
to accompany setoff, 725.

COPY OF INDORSEMENT:
to be set out in copy of instrument when (*Form No. 113*), 545, note.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

COPY OF WRITTEN INSTRUMENT:

to accompany setoff, 725.
indorsement to be set out in, when (*Form No. 113*), 545, note.
on account sued on with declaration, 546.
see "Declaration."

CORAM NOBIS:

writ of, to correct errors in judgment in same court, 1002.
see "Writ of Error."

CORONER:

may serve summons when, 436.
see "Officers."

CORPORATE EXISTENCE:

proof of, 658.
see "Corporation."

CORPORATE STOCK:

levy of attachment on, 324.
declaration in *assumpsit* for (*Form No. 98*), 537.
see "Corporation" and "Stock."

CORPORATION:

actions against, when *assumpsit* will lie, 86.
in what name to sue, 19.
must be named in declaration, 483.
how to be named as defendants in action on contract, 33.

CORPORATIONS:

as plaintiff's mistake in name, 13.
successor of, in action on contract, 33.
may be made a garnishee, 362.
may be guilty of libel, 194.
libel of, declaration for in case (*Form No. 276*), 618, note.
stockholders' interest attachable when, 297.
return of summons served upon, 444, note.
agent of, who is not, to receive service of process, 441, note.
books of, how shown in evidence, 850.
by-laws, declaration on in *assumpsit* (*Form No. 107*), 542.
de facto, in what name to sue, 13.
existence of, how proved, 658.
cannot be questioned collaterally, 1124.
only questioned by *quo warranto* or *scire facias*, 1124.
writ of *scire facias* to try, 1167.
foreign, as garnishees, 362.
as garnishee, answer under seal and on oath, 367.
insolvent, when to be plaintiff, 24.
municipal, how to be sued on contract, 33.
may maintain garnishment, 361.
may not be held as garnishees, 362.
service of process upon, 443.
declaration in case for negligence of (*Forms Nos. 225-230*), 600.
no cost awarded against, 1010.
mandamus will lie to, when, 1103.
officer of to answer *mandamus* individually, 1107.
nul tiel, plea in abatement, 658.
(*Form No. 307*), 674.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

CORPORATIONS—Continued.

- private, service of process upon, 441.
- mandamus* will lie to, when, 1104.
- receiver of, service of process upon, 442.
- religious, under what name to sue, 13, note.
- stock of, subscribers to, may plead release from liability (*Form No. 341*), 710, note.
- ultra vires*, plea of (*Form No. 324*), 710.
- see "Municipal Corporations" and "Officers."

CORRECTING FORM OF VERDICT:

- power of jury in, 948.
- see "Verdict" and "Amendment."

CORRECTING TESTIMONY:

- by recalling witness, 884.
- see "Testimony," "Witnesses" and "Proof."

CORRECTION OF PUBLICATION:

- excuses libel, 196.
- see "Publication" and "Libel."

CORRECTION OF RECORD:

- cannot be made by bill of exceptions, 1023.
- see "Amendments."

CORRESPONDENCE:

- how shown in evidence, 861, note.
- see "Evidence" and "Proof."

COSTS:

- general rule relating to, 1008.
- when defendant shall recover, 1010.
- recoverable in action of covenant, 98.
- on appeal, divisions of, 1011.
- from justices court, 425.
- bond for in attachment cases, when required, 316, note.
- execution of, 430.
- see "Security for Costs."
- classification of, "Interlocutory" and "Final," 1008.
- collection of, provided for by statute, practice, 1012.
- on *certiorari*, when granted, 406.
- in garnishment, 375.
- judgment for, in suit on replevin bond, 182, note.
- of acquittal, 1010.
- in *mandamus*, 1111.
- plaintiff's right to recover, 1009.
- on plea *puis darrein* continuance, 758.
- on prohibition, 1009, note, 1010, note.
- in *quo warranto*, 1136.
- on reference of issue to referee, 1203.
- on rehearing in upper court, 1095, note.
- in replevin, 1010, note.
- on *scire facias*, 1178, 1009, note, 1010, note.
- in suits for the people, 1010.
- security for, when required before commencing suit, 430.
- when need not be given, 431.
- to be given in distress for rent by non-resident plaintiff, 1220.

[The references are to sections: Vol. I., §§ 1-737; Vol. II., §§ 738-1273.]

COSTS—Continued.

- taxation of, general rule, 1012.
 - when improper, fee bill may be replevined, 1012.
 - cannot be appealed from by witness entitled to cost, 1014, note.
 - on replevin of fee bill, 1038, note.
- attorney's fees taxed as, when, 1274.
- on writ of prohibition, 1123.
- for caring for attached property, 335.
- of sending transcript of record to upper court, 1058, note.
- on hearing of motion for new trial, 977.
- when case dismissed, 1010.
 - see "Judgment" and "Expenses."

CO-TENANTS:

- when liable for use and occupation, 79.
- "account" will lie at suit of, 101.
- may have action of account or bill in chancery, 110.
- action of trover by and against, 146, 161.
- action by and against, 161.
- in ejectment, must prove ouster when, 260, note.
- adverse possession as defense in ejectment by, 271.
- see "Tenants in Common" and "Partners."

COUNSEL:

- party not compelled to have, 1244, 1268, note.
- advice of, as defense in malicious prosecution, 204.
- absence of, ground for new trial when, 969.
- appearance, "General" or "Special," rule, 1266.
- appearance of for client, generally, 1266.
- withdrawal of, substitution of attorneys, 1267.
- authority of, to make admission for client, 1267.
 - to compromise cause, 1268.
 - to satisfy judgment, 1268.
 - in regard to assignment of judgment, 1268.
 - to receive service of notice in appealed cases, 1268, note.
- authority and powers, in management of case, satisfaction, 1268.
- to dispose of perishable property of client, 1268, note.
- excess of, relieved by equity when, 1268, note.
- duty of law firm to client, 1269.
- duties and liabilities of to client, generally, 1269.
 - in management of case, 1268, 1270.
 - to remain in court till jury discharged, 1270.
 - in collections of money, 1271.
 - in purchase of land, 1272.
 - in the investigation of title, 1273.
- liability of to third persons, 1263.
- liability of client to, compensation, 1274.
- how contract of retainer proved, 1275.
- lien for services, 1276.
- disability of, because of his profession, 1258, 1259, 1260, 1261, 1262.
- cannot act for both parties, 1259.
- right to, possessed by client, 1264.
- stipulation of, no part of record unless by bill of exceptions, 1023.
- trustee of client, when, 1269, 1272, 1275, note.
 - see "Attorney."

COUNSEL, ASSISTANT:

- compensation of, liability of client for, 1274.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

COUNSEL, ARGUMENT OF:

- is a matter of right, 906.
- limitation of time for, 906.
- scope of, 907.
- may be excepted to and assigned for error, 907.
- error in. how availed of, 908.
- order of making, rule regarding, 909.
- cannot be cut off by adversary, 909, note.
- improper remarks in, ground for new trial, when, 967.
- reviewed only by aid of bill of exceptions, 1023.
- in upper court, rule governing, 1076.
 - may be waived, 1076.
 - none oral upon motion for rehearing, 1077.
 - oral, time allowed for, 1078.
- privilege regarding, 1256.
- exception to ruling of court on objection to, 1256.
- should be restricted to evidence and case, 1256.
- see "Argument of Counsel" and "Opening Statement."

COUNSEL FEES:

- see "Attorney's fees."

COUNSELLOR AT LAW:

- definition of, 1231.

COUNTER AFFIDAVITS:

- to motions to set aside default, 802.
- when motion made to set aside judgment confessed, 999.
- see "Affidavit" and "Motions."

COUNTRY. CONCLUSION TO:

- what is, in plea, 690.
- see "Pleas."

COUNTS:

- new ones may be added any time before judgment, 502, 525.
- common, when will lie in *assumpsit*, 62.
 - lie only for money demand, 62.
 - number of, 62.
- for "Account stated," when proper in declaration, 504.
- election of, when inconsistent, 514.
- joinder of in declaration, 525.
 - when repugnant, effect of, 514.
 - "trespass" and "case," 525.
- misjoinder of in declaration, 525.
- special, in *assumpsit* when required, 514.
- withdrawal of waives right of recover, 525.
- see "Declaration."

COUNTY BOARD OF COMMISSIONERS:

- mandamus* will lie to, when, 1101.
- see "Officers."

COUNTY COURTS:

- number of, 2.
- jurisdiction of, 10.
 - on appeal from justice, 411.
- powers of, regarding original writs, 389.
- appeals from, to circuit court, 10, note, 1016, note.
- to supreme court, 10, note.
- writ of error to, when it will lie, 1038, note.
- see "Courts."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

COUNTY JUDGE:

mandamus will lie to when, 1101.
see "Officers" and "Judge."

COUNTY OFFICER:

mandamus will lie to, when, 1101.
see "Officers."

COUNTY TREASURER:

mandamus will lie to, when, 1101.
see "Officers."

COURT:

definition of, 1.
classification of, 1.
origin and nature of, 1.
the repository of judicial power, 3.
appellate, jurisdiction of, 8.
to assess damages in replevin, 179.
circuit, several branches of, 9.
seal of, 2.
superior of, Cook county, jurisdiction of, 9.
term of, judge may not postpone, 9.
trial by, when proper, 803.
see "Trial by the Court."
adjournment of from day to day, 6.
appellate, number of, 2.
appellate, jurisdiction of, what are, 5.
of chancery, what are, 2.
circuit, number of, 2.
jurisdiction of, 9.
city, number of, 2.
jurisdiction of, 11.
regarding original writs, 389.
civil, what are, 2.
contempt of, authority to fine for, 6.
county, number of, 2.
jurisdiction of, 10.
regarding original writs, 389.
criminal, what are, 2.
ecclesiastical, what are, 2.
equitable jurisdiction of in garnishment regarding sales and
lens, 384.
general powers of, 5.
jurisdiction of, 1.
in term time, 6.
as to adjournment, 6.
in *habeas corpus*, limit to number of writs, 1156.
of law, what are, 2.
of original jurisdiction, what are, 5.
powers of, over judgment record, 743.
see "Jurisdiction."
of record, what are, 2.
jurisdiction of, 6.
county courts are, 10.
not of record, what are, 2.
special term of, when judges may appoint, 9.
state, actual powers of, 6.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

COURT—Continued.

- superior, number of, 2.
- jurisdiction of regarding original writs, 389.
- supreme, powers of in vacation, 7, note.
- contempt of, what is, 6, note.
- garnishee guilty of, on refusal to surrender property, 382.
- witnesses on arbitration liable for, when, 1188.
- continuance of, when no judge in attendance, 788, note.
- day in, required to give jurisdiction, 426.
- decision of—See "Judgment."
- discretion of, in granting *certiorari*, 393.
- in granting *certiorari* must be sound and legal, 394.
- duty of, on hearing motion for new trial, 976.
- files, privilege of attorney in examining, 1255.
- jurisdiction of, in attachment proceedings, 293, 298.
- cannot be waived, 652.
- not lost by striking case from docket, 799.
- how acquired of person on confession of judgment, 997, note.
- to set aside judgment, extent of, 1007.
- and jury, province of general rule, 910.
- on mixed questions of law and fact, 915.
- misconduct of, ground for new trial, when, 974.
- opening and calling calendar, 788.
- province of, to apply the law, 911, 912.
- what are questions of law, 912.
- cannot weigh evidence, 916.
- record, entire only brought up by *certiorari*, 393.
- privilege of attorney in examining, 1255.
- rules of, authority to make, 6.
- when should not be changed, 6, note.
- power of supreme court regarding, 7.
- must be proved, 797, note.
- see "Rules of Court."
- rulings of, on objection to evidence, silence construed as against the objection, 896.

COVENANT:

- broken, pleaded specially in covenant, 704.
- joint and severally by statute, 34.
- for quiet enjoyment, declaration for breach of (*Form No. 178*), 579.
- running with the land, who may sue on, 35.
- performed, plea of when to be interposed, what it admits (*Form No. 341*), 710, note.
- of warranty, breach of, declaration for, generally (*Forms Nos. 171-176*), 577.
- declaration for, against incumbrances (*Form No. 177*), 578.
- declaration for, for quiet enjoyment (*Form No. 178*), 579.
- declaration for, of seizin and power to convey (*Form No. 179*), 580.
- of quantity of land declaration for breach of (*Form No. 175*), 577.
- against incumbrances, declaration for breach of (*Form No. 177*), 578.
- of power to convey declaration for breach of (*Form No. 179*), 580.
- of seizin declaration for breach of (*Form No. 179*), 580.
- of title—See "Covenant of Seizin."
- see "Warranty." etc.

COVENANT, ACTION OF:

- how classified, 50.
- nature of, 95.

[The references are to sections: Vol. I., §§ 1-757; Vol. II., §§ 788-1276.]

COVENANT, ACTION OF—*Continued.*

- when it will lie, 96.
- when it only will lie, 55.
- concurrent with *assumpsit*, when, 59.
- "debt," concurrent remedy with, when, 96.
- assumpsit* concurrent remedy with, 96.
- when the particular remedy, 97.
- when will not lie, 97.
- preferable to debt, when, 97.
- preferable to *assumpsit*, when, 97.
- costs recoverable in, 98.
- declaration in action of, generally, 572.
- the conclusion (*Form No. 162*), 573.
- avertment of damages (*Form No. 163*), 574.
- special counts on leases (*Forms Nos. 164-168*), 575.
- on contract to purchase land (*Forms Nos. 169-170*), 576.
- for breach of warranty (*Forms Nos. 171-176*), 577.
- on breach of warranty against incumbrances (*Form No. 177*), 578.
- for breach of warranty for quiet enjoyment (*Form No. 178*), 579.
- for breach of warranty of seizin and power to convey (*Form No. 179*), 580.
- form of by lessor against lessee for rent (*No. 164*), 575.
- by lessor against lessee, for not repairing, etc., for removing fixtures (*No. 165*), 575.
- by lessor against assignee of lessee for rent (*No. 166*), 575.
- by heir of lessor against lessee for rent, etc. (*No. 167*), 575.
- by devisee of lessor against lessee for rent, etc. (*No. 168*), 575.
- on land contract against vendor for not conveying (*No. 169*), 576.
- on land contract for purchase money (*No. 170*), 576.
- for breach of warranty, grantee against grantor (*No. 171*), 577.
- for breach of warranty, assignee of grantee against previous grantor (*No. 172*), 577.
- for breach of warranty, grantee against grantor in deed of conveyance (*No. 173*), 577.
- for breach of warranty, devisee of grantee against grantor (*No. 174*), 577.
- for breach of warranty of quantity of land (*No. 175*), 577.
- on breach of warranty after settlement of estate, grantee against heir of grantor (*No. 176*), 577.
- on breach of warranty against incumbrances (*No. 177*), 578.
- for breach of warranty for quiet enjoyment (*No. 178*), 579.
- for breach of warranty of seizin and power to convey (*No. 179*), 580.
- plea in, general issue what may be shown under, 694.
- special plea in, or notice with general issue, when required, 704.
- see "Declaration" and "Pleas."

COVERTURE:

- pleaded specially in *assumpsit*, 702.
- pleaded specially in debt, 703.
- see "Husband and Wife," "Married Women" and "Wife."

CREDIBILITY OF WITNESS:

- to be determined by jury, 714, 821. 917.
- how ascertained, 821.
- see "Evidence," "Witnesses."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

CREDIT OF WITNESS:

how impeached, 885.

see "Impeachment," "Proof" and "Witnesses."

CREDITORS:

assignment for benefit of, who to sue in case of, 21.

defendants in case of, 37.

CRIME:

words imputing when not slander, 188.

"CRIM. CON.:"

signification of, 216.

CRIMINAL CONVERSATION:

definition of, 216.

plaintiffs in actions for, when interest assigned, 28.

action on case for, 216.

action of damages in, 216.

defense in, 216.

declaration in, trespass for (*No. 188*), 590.

(*Form No. 184*), 590, note.

case for (*Forms Nos. 244-246*), 606.

and enticing away, distinction between, 606, note.

CRIMINAL COURTS:

what are, 2.

see "Courts."

CRIMINAL INTENT:

at what age child may have, 41.

CRIMINAL LIABILITY:

for false imprisonment, 209, note.

see "False Imprisonment" and "Malicious Prosecution."

CROPS:

attachment of cannot be made till landlord's share set off, 1220, note.

right to gather after action of forcible entry and detainer, 1207, note.

recoverable in replevin when, 156.

sold to defendant, declaration in *assumpsit* for (*III*), 510.

removal of, distrained though rent not due, 1220.

CROSS ACTION:

see "Recoupment" and "Set-off."

CROSS DEMAND:

see "Recoupment" and "Set-off."

CROSS ERRORS:

assignment of, rule governing, 1065.

upon what may be made, 1065.

equivalent to plea of defendant in trial court, 1065.

see "Errors" and "Assignment."

CROSS EXAMINATION:

purpose of, as to instrument in writing, 849.

as to scientific books, 854.

time for, and importance of, 874.

objects of, generally, 875.

object of, to sift, explain, or modify, 876.

discrediting the witness, 877.

to develop new matter favorable to examining party, 877.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

CROSS EXAMINATION—Continued.

- extent of, 876.
- discrediting witness, 877.
- leading questions permissible, 879.
- impeaching witness, 887.
- of sustaining witness, 889.
- see "Evidence," "Proof" and "Witnesses."

CROSSING OF RAILROAD:

- is itself warning of danger, 223.
- see "Railroads."

CURING ERROR:

- in admission of evidence by striking out and withdrawing, 899, 903.
- by instruction, 939.
- see "Errors" and "Amendment."

CUSTODIA LEGIS:

- property seized in replevin is in, 175.
- attached property is in, 331.
- property in, not susceptible of garnishment, 360.
- see "Custody of Law," "Levy" and "Attachment."

"CUSTODIAN:"

- definition of, as used in action of account (*Form No. 183*), 58, note.
- in attachment, 323.
- declaration against in "account," to account for goods (*Form No. 183*), 581.
- see "Attachment."

CUSTODY OF LAW:

- property seized in replevin is in, 175.
- attached property is in, 331.
- see "Possession," "Attachment" and "Levy."

CUSTODY OF PROPERTY:

- damages occasioned by, trespass on the case for, 232.
- see "Possession."

CUSTOM OF MERCHANTS:

- regarding attachment in London, 291.
- see "Attachment."

CUTTING ROPE:

- and loosening boat, declaration in trespass for (*Form No. 198*), 591.
- see "Trespass."

CUTTING TREES:

- penalty for, recoverable in "debt," 93.
- action of trespass for, 124.
- see "Trees" and "Trespass."

D.

DAMAGE CASES:

- defenses to, plea of diligence of common carrier (*Form No. 350*), 710.
- see "Negligence."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DAMAGES:

- for personal injuries who to sue for, generally, 26.
- from injury to property, who may recover, 26.
- to school land, who may recover, 28, note.
- occasioned by intoxication who to sue for, 30.
- limit of, in case of death, 42.
- who may recover, in case of death from wrongful act, 42.
- incidental, when may be recovered in case of death, 42.
- when recoverable for act of animal, 43.
- resulting from nuisance, who liable for, 45.
- breach of contract *assumpsit* for, against corporation, 86.
- when gist of action on bond, 93.
- actual, recoverable only in trespass when, 114.
- when malice an element of, 115.
- force an element of, in trespass, when, 115.
- liability for, occasioned by tort, 131.
- nominal, in action of trover, when, 152.
- judgment for, favor of defendant in replevin, 178.
- cannot be awarded in forcible entry and detainer, 1216, note.
- recovery of, in replevin, 178.
- to reputation, action on the case for, 184.
- necessary to malicious prosecution, 199, 205.
- proof of, in malicious prosecution, 203.
- recoverable in action for seduction, 214.
- in action for false imprisonment, 211.
- consequential, action on the case for, 213.
- in action for criminal conversation, 216.
- caused by accident, not recoverable, 223.
- to property occasioned by improper custody and use, action on the case for, 232.
- occasioned by fraud and deceit, action on case for, 233.
- occasioned by waste, action on case for, 234.
- occasioned by nuisance, action on case for, 235.
- suggestion of, to recover *mesne* profits in ejectment, 280.
- in ejectment, defenses to, 282.
- rights of parties on trial, 284.
- defendant's exemption, 285.
- (*Forms Nos. 293, 294*), 620.
- an appeal from justices court, 425.
- special, when to be averred in declaration, 524.
- a proximate consequence, 524.
- form of in allegation of, in declaration in debt (*No. 144*), 563.
- averment of, in declaration, 524.
- illustrated, 489.
- in debt (*Form No. 144*), 564.
- of covenant (*Form No. 163*), 574.
- for tort, 589.
- recoupment of, generally, 729.
- recouped, how, 731.
- excessiveness of, ground for new trial, when, 972.
- smallness of, ground for new trial, when, 973.
- specific—See "Special Damages."
- assessment of, in action on penal bond, 93.
- in replevin, 179.
- in ejectment, where plaintiff's right expires, 275.
- on suggestion in ejectment, 283.
- for improvements in ejectment, 286.
- on plea in abatement, 681.
- in default of defendant, 801.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1278.]

DAMAGES—*Continued.*

- exemplary, recoverable in trespass when, 114.
- in action for slander, 187.
- recoverable in action for malicious prosecution, 205.
- in action for crim. con., 216.
- averment sufficient to recover, in declaration for false imprisonment (*Form No. 187*), 590, note.
- measure of, in action of assumpsit, 60.
- in assumpsit for extras, 73, note.
- in action of covenant, 98.
- in action of trespass, 114.
- when interest included in trespass or trover, 119.
- in action of trespass to land, 121.
- in action of trover, 152.
- in action of replevin, 179.
- in action on replevin bond, 182.
- in action for personal injuries, 216.
- in action for breach of promise, 218.
- in action on case for nuisance, 235.
- in action on attachment bond, 317.
- in recovery of mesne profits in ejectment, 279, 280.
- in action on appeal bond in forcible entry and detainer, 1219, note.
- compensation of attorney, 1274, 1275.
- mitigation of in replevin bond, 179, 181.
- in slander, 187.
- punitive, recoverable in trespass, when, 114.
- unliquidated, not recoverable in "debt," 90.
- not susceptible of garnishment, 360.
- cannot be subject of set-off, 370.
- vindictive, recoverable in trespass, when, 114.
- in action on replevin bond, 182.

DAMAGE FEASANT:

- replevin for distress of cattle, 162.
- animals taken, plea in action for, 708.
- see "Distress" and "Cattle."

DANGER:

- warning of, railroad crossing is of itself, 223.
- see "Notice," "Negligence," "Due Care" and "Diligence."

DAY IN COURT:

- required to give jurisdiction, 426.

DEATH:

- caused by negligence, action on case for, 227.
- who to recover damages for, 26.
- effect of, on plaintiffs in suit, 21.
- on defendants in action on contracts, 36.
- on defendants in action for torts, 42.
- of defendant in action of ejectment, 36.
- after personal service in attachment, 330.
- in *mandamus*, does not abate writ, 1113.
- of plaintiff in action for torts, effect of, 29.
- in ejectment, effect of, 261, 266.
- plea in abatement for, 637.
- of trial judge, signing bill of exceptions in case of, 1025, note.
- suggestion of, of plaintiff, 21.
- of defendant, in action on contract, 36.
- in attachment, 330.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DEATH—Continued.

- suggestion of, in action of ejectment, 266, 267.
 - in *certiorari*, 407.
 - general rules and form, 759.
- of wrongdoer, effect on tort cases, 46.
- by wrongful act, who to sue for damages occasioned by, 26, 29.
- action on the case for, 227.
- who liable for, 42.
- limit of damages recoverable for, 42.
 - see "Negligence" and "Suggestion of Death."

DEBAUCHING PLAINTIFF'S DAUGHTER:

- declaration for, in trespass (*Form No. 191*), 590.
- see "Seduction" and "Trespass."

DEBT:

- action of, how classified, 50.
- generally, 88.
- when preferable to *assumpsit*, 55.
- when proper remedy to recover fine, etc., 87.
- disadvantage of, 88.
- when the proper remedy, 89.
- will lie on forfeiture, though *scire facias* prescribed, 89.
- when not the proper remedy, 90.
- by and against executors, etc., 91.
- on bond, generally, 92.
- to recover forfeiture or penalty, 93.
- the recovery, 94.
- concurrent remedy with covenant, when, 96.
- covenant preferable to, when, 97.
- contrasted with account, 99.
- and *assumpsit*, difference between, 54.
- contrasted, 88.
- when concurrent remedies, 88.
- distinction between declaration, 503.
- on bond of indemnity, plea in action of (*Form No. 339*), 710.
- form of averment of, in special plea or notice with general issue (*No. 339*), 710.
- declaration in, common counts, statement of cause of action, 553.
- the inducement, 554.
- averment of consideration, 555.
- averment of time, 556.
- profert of specialty need not be made, 557.
- stating contract itself, 558.
- averment of performance or readiness to perform, 559.
- the breach, 560.
- on a statute, 561.
- on statute, conclusion of, 562.
- breach, assignment of (*Forms Nos. 142-143*), 563.
- allegations of damages (*Form No. 144*), 566.
- on common counts (*Form No. 145*), 565.
- on special counts, on common bond (*Forms Nos. 146-151*), 566.
 - on indemnity bonds, penal bonds (*Forms Nos. 152-156*), 567.
 - on judgment (*Forms Nos. 157-158*), 568.
 - on a recognizance (*Form No. 159*), 569.
 - on licensed bond for use, etc. (*Form No. 160*), 570.
 - on statute for penalty or forfeiture (*Form No. 161*), 571.
- form of, on bond, assignee of an assignee of obligee against obligor (*No. 151*), 566.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DEBT—Continued.

- declaration in, form of, on bond, surviving obligee against surviving obligor (*No. 150*), 566.
- on several bonds (*No. 149*), 566.
- on bond assigned (*No. 148*), 566.
- on money bond, setting out condition (*No. 147*), 566.
- on common money bond (*No. 146*), 566.
- on bond of indemnity to secure fidelity of employé (*No. 152*), 567.
- on appeal bond (*No. 153*) 567.
- on bond of executor, etc., by distributee (*No. 154*), 567.
- on sheriff's bond (*No. 155*), 567.
- on replevin bond (*No. 156*), 567.
- on a judgment (*No. 157*) 568.
- on a judgment of justice of the peace (*No. 158*), 568.
- on bail bond (*No. 159*), 569.
- on license bond, for use of person injured, etc. (*No. 160*), 570.
- on a statute, for penalty or forfeiture (*No. 161*) 571.
- plea in, general issue, what may be shown under, 693.
- special pleas in, or notice with general issue, when required, 703.
- judgment in, form of, 993, note.
- on bond, form of, 993, note.
- see "Action of Debt" and "Declaration."

DECEIT:

- money paid because of, recovered in assumpsit, 60.
- assumpsit to recover, money paid because of, 69.
- when contract may be rescinded for, 71.
- ground for trover, when, 144.
- in sale of horse, declaration in case for (*Form No. 239*), 605.
- in selling goods, declaration in case for (*Form No. 240*), 605.
- declaration in case for, for deceit in exchange of horses (*Form No. 242*), 605.
- and fraud, declaration for (*Forms Nos. 239-243*), 605.
- see also "Fraud."

DECLARATION IN ACTION OF ACCOUNT:

- not required to be formal, 106.
- generally (*Forms Nos. 180-183*), 581.
- form of, tenant in common against co-tenant (*Form No. 180*), 581.
- not averring relation of tenants in common (*No. 181*), 581.
- partner against partner (*No. 182*), 581.
- against "custodian" to account (*No. 183*), 581.
- see "Account."

DECLARATION IN ACTION OF ASSUMPSIT:

- generally, 503.
- how distinguished from debt, 503.
- common counts, generally, 504.
- common count sufficient, when, 504.
- special count required, when, 504.
- to recover rent, 510.
- common counts, indebitatus count, 505.
- form of indebitatus count (*No. 41*), 506.
- quantum meruit count, 507.
- quantum meruit count, form of (*No. 42*), 507.
- quantum valebant count (*Form No. 43*), 508.
- "Account Stated," 509.
- common counts, statement of causes of action recoverable in, 510.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DECLARATION IN ACTION OF ASSUMPSIT—Continued.

- common counts, goods sold and delivered (*I*), 510.
 - for crops sold to the defendant (*III*), 510.
 - for fixtures (*IV*), 510.
 - for real estate sold and conveyed (*V*), 510.
 - for labor and services (*VI*), 510.
 - for labor and services of horses and carriages, etc., (*VIa*), 510.
 - for labor and material (*VII*), 510.
 - for money lent (*VIII*), 510.
 - for money paid to defendants' use (*IX*), 510.
 - for money had and received (*X*), 510.
 - for interest (*XI*), 510.
 - for use and occupation (*XII*), 510.
 - for board and lodging (*XIII*), 510.
 - for hire of horses and carriages (*XIV*), 510.
 - for pasturage, etc. (*XV*), 510.
 - for boarding, stabling horses, cattle, etc. (*XVI*), 510.
 - for necessaries (*XVII*), 510.
 - for physicians' bill (*XVIII*), 510.
 - for attorneys' fees (*XIX*), 510.
 - for wages and salary (*XX*), 510.
 - for warehouse room, storage, etc. (*XXI*), 510.
 - for dockage of ships and vessels (*XXII*), 510.
 - for freight or carriage of goods by land (*XXIII*), 510.
 - for freight or carriage of goods by water (*XXIV*), 510.
 - freight and goods from another (*XXV*), 510.
 - consolidated, 511.
- by surviving partner (*Form No. 47*), 513.
 - on promise to him to pay debts due the firm before death of the member (*Form No. 48*), 513.
- against a surviving partner on promise of both (*Form No. 49*), 513.
 - on his promise, after death of his partner (*Form No. 50*), 513.
- by an executor on promise to testator (*Form No. 51*), 513.
 - on promise as such (*Form No. 52*), 513.
 - on promise to testator (*Form No. 53*), 513.
 - on promise to him as such (*Form No. 54*), 513.
- by administer on promise to intestate (*Form No. 55*), 513.
 - laying debt to intestate and promise to plaintiff (*Form No. 56*), 513.
 - on cause of action arising after death of intestate (*Form No. 57*), 513.
- against an administrator on promise by intestate (*Form No. 58*), 513.
 - laying debt from intestate and promise by administrator (*Form No. 59*), 513.
 - on cause of action arising after death of intestate (*Form No. 60*), 513.
- special counts when required, 514.
 - six points to be observed, 514.
 - the "inducement" 515.
 - the "consideration," 516.
 - the "promise," 517.
 - necessary averments generally, 518.
 - averment of notice, 519.
 - averment of request, 520.
 - averment of breach, 521.
 - averment of two breaches, 522.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DECLARATION IN ACTION OF ASSUMPSIT—Continued.

- special counts, form of assigning the breach, 523.
- averment of damages, 524.
- joinder of, 525.
- on special count, form of.
 - against agent, for not accounting for goods entrusted to him to sell (*No. 61*), 526.
 - for not using due care in selling goods (*No. 62*), 526.
 - for selling part at less than stated price, for not accounting and not delivering up remainder (*No. 63*), 526.
 - for selling part under price, not accounting, not delivering, etc. (*No. 64*), 526.
 - against forwarding agent, a warehouseman for not forwarding goods, etc. (*No. 65*), 526.
 - for lack of care and not forwarding as directed (*No. 66*), 526.
 - on implied promise that he had authority to sell, etc. (*No. 67*), 526.
 - against *Del Credere* agent on his guaranty (*No. 68*), 526.
 - on an award (*No. 69*), 527.
 - made on parole submission, time for making prolonged (*No. 70*), 527.
 - against bailee for reward, not using due care and for not re-turning goods (*No. 71*), 528.
 - by common carrier against consignee for not receiving goods, etc. (*No. 72*), 529.
 - for gross neglect and loss of goods (*No. 73*), 529.
 - for carelessness and delay in delivery (*No. 74*), 529.
 - of passengers for negligent injury, etc. (*No. 75*), 529.
 - on a guaranty, of price of goods to be supplied to a third person (*No. 76, 77*), 530.
 - of house rent (*No. 78*), 530.
 - of debt of third person consideration, running to defendant (*No. 79*), 530.
 - against hirer of goods for carelessness (*No. 80*), 531.
 - for non-payment of rent, lease under seal (*No. 81*), 532.
 - against tenant, for not keeping premises in repair (*No. 82*), 532.
 - for not using premises in tenant-like manner (*No. 83*), 532.
 - of farm, for not cultivating according to the custom (*No. 84*), 532.
 - for breach of promise of marriage on request (*No. 85*), 533.
 - where defendant has married another person (*No. 86*), 533.
 - within a reasonable time, no request made (*No. 87*), 533.
 - for discharge from service before expiration of time (*No. 88*), 534.
 - to recover reward offered by advertisement for discovery of offender (*No. 89*), 535.
 - for goods sold at market price, vendee not accepting (*No. 90*), 536.
 - for timber sold and not taken away (*No. 91*), 536.
 - for article taken on trial to be returned or paid for at certain time (*No. 92*), 536.
 - against vendor for not delivering (*Nos. 93-94*), 536.
 - for not delivering goods at particular place within reasonable time (*No. 95*), 536.
 - for non-delivery of goods whereby plaintiff procured others at higher price (*No. 96*), 536.
 - for sum deposited to be returned if goods unsatisfactory (*No. 97*), 536.
 - for hire of warehouse room (*Form No. 99*), 538.
 - for breach of warranty, of horse (*No. 100*), 539.
 - that goods equal sample (*Form No. 101*), 539.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DECLARATION IN ACTION OF ASSUMPSIT—Continued.

- on special count, on warranty, that goods were fit for purpose intended (*No. 102*), 539.
- of horse in exchange (*No. 103*), 539.
- on promise to pay difference in exchange of horses (*No. 104*), 540.
- on building contract, non-performance of part, negligence as to residue (*No. 105*), 541.
- for discharging plaintiff before completing work (*No. 106*), 541.
- on corporation bylaws (*No. 107*), 542.
- for doctor's bill (*No. 108*), 543.
- on fire insurance policy (*Nos. 109-110*), 544.
- on life insurance policy (*No. 111*), 544.
- on promissory note, payee against maker (*No. 112*), 545.
 - indorsee against maker (*No. 113*), 545.
 - second (or subsequent) indorsee against maker (*No. 114*), 545.
 - indorsee against payee or other indorser (*No. 115*), 545.
 - holder against maker and indorser (*No. 116*), 545.
 - payable at a particular place, payee against maker (*No. 117*), 545.
 - payable in installments, all due (*No. 118*), 545.
 - payable in installments, not all due (*No. 119*), 545.
 - payable to bearer (*No. 120*), 545.
 - surviving payee against maker (*No. 121*), 545.
- on contract in writing, payable in trade, time and place not specified (*No. 122*), 545.
 - payable in trade, time and place specified (*No. 122, second form*), 545.
 - payable in trade, price, time and place agreed upon (*No. 122, third form*), 545.
- on bill of exchange, drawer, being payee, against acceptor (*No. 123*), 545.
 - drawer, not being payee, against acceptor (*No. 124*), 545.
 - payee, not being drawer, against acceptor (*No. 125*), 545.
 - indorsee against maker (*No. 126*), 545.
 - payee against drawer for non-acceptance (*No. 127*), 545.
 - indorsee against drawer for non-acceptance (*No. 128*), 545.
 - indorsee against indorser for non-acceptance (*No. 129*), 545.
 - indorsee against drawer for default in payment by drawee (*No. 130*), 545.
 - indorsee against indorser for default of drawee (*No. 131*), 545.
 - holder against drawer and indorser (*No. 132*), 545.
 - indorsee against drawer, bill drawn and accepted, payable at particular place (*No. 133*), 545.
 - drawer against acceptor on condition (*No. 134*), 545.
 - against drawer, default of payment, drawee not found (*No. 135*), 545.
 - indorser against drawer where drawer is dead (*No. 136*), 545.
 - indorser against drawer where presentment waived (*No. 137*), 545.
 - executor of indorser against drawer (*No. 138*), 545, note.
 - executor of drawer on promise to testator (*No. 138*), 545.
 - executor of drawer against acceptor on promise to plaintiff as executor (*No. 139*), 545.
- copy of instrument in writing or account sued on (*No. 46*), 512.
- see "Assumpsit" and "Form."

DECLARATION IN ACTION OF ATTACHMENT:
generally, 621.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DECLARATION IN ACTION OF ATTACHMENT—Continued.
 judgment in excess of *addamnum* clause, *remittitur*, 347.
 in aid, 350, note.

see "Attachment."

DECLARATION IN ACTION OF "CASE:"

general rules, 582.

form of, by agents, 595.

against bailee, for negligence (No. 208), 596.

without reward for negligence and non-delivery (No. 209), 596.

for immoderately driving horse (No. 210), 596.

for negligent driving against plaintiff's carriage (No. 211), 597.

by employer against employee for careless driving (No. 212), 597.

by owner of vessel against captain for negligence in care of goods (No. 213), 598.

against common carrier, by land for negligence (No. 214), 598.

for negligently unloading goods (No. 215), 598.

against inn keeper for loss of chattel (No. 216), 598.

against railroad company, negligence in running train across highway (No. 217), 599.

by administrator, for negligence, causing death (No. 218), 599.

for not ringing bell, etc. (No. 219), 599.

for negligence regarding escape of fire (No. 220), 599.

for not fencing road (No. 221), 599.

for not maintaining cattle guards (No. 222), 599.

for injury to passenger (No. 223), 599.

for injury to person by collision (No. 224), 599.

against municipal corporation for negligence regarding sidewalk (No. 225), 600.

for digging away bank and injuring plaintiff's wall (No. 227), 600.

for obstructing street (No. 228, 229), 600.

for injury to intoxicated person (No. 230), 600.

for negligence in kindling fire (No. 232), 602.

regarding partition fence (No. 233), 602.

for keeping ferocious dog (No. 234), 603.

for keeping dog accustomed to bite sheep, etc. (No. 235), 603.

for injury to plaintiff by defendant's bull (No. 236), 603.

for shooting dog (No. 237), 603.

on warranty (No. 238), 604.

for fraud in sale of horse (No. 239), 605.

in selling goods (No. 240), 605.

for selling unmerchable goods deceitfully packed (No. 241), 605.

for deceit in horse trade (No. 242), 605.

for misrepresentation of person's honesty (No. 243), 605.

for criminal conversation (No. 244), 606.

for enticing away wife, etc. (Nos. 245-246), 606.

for malicious prosecution and false imprisonment (No. 247), 607.

for maliciously causing arrest (Nos. 248-249), 607.

for malicious prosecution of civil case (No. 250), 607.

for enticing away workman (No. 252), 609.

against physician for negligence (No. 253), 610.

against attorney, for negligence in examining title (No. 254), 610.

for negligence in defending case (No. 255), 610.

for waste by injuring premises, etc. (No. 256), 611.

in cutting trees, etc. (No. 256), 611.

against officer for false return (No. 258), 612.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DECLARATION IN ACTION OF "CASE"—*Continued.*

- against common carrier, against sheriff, for not levying (*No.* 259), 612.
 - for not taking sufficient bond in replevin (*No.* 260), 612.
 - for excessive levy (*No.* 261), 612.
- for negligence in running foul of vessel (*No.* 262), 613.
 - in running down vessel (*No.* 263), 613.
- against steamboat owner for causing dangerous swell in river, etc. (*No.* 264), 613.
- for untying boat, etc. (*No.* 265), 613.
- against warehousemen for not forwarding goods (*No.* 266), 614.
- for diverting water course (*Nos.* 267-268), 615.
- for overflowing meadow (*No.* 269), 615.
- against commissioners of highways for overflowing land by ditch (*No.* 270), 615.
- for obstructing, public way by vessel (*No.* 271), 616.
 - private way (*No.* 272), 616.
 - window lights (*No.* 273), 616.
- for neglecting to produce papers (*No.* 274), 617.
- for libel, general form (*No.* 275), 618.
 - directly charging offense—not requiring inducement (*No.* 275), 618.
 - not directly charging offense—requiring inducement (*No.* 276), 618.
 - not directly charging plaintiff with perjury—requiring inducement (*No.* 277), 618.
 - avowment of special damages (*No.* 278), 618.
 - contained in letter from employer (*No.* 279), 618.
 - published in newspaper (*No.* 280), 618.
 - in letter intimating insolvency (*No.* 281), 618.
- for slander—directly charging offense—not requiring inducement (*No.* 282), 619.
 - not directly charging offense—requiring inducement (*No.* 283), 619.
 - by accusation of false swearing (*No.* 284), 619.
 - of school mistress (*No.* 285), 619.
 - in charging want of chastity (*No.* 286), 619.
 - regarding profession (*No.* 287), 619.
 - imputing dishonesty (*Nos.* 288-289), 618.
 - imputing insolvency (*No.* 290), 619.
 - in foreign language (*No.* 291), 619.
- see "Case" and "Trespass on the Case."

DECLARATION IN ACTION OF COVENANT:

- generally, 572.
- conclusion of (*Form No.* 162), 573.
- form of, devisee against leasee, for rent, etc. (*No.* 168), 575.
- special count on contract to purchase land (*Nos.* 169-170), 576.
- by heir of lessor against lessee, for rent, etc. (*No.* 167), 575.
- on land contract, against vendor for not conveying (*No.* 169), 576.
 - for purchase money (*No.* 170), 576.
- for breach of warranty (*Forms Nos.* 171-176), 577.
 - grantee against grantor (*Form No.* 171), 577.
 - assignee of grantee against previous grantor (*Form No.* 172), 577.
 - grantee against grantor, in deed of conveyance (*Form No.* 173), 577.
 - devisee of grantee against grantor (*Form No.* 174), 577.
 - of quantity of land (*Form No.* 175), 577.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DECLARATION IN ACTION OF COVENANT—*Continued.*

- form of, for breach of warranty after settlement of estate, grantee against heir or grantor (*Form No. 176*), 577.
- against incumbrances (*Form No. 177*), 578.
- for quiet enjoyment (*Form No. 178*), 579.
- for seizin and power to convey (*Form No. 179*), 580.
- the conclusion (*Form No. 162*), 573.
- averment of damages (*Form No. 163*), 574.
- on leases (*Forms Nos. 164-168*), 575.
- form of, by lessor against lessee for rent (*No. 164*), 575.
- for not repairing, etc., for removing fixtures (*No. 165*), 575.
- by lessor against assignee of lessee for rent (*No. 166*), 575.
- see "Covenant" and "Form."

DECLARATION IN ACTION OF "DEBT:"

- common counts, statement of cause of action, 553.
- the inducement, 554.
- averment of consideration, 555.
- averment of time, 556.
- profert of specialty need not be made, 557.
- stating contract itself, 558.
- averment of performance or readiness to perform, 559.
- the breach, 560.
- on a statute, 561.
- conclusion of, 562.
- breach, assignment of (*Form Nos. 142-143*), 563.
- allegation of damages (*Form No. 144*), 564.
- on the common counts (*Form No. 145*), 565.
- on special count, on common bond (*Forms Nos. 146-151*), 566.
- form of, on bond assigned (*No. 148*), 566.
- on several bonds (*No. 149*), 566.
- surviving obligee against surviving obligor (*No. 150*), 566.
- assignee of an assignee of obligee against obligor (*No. 151*), 566.
- on indemnity bonds, penal bonds (*Forms Nos. 152-156*), 567.
- to secure fidelity of employee (*Form No. 152*), 567.
- on appeal bond (*Form No. 153*), 567.
- bond of executors, etc., by distributees (*Form No. 154*), 567.
- on sheriff's bond (*Form No. 155*), 567.
- on replevin bond (*Form No. 156*), 567.
- on a judgment (*Form No. 157*), 568.
- of a justice of the peace (*Form No. 158*), 568.
- on bail bond (*Form No. 159*), 569.
- on a recognizance (*Form No. 159*), 569.
- on license bond, for use, etc. (*Form No. 160*), 570.
- for use of person injured, etc. (*Form No. 160*), 570.
- on statute for penalty or forfeiture (*Form No. 161*), 571.
- see "Debt" and "Form."

DECLARATION IN ACTION OF EJECTMENT:

- rules regarding, 620.
- must aver time of possession, 484.
- see "Ejectment" and "Form."

DECLARATION IN ACTION OF REPLEVIN:

- general rules, 177, 582.
- form of (*No. 203*), 593.
- see "Replevin" and "Form."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DECLARATION IN ACTION OF TRESPASS:

- generally, 582.
- quare clausum fregit*, possession necessary to support, 114.
- quare clausum fregit*, must describe abutments, 486.
- for injury to animals, 116.
- for cutting trees, 124.
- use of "continuendo" in, 592, note.
- form of, for assault and battery (No. 184), 590.
 - for assault with firearm, wounding, etc. (No. 185), 590.
 - for riding or driving, against plaintiff (No. 186), 590.
 - for false imprisonment (No. 187), 590.
 - for criminal conversation (No. 188), 590.
 - for assault upon plaintiff's wife (No. 189), 590.
 - by husband and wife, for assault upon the latter (No. 190), 590.
 - for debauching plaintiff's daughter (No. 191), 590.
 - for goods taken and carried away (No. 192), 591.
 - against officer for seizing exempt property (No. 193), 591.
 - for chasing sheep (No. 194), 591.
 - for shooting dog (No. 195), 591.
 - for running vehicle against plaintiff's horse (No. 196), 591.
 - for running vehicle against plaintiff's vehicle and injuring plaintiff and vehicle (No. 197), 591.
 - for cutting rope and loosening boat (No. 198), 591.
 - for injury to real property (Nos. 199-200), 592.
 - for injury to dwelling and goods (No. 199), 592.
 - for expulsion from house (No. 200), 592.
 - quare clausum fregit*, stating many injuries (No. 201), 592.
 - for tearing up railroad and making another across same (No. 202), 592.
- see "Trespass" and "Form."

DECLARATION IN ACTION OF TROVER:

- generally, 582.
- avowment of "finding," 136.
- form of (No. 204), 594.
 - by executor for conversion after testator's death (No. 207), 594.
 - by executor for conversion in testator's lifetime (No. 206), 594.
- see "Forms" and "Trover."

DECLARATION, AD DAMNUM CLAUSE IN:

- effect on judgment in attachment, 347.
- amendment of, 487.
- controls recovery, 524.
- increased after verdict, 524.
- see "Form of Declaration" and "Damages."

DECLARATION. AFFIDAVIT OF CLAIM:

- to be filed with, 550.
- see "Demand" and "Affidavit."

DECLARATION AGAINST AGENT:

- in *assumpsit*, for not accounting for goods, etc., entrusted to him to sell (Form No. 61), 526.
- for not using due care in selling goods (Form No. 62), 526.
- for not obeying orders in selling goods (Form No. 63), 526.
- against forwarding agent, in *assumpsit* for selling part below price, not delivering, not accounting, etc. (Form No. 64), 526.
- a warehouse man for not forwarding, etc. (Form No. 65), 526.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DECLARATION AGAINST AGENT—Continued.

- against forwarding agent for lack of care, not forwarding as directed, etc. (*Form No. 66*), 526.
- on implied promise that he had authority to sell, etc. (*Form No. 67*), 526.
- against *Del Credere* agent in *assumpsit* on his guaranty (*Form No. 68*), 526.
- see "Agent," "Assumpsit" and "Form."

DECLARATION AGAINST ATTORNEY:

- generally, 1269, note.
- in case, for negligence in examining title (*Form No. 254*), 610.
- for negligence in defending case (*Form No. 255*), 610.
- see "Attorneys at Law" and "Negligence."

DECLARATION AGAINST BAILEE:

- in case, for negligence (*Form No. 208*), 596.
- without reward for negligence and non-delivery (*Form No. 209*), 596.
- for immoderately driving a horse (*Form No. 210*), 596.
- see "Bailees," "Common Carriers" and "Forms."

DECLARATION AGAINST CAPTAIN OF VESSEL:

- case, for negligence in care of goods (*Form No. 213*), 598.
- see "Negligence," "Ships," etc.

DECLARATION AGAINST COMMON CARRIER:

- in *assumpsit*, for gross neglect and loss of goods (*Form No. 73*), 529.
- for carelessness and delay in delivery (*Form No. 74*), 529.
- of passengers for negligent injury, etc. (*Form No. 75*), 529.
- in case, for negligence (*Forms Nos. 213-216*), 598.
- see "Common Carriers."

DECLARATION AGAINST CO-TENANT:

- by tenant in common, "account" (*Form No. 180*), 581.
- see "Tenants in Common" and "Partners."

DECLARATION AGAINST "CUSTODIAN:"

- in "account," to account for goods (*Form No. 183*), 581.
- see "Action of Account" and "Forms."

DECLARATION AGAINST HIRER OF GOODS:

- in *assumpsit* for carelessness (*Form No. 80*), 531.
- see "Bailees" and "Assumpsit."

DECLARATION AGAINST INN KEEPER:

- in case, for loss of chattel (*Form No. 216*), 598.
- see "Inn Keepers" and "Negligence."

DECLARATION AGAINST OFFICER:

- for seizing exempt property (*Form No. 193*), 591.
- see "Sheriffs," "Trespass" and "Forms."

DECLARATION AGAINST PARTNER:

- in account, by partner (*Form No. 182*), 581.
- see "Partners" and "Forms."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DECLARATION AGAINST PHYSICIAN:

in case, for negligence (*Form No. 253*), 610.
see "Assumpsit," "Case" and "Forms."

DECLARATION AGAINST RAILROAD:

for killing animals, 231, note.
in case, for negligence in running train across highway (*Form No. 217*), 599.
by administrator for negligence, causing death (*Form No. 218*), 599.
for not ringing bell, etc. (*Form No. 219*), 599.
for negligence regarding escape of fire (*Form No. 220*), 599.
for not fencing road (*Form No. 221*), 599.
for not maintaining cattle guards (*Form No. 222*), 599.
for injury to passengers (*Form No. 223*), 599.
for injury to person (*No. 224*), 599.
see "Negligence," "Trespass" and "Forms."

DECLARATION AGAINST SHERIFF:

in case, for false return (*Form No. 258*), 612.
for not levying (*Form No. 259*), 612.
for not taking sufficient bond in replevin (*Form No. 260*), 612.
for making excessive levy, etc. (*Form No. 261*), 612.
see "Officer," "Sheriff" and "Trespass."

DECLARATION AGAINST STEAMBOAT OWNER:

for causing dangerous swell in river, etc., case (*Form No. 264*), 613.
see "Ships," "Negligence" and "Forms."

DECLARATION AGAINST TENANT:

in *assumpsit*, for non-payment of rent, lease under seal (*Form No. 81*), 532.
for not keeping premises in repair (*Form No. 82*), 532.
for not using premises in tenant-like manner (*Form No. 83*), 532.
for not cultivating according to the custom (*Form No. 84*), 532.
in case, for waste in cutting trees (*Form No. 256*), 611.
see "Landlord and Tenant," "Assumpsit," "Covenant," "Lease" and "Forms."

DECLARATION AGAINST VENDEE:

in *assumpsit* for goods sold at market price, not accepted (*Form No. 90*), 536.
see "Sale," "Assumpsit" and "Forms."

DECLARATION AGAINST VENDOR:

in *assumpsit*, for not delivering (*Forms Nos. 93-94*), 536.
for not delivering goods at a particular place in a reasonable time (*Form No. 95*), 536.
for non-delivery of goods whereby plaintiff procured others at higher price (*Form No. 96*), 536.
for sum deposited to be returned if goods unsatisfactory (*Form No. 97*), 536.
see "Sale," "Assumpsit" and "Forms."

DECLARATION AGAINST VESSEL OWNER:

for running down plaintiff's boat, case (*Forms Nos. 262-263*), 613.
in case for obstructing public way (*Form No. 271*), 616.
see "Negligence" and "Ships."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DECLARATION AGAINST WAREHOUSEMAN:

in case for not forwarding goods (*Form No. 266*), 614.
see "Warehouseman" and "Negligence."

DECLARATION, AMENDMENT OF:

in matter of substance when allowed, 487.
as to names of defendants when allowed, 487.
for variance, when to be made, 487.
for failing to allege representative capacity, 513, note.
rules relating to, 741.
new plea after, 746.
in distress for rent, 1226.
see "Amendments."

DECLARATION, AVERMENTS OF:

to recover penalty, 85.
of "Breach" in debt, 553.
sufficient when, 481.
must not aver conclusions, 482.
affidavits must be averred, 486.
determine form of action, 487, 503.
certainty required in, 487.
damage in, illustrated, 489.
statement of contract, either in terms or substance, 503.
when must be sustained by proof, 516.
must support proof to be offered, 525.
place in, necessity for, 526, note.
demand on written instrument, etc. (*Form No. 122*), 545, note.
of "Consideration," in a promissory "note," payable in other than
money (*Form No. 122*), 545, note.
notice to defendant in suit on bill of exchange (*Form No. 127*), 545,
note.
of presentment of bill of exchange (*Forms Nos. 124, 128*), 545, note.
in action for torts, 583.
of plaintiff's right or interest, 584.
of plaintiff's right or interest in subject matter, 584.
of duty of defendant, 585.
of injury, when immediate, 586.
of injury, when consequent, 587.
of damages, 589.
for trover, what necessary, 594.
on the case, 595.
"crim. con." of intercourse, 606, note.
special damages in, for libel (*Form No. 278*), 618.
of publication of libel necessary (*Form No. 277*), 618, note.
see "Averments," "Forms," and "Requisites."

DECLARATION, "BODY OF:"

illustrated, 489.
necessary elements of, 502.
how construed, 502.
on specialty contract, 554.

DECLARATION, BACKING:

rule governing, 547.

DECLARATION, BREACH:

illustrated, 489.
see "Requisites" and "Forms."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DECLARATION BY AGENTS:

forms of, in trespass on the case, 595.

see "Agents," "Trespass," "Case," "Forms."

DECLARATION BY BAILEES:

forms of, in action on the case, 595.

see "Bailees" and "Forms."

DECLARATION, BY BANK:

form of commencement, 498.

see "Banks," "National Banks," and "Forms."

DECLARATION BY COMMON CARRIER:

against consignee for not receiving goods, etc. (*Form No. 72*), 529.

see "Common Carrier" and "Forms."

DECLARATION BY EXECUTOR, ETC.:

in trover, for conversion after testator's death (*Form No. 207*), 594.

for conversion in testator's life time (*Form No. 206*), 594.

see "Executors," etc., "Forms."

DECLARATION, CAUSE OF ACTION:

must be averred in, 486.

see "Action" and "Cause of Action."

DECLARATION, COMMENCEMENT OF:

illustrated, 489.

what it contains, generally, 494.

must name parties to the suit, 495.

in case, 595.

statement of manner in which defendant brought into court may now be omitted, 496.

recital of form of action, 497.

where public officer a party, 499.

in suits begun by *capias*, 500.

how character in which defendant is sued should be stated, 501.

see "Commencement" and "Form."

DECLARATION, COMMON COUNTS IN:

assumpsit, when will lie, 62.

when sufficient, 503.

against municipal corporations, 504.

the *indebitatus* count, for what available, 505.

founded on promise to pay money, 505.

must aver express promise, 505.

the *quantum valebant* count, 508.

"account stated," 509.

will not lie to recover rent, 510.

statement of causes of action recoverable in, 510.

for goods sold and delivered (*I*), 510.

for goods bargained and sold (*II*), 510.

for crops sold to the defendant (*III*), 510.

for fixtures (*IV*), 510.

for real estate sold and conveyed (*V*), 510.

for labor and services (*VI*), 510.

for labor and services of horses, carriages, etc. (*VIa*), 510.

for labor and material (*VII*), 510.

for money lent (*VIII*), 510.

for money paid to defendant's use (*IX*), 510.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DECLARATION, COMMON COUNTS IN—Continued.

for money had and received (X), 510.
 for interest (XI), 510.
 for use and occupation (XII), 510.
 for board and lodging (XIII), 510.
 for hire of horses, carriages, etc. (XIV), 510.
 for pasturage, etc. (XV), 510.
 for boarding and stabling horses, cattle, etc. (XVI), 510.
 for necessaries (XVII), 510.
 for physician's bills (XVIII), 510.
 for attorney's fees (XIX), 510.
 for wages and salary (XX), 510.
 for warehouserom, storage, etc. (XXI), 510.
 for dockage of ships and vessels (XXII), 510.
 for freight or carriage of goods by land (XXIII), 510.
 for freight or carriage of goods by water (XXIV), 510.
 freight of goods another form (XXV), 510.
 consolidated, 511.
 in form of debt, 552.
 in debt (*Form No. 145*), 565.

see "Common Counts," "Counts" and "Forms."

DECLARATION, CONCLUSION OF:

illustrated, 489.

see "Conclusion" and "Form."

DECLARATION, CONSIDERATION IN:

illustrated, 489.

necessity for, 516.

see "Consideration" and "Form."

DECLARATION, CONSTRUCTION OF: —

most strongly against pleader, 85.

see "Construction" and "Pleadings."

DECLARATION, COPY OF INSTRUMENT ON ACCOUNT SUED ON:

rule governing, 546.

must be attached to declaration, 546.

see "Copy" and "Written Instrument."

DECLARATION, COUNTS MAY BE ADDED:

to at any time before judgment, 502-525.

DECLARATION, DEFINITION OF:

and rule governing, 477.

see "Definition."

DECLARATION, DEFECTS IN:

cured by verdict, what will be, 487.

see "Amendment" and "Verdict."

DECLARATION, DEGREE OF PROOF:

necessary to sustain, 818.

see "Proof" and "Pleading."

DECLARATION, DEMURRER TO:

for insufficiency, 482.

for error in statement of time, 484.

when amendment allowed after, 487.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DECLARATION, DEMURRER TO—*Continued.*

- in common counts for not averring express promise, 505.
- for lack of averment of notice, 519.
- for misjoinder of causes of action, 525.
- because of misjoinder of counts, 525.
- when consideration not stated to promissory note payable in other than money (*Form No. 122*), 545, note.
- for not describing "close" in action for injury to land, 583.
- all or a part, 635, 636.
- "general" (*Form No. 297*), 637.
- "special" (*Form No. 298*), 637.
- in special cases, 637, notes.
- on which to make proof, 905.
- see "Counts," "Demurrer," "Election of Counts" and "Proof."

DECLARATION, FILING:

- nunc pro tunc*, 548.
- when to be filed, 548.
- default of, continuance, costs, 549.

DECLARATION FOR ARTICLE TAKEN ON TRIAL:

- to be returned or paid for at certain time (*Form No. 92*), 536.
- see "Sale," "Conditional Sale" and "Forms."

DECLARATION, FOR ASSAULT AND BATTERY:

- in trespass (*Form No. 184*), 590.

DECLARATION FOR ASSAULT WITH FIREARMS:

- trespass (*Form No. 185*), 590.

DECLARATION FOR ASSAULT UPON WIFE:

- in trespass (*Form No. 189*), 590.
- trespass, suit of husband and wife (*Form No. 190*), 590.
- see "Assault and Battery," and "Trespass."

DECLARATION FOR BREACH OF PROMISE OF MARRIAGE:

- on request, assumpsit (*No. 85*), 533.
- where defendant has married another person, assumpsit (*No. 86*), 533.
- in assumpsit within a reasonable time, no request made (*Form No. 87*), 533.
- see "Breach of Promise" and "Marriage."

DECLARATION FOR BREACH OF WARRANTY:

- of horse (*Form No. 100*), 539.
- in assumpsit, that goods equal samples (*Form No. 101*), 539.
- in covenant, for quiet enjoyment (*Form No. 178*), 579.
- of seizin and power to convey (*Form No. 179*), 580.
- see "Warranty" and "Covenant."

DECLARATION FOR CHASING SHEEP:

- in trespass (*Form No. 194*), 591.
- see "Sheep," "Trespass" and "Forms."

DECLARATION FOR CRIMINAL CONVERSATION:

- in case (*Forms Nos. 244-246*), 606.
- in trespass (*Form No. 188*), 590.
- see "Criminal Conversation" and "Trespass."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DECLARATION FOR CUTTING ROPE:

and loosening boat, trespass (*Form No. 198*), 591.

see "Trespass," "Forms" and "Ships."

DECLARATION FOR DEBAUCHING PLAINTIFF'S DAUGHTER:

trespass (*Form No. 191*), 590.

see "Assault," "Seduction" and "Trespass."

DECLARATION FOR DISCHARGE FROM SERVICE:

before expiration of time, assumpsit (*Form No. 88*), 534.

see "Master and Servant," and "Servant."

DECLARATION FOR DIVERTING WATER COURSE:

case (*Forms Nos. 267-268*), 615.

see "Stream," "Trespass" and "Watercourse."

DECLARATION FOR DOCTORS' BILL:

in *assumpsit* (*Form No. 108*), 543.

see "Physician" and "Professional Services."

DECLARATION FOR ENTICING AWAY:

wife, etc., case (*Forms Nos. 245-246*), 606.

workman, case (*Form No. 252*), 609.

see "Seduction," "Trespass" and "Crim. Con."

DECLARATION FOR EXPULSION FROM HOUSE:

trespass (*Form No. 200*), 592.

see "Eviction," "Ejectment," "Trespass" and "Forms."

DECLARATION FOR FALSE IMPRISONMENT:

in trespass (*Form No. 187*), 590.

see "False Imprisonment," "Trespass" and "Forms."

DECLARATION FOR FRAUD AND DECEIT:

in sale of horse, case (*Form No. 239*), 605.

in selling goods, case (*Form No. 240*), 605.

for selling unmerchantable goods deceitfully packed (*Form No. 241*), 605.

in horse trade (*Form No. 242*), 605.

for misrepresentation of person's honesty (*Form No. 243*), 605.

see "Deceit," "Fraud" and "Case."

DECLARATION FOR GOODS SOLD AND DELIVERED:

rule, 71.

averment of consideration, 516, note.

see "Sale" and "Goods."

DECLARATION FOR GOODS TAKEN AND CARRIED AWAY:

trespass (*Form No. 192*), 591.

see "Goods and Trespass *de bonis asportatis*."

DECLARATION FOR INJURY:

to the person (*Forms Nos. 184-191*), 590.

by intoxication (*Form No. 230*), 600.

to personal property, trespass (*Forms Nos. 192-198*), 591.

in case (*Forms Nos. 232-233*), 602.

plaintiff, etc., by vehicle, trespass (*Form No. 197*), 591.

to house and goods, trespass (*Form No. 199*), 592.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DECLARATION FOR INJURY—Continued.

- to real property (*Forms Nos. 199-202*), 592.
- to railroad for tearing up railroad and making another across same (*Form No. 202*), 592.
- to premises in case against tenant for waste (*Form No. 257*), 611.
- see "Negligence," "Trespass," "Land" and "Real Estate."

DECLARATION, INSUFFICIENT:

- ground for demurrer, motion in arrest of judgment, or error, 633, note.
- see "Demurrer," "Irregularity" and "Amendment."

DECLARATION FOR KILLING HORSE:

- trespass (*Form No. 196*), 591.
- see "Trespass" and "Forms."

DECLARATION FOR LIBEL:

- in case (*Forms Nos. 275-281*), 618.
- against corporation (*Form No. 276*), 618, note.
- see "Libel," "Slander" and "Forms."

DECLARATION FOR MALICIOUS ARREST:

- in case (*Forms Nos. 248-249*), 607.
- see "Arrest" and "Malicious Prosecution."

DECLARATION FOR MALICIOUS PROSECUTION:

- in case (*Forms Nos. 247-250*), 607.
- of civil case, trespass on the case (*Form No. 250*), 607.
- see "Malicious Prosecution" and "Forms."

DECLARATION FOR MONEY LOST IN GAMING:

- declaration to recover (*Form No. 204*), 594, note.
- see "Wager" and "Assumpsit."

DECLARATION FOR NEGLIGENCE:

- averment necessary, 481.
- in driving against plaintiff's carriage (*Form No. 211*), 597.
- in driving negligently against servant (*Form No. 212*), 597.
- against railroad companies (*Forms Nos. 217-224*), 599.
- against municipal corporations (*Forms Nos. 229-230*), 600.
- for digging bank, for injury to plaintiff's wall (*Form No. 227*), 600.
- in kindling fire, case (*Form No. 232*), 602.
- regarding animals, case (*Forms Nos. 234-237*), 603.
- regarding partition fence (*Form No. 233*), 603.
- in keeping dog accustomed to bite sheep, etc. (*Form No. 234*), 603.
- for injury to plaintiff by defendant's bull (*No. 236*), 603.
- for act of officer (*Forms Nos. 258-261*), 612.
- in case, regarding boats and vessels (*Forms Nos. 262-265*), 613.
- against warehouseman for not forwarding (*Form No. 266*), 614.
- regarding water course (*Forms Nos. 267-270*), 615.
- for obstructing public way (*Forms Nos. 271-272*), 616.
- in producing papers, case (*Form No. 274*), 617.
- in practice of profession (*Forms Nos. 253-255*), 610.
- see "Negligence."

DECLARATION FOR NOT REPAIRING:

- covenant (*Form No. 165*), 575.
- see "Repairs," "Covenant" and "Trespass."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DECLARATION FOR NUISANCE:

in case (*Form No. 231*), 601.

see "Nuisance."

DECLARATION FOR OBSTRUCTION:

to street, in case (*Forms Nos. 228-229*), 600.

to private way, in case (*Form No. 272*), 616.

to window lights, in case (*Form No. 273*), 616.

see "Obstruction," "Trespass" and "Negligence."

DECLARATION FOR OVERFLOW OF LAND:

in case, against commissioners of highways (*Form No. 207*), 615.

for overflowing meadow, in case (*Form No. 269*), 615.

see "Trespass."

DECLARATION FOR PRICE OF STORAGE:

in assumpsit (*Form No. 99*), 538.

see "Storage."

DECLARATION FOR REMOVING FIXTURES:

covenant (*Form No. 165*), 575.

see "Trespass," "Forms."

DECLARATION FOR RENT:

in covenant, by lessor against assignee of lessee (*Form No. 166*), 575.

by lessor against lessee (*Form No. 164*), 575.

by heir of lessor against lessee (*Form No. 167*), 575.

by devisee of lessor against lessee (*Form No. 168*), 575.

avertment of assignment of lease in, 575, note.

see "Covenant," "Landlord and Tenant" and "Rent."

DECLARATION FOR RIDING OR DRIVING AGAINST PLAIN-TIFF:

trespass (*Form No. 186*), 590.

see "Trespass," "Forms."

DECLARATION FOR SEDUCTION:

in case, form of (*No. 251*), 608.

see "Seduction," "Trespass."

DECLARATION FOR SHOOTING DOG:

in trespass (*Form No. 195*), 591.

in case (*Form No. 237*), 603.

see "Dog," "Trespass," "Forms."

DECLARATION FOR SLANDER:

in case (*Forms Nos. 282-291*), 619.

see "Slander," "Forms."

DECLARATION FOR STOCK SUBSCRIPTIONS:

(*Form No. 98*), 537.

see "Corporation," "Stock."

DECLARATION FOR TIMBER SOLD:

and not taken away, assumpsit (*Form No. 91*), 536.

see "Timber," "Trees," "Trespass."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DECLARATION FOR TORT:

- generally, 582.
- statement of matter or thing affected, 583.
- statement of plaintiff's right or interest in subject matter, 584.
- avermment of defendant's duty or obligation, 585.
- avermment of injury, when immediate, 586.
- avermment of injury, when consequent, 587.
- variance between declaration and proof, 588.
- avermment of damages, 589.
- for injury to the person (*Forms Nos. 184-191*), 590.
- for injury to personal property (*Forms Nos. 192-198*), 591.
- replevin, generally (*Form No. 203*), 593.
- trover (*Forms Nos. 204-207*), 594.
- case, generally, 595.
- against bailee, case (*Forms Nos. 208-210*), 596.
- for negligent driving, case (*Forms Nos. 211-212*), 597.
- against common carriers for negligence, case (*Forms Nos. 213-216*), 598.
- against railroad company for negligence, case (*Forms Nos. 217-224*), 599.
- against municipal corporation for negligence, case (*Forms Nos. 225-230*), 600.
- for nuisance, case (*Form No. 231*), 601.
- for injury to personal property, case (*Forms Nos. 232-233*), 602.
- for negligence regarding animals, case (*Forms Nos. 234-237*), 603.
- upon warranty, case (*Form No. 238*), 604.
- fraud and deceit (*Forms Nos. 239-243*), 605.
- criminal conversation, case (*Forms Nos. 244-246*), 606.
- for malicious prosecution and false imprisonment (*Forms Nos. 247-250*), 607.
- for seduction (*Form No. 251*), 608.
- for enticing away a workman (*Forms No. 252*), 609.
- for negligence in practice of profession (*Forms Nos. 253-255*), 610.
- for waste, case (*Forms Nos. 256-257*), 611.
- for negligence of officer (*Forms Nos. 258-261*), 612.
- for negligence regarding boats and vessels, case (*Forms Nos. 262-265*), 613.
- for negligence of warehouseman (*Form No. 266*), 614.
- for negligence regarding water course, case (*Forms Nos. 267-270*), 615.
- for obstructing highway (*Forms Nos. 271-272*), 616.
- for neglect to produce documents on notice, etc., case (*Form No. 274*), 617.
- in case for libel (*Forms Nos. 275-281*), 618.
- for slander (*Forms Nos. 282-291*), 619.
- see "Forms" and "Torts."

DECLARATION FOR UNTYING BOAT, ETC.:

- in case (*Form No. 265*), 613.
- see "Trespass," "Boats and Ships."

DECLARATION FOR WASTE:

- in case (*Form No. 265*), 613.
- see "Waste" and "Trespass."

DECLARATION, FORMAL PARTS:

- enumerated, 488.
- see "Requisites" and "Forms."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DECLARATION, FORM OF:

objected to by demurrer, not by plea of general issue, 691.
see "Form," etc.

DECLARATION, FORM OF, IN "ACCOUNT."

tenant in common against co-tenant (*No. 180*), 581.
not averring relation of tenants in common (*No. 181*), 581.
partner against partner (*No. 182*), 581.
against custodian to account (*No. 183*), 581.
see "Action of Account" and "Form."

"DECLARATION, FORM OF, IN ASSUMPSIT:"

illustrating the various parts, model, 489.
in common counts, for goods, etc., sold and delivered (*I*), 510.
for goods bargained and sold (*II*), 510.
for crops sold to defendant (*III*), 510.
for fixtures (*IV*), 510.
for real estate sold and conveyed (*V*), 510.
for labor and services (*VI*), 510.
for labor and services of horses, carriages, etc. (*VIa*), 510.
for labor and material (*VII*), 510.
for money lent (*VIII*), 510.
for money paid to defendant's use (*IX*), 510.
for money had and received (*X*), 510.
for interest (*XI*), 510.
for use and occupation (*XII*), 510.
for board and lodging (*XIII*), 510.
for hire of horses, carriages, etc. (*XIV*), 510.
for pasturage, etc. (*XV*), 510.
for boarding and stabling horses, cattle, etc. (*XVI*), 510.
for necessities (*XVII*), 510.
for physicians' bills (*XVIII*), 510.
for attorney's fees (*XIX*), 510.
for wages and salary (*XX*), 510.
for warehouseroom, storage, etc. (*XXI*), 510.
for dockage of ships and vessels (*XXII*), 510.
for freight or carriage of goods, by land (*XXIII*), 510.
for freight or carriage of goods by water (*XXIV*), 510.
consolidated (*No. 45*), 512.
by a surviving partner on promise to him to pay debts due firm before death of member (*No. 48*), 513.
against surviving partner on his promise after death of his partner (*No. 50*), 513.
by executor, on promise to testator (*No. 51*), 513.
on promise by him as such (*No. 52*), 513.
against an executor, on promise to testator (*No. 53*), 513.
on promise by him as such (*No. 54*), 513.
by an administrator, on promise to intestate (*No. 55*), 513.
laying debt to intestate and promise to plaintiff (*No. 56*), 513.
on cause of action arising after death of intestate (*No. 57*), 513.
against an administrator, on promise by intestate (*No. 58*), 513.
laying debt from intestate and promise by administrator (*No. 59*), 513.
on cause of action arising after death of intestate (*No. 60*), 513.
special counts, against agent for not accounting for goods, etc., entrusted to him to sell (*No. 61*), 526.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

- "DECLARATION, FORM OF, IN ASSUMPSIT"**—*Continued.*
 in common counts, against agent for not using due care in selling,
 goods (No. 62), 526.
 for not obeying orders in selling goods (No. 63), 526.
 for selling part under price, not accounting, not delivering,
 etc. (No. 64), 526.
 against forwarding agent, a warehouseman, for not forwarding
 goods, etc. (No. 65), 526.
 for lack of care and not forwarding as directed (No. 66), 526.
 against agent on implied promise that he had authority to sell,
 etc. (No. 67), 526.
 against *del credere* agent on his guaranty (No. 68), 526.
indebitatus count on an award (No. 69), 527.
 on an award made on parol submission, time for making pro-
 longed (No. 70), 527.
 against bailee for reward, for not using due care in repairing,
 etc., and not returning on request (No. 71), 528.
 by common carrier against consignee for not receiving goods,
 etc. (No. 72), 529.
 against common carrier, for gross neglect and loss of goods
 (No. 73), 529.
 for carelessness and delay in delivery (No. 74), 529.
 of passengers for negligent injury, etc. (No. 75), 529.
 on a guaranty, of the price of goods to be supplied to a third
 person (Nos. 76-77), 530.
 of house rent (No. 78), 530.
 of debt of third person, consideration running to defendant
 (No. 79), 530.
 against hirer of goods, etc., for carelessness (No. 80), 531.
 against tenant, for non-payment of rent, lease under seal (No.
 81), 532.
 for not keeping premises in repair (No. 82), 532.
 for not using premises in tenant-like manner (No. 83), 532.
 of farm, for not cultivating according to custom (No. 84),
 532.
 for breach of promise of marriage, on request (No. 85), 533.
 where defendant has married another person (No. 86), 533.
 within a reasonable time, no request made (No. 87), 533.
 for discharge from service before expiration of time (No. 88),
 534.
 to recover reward offered by advertisement for discovery of
 offender (No. 89), 535.
 for goods sold at market price, vendee not accepting (No. 90),
 536.
 for timber sold and not taken away (No. 91), 536.
 for article taken on trial to be returned or paid for at certain
 time (No. 92), 536.
 against vendor for not delivering (Nos. 93-94), 536.
 for not delivering goods at particular place, within a reason-
 able time (No. 95), 536.
 for non-delivery of goods whereby plaintiff secured others at
 higher price (No. 96), 536.
 for sum deposited, to be returned if goods unsatisfactory (No.
 97), 536.
 on subscription for stock of corporation (No. 98), 537.
 for hire of warehouse room (No. 99), 538.
 for breach of warranty of horse (No. 100), 539.
 breach of warranty that goods equal sample (No. 101), 539.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

"DECLARATION, FORM OF, IN ASSUMPSIT"—Continued.

- in common counts, on warranty, that goods were fit for purpose intended (No. 102), 539.
- of horse in exchange (No. 103), 539.
- on promise to pay difference in exchange of horses (No. 104), 540.
- on building contract, non-performance of part, negligence as to residue (No. 105), 541.
- for discharging plaintiff before completing work (No. 106), 541.
- on corporation by-laws (No. 107), 542.
- for doctor's bill (No. 108), 543.
- on fire insurance policy (Nos. 109-110), 544.
- on life insurance policy (No. 111), 544.
- on promissory note, payee against maker (No. 112), 545.
- indorsee against maker (No. 113), 545.
- second (or subsequent) indorsee against maker (No. 114), 545.
- indorsee against payee or other indorser (No. 115), 545.
- holder against maker and indorsers (No. 116), 545.
- made payable at particular place, payee against maker (No. 117), 545.
- payable in installments, all due (No. 118), 545.
- payable in installments, not all due (No. 119), 545.
- payable to bearer (No. 120), 545.
- surviving payee against maker (No. 121), 545.
- on contract, in writing, payable in trade, time and place not specified (No. 122), 545.
- payable in trade, time and place specified (No. 122, *second form*), 545.
- payable in trade, price, time and place agreed upon (No. 122, *third form*), 545.
- on bill of exchange, drawer, being payee, against acceptor (No. 123), 545.
- drawer, not being payee, against acceptor (No. 124), 545.
- payee, not being drawer, against acceptor (No. 125), 545.
- indorsee against maker (No. 126), 545.
- payee against drawer for non-acceptance (No. 127), 545.
- indorsee against drawer for non-acceptance (No. 128), 545.
- indorsee against indorser for non-acceptance (No. 129), 545.
- indorsee against indorser for default by drawer (No. 131), 545.
- holder against drawer and indorser (No. 132), 545.
- indorsee against drawer, bill drawn and accepted, payable at particular place (No. 133), 545.
- drawer against acceptor on condition (No. 134), 545.
- against drawer, default of payment, drawee not found (No. 135), 545.
- indorsee against drawer where drawee is dead (No. 136), 545.
- indorsee against drawer where presentment waived (No. 137), 545.
- executor of drawer on promise to testator (No. 138), 545.
- executor of indorser against drawer (No. 138), 545, note.
- executor of drawer against acceptor on promise to plaintiff as executor (No. 139), 545.
- see "Assumpsit" and "Forms."

DECLARATION, FORM OF, IN "CASE:"

- by agents, 595.
- against bailee for negligence (No. 208), 596.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DECLARATION, FORM OF, IN "CASE"—Continued.

- without reward, for negligence and non-delivery (No. 209), 596.
- for immoderately driving horse (No. 210), 596.
- for negligent driving against plaintiff's carriage (No. 211), 597.
- by employer against employe for careless driving (No. 212), 597.
- by owner of vessel against captain for negligence in care of goods (No. 213), 598.
- against common carrier, by land for negligence (No. 214), 598.
- for negligently unloading goods (No. 215), 598.
- against inn keeper, for loss of chattel (No. 216), 598.
- against railroad company, for negligence in running train across highway (No. 217), 599.
- by administrator for negligence, causing death (No. 218), 599.
- for not ringing bell, etc. (No. 219), 599.
- for negligence regarding escape of fire (No. 220), 599.
- for not fencing road (No. 221), 599.
- for not maintaining cattle guards (No. 222), 599.
- for injury to passenger (No. 223), 599.
- for injury to person by collision (No. 224), 599.
- against municipal corporation for negligence regarding sidewalk (No. 225), 600.
- for digging away bank and injuring plaintiff's wall (No. 227), 600.
- for obstructing street (Nos. 228-229), 600.
- for injury by intoxicated person (No. 230), 600.
- for nuisance in keeping slaughter house (No. 231), 601.
- for negligence, in kindling fire (No. 232), 602.
- regarding partition fence (No. 233), 602.
- for keeping ferocious dog (No. 234), 603.
- for keeping dog accustomed to bite sheep, etc. (No. 235), 603.
- for injury to plaintiff by defendant's bull (No. 236), 603.
- for shooting dog (No. 237), 603.
- upon warranty (No. 238), 604.
- for fraud, in sale of horse (No. 239), 605.
- in selling goods (No. 240), 605.
- for selling unmerchantable goods deceitfully packed (No. 241), 605.
- for deceit in exchange of horses (No. 242), 605.
- for misrepresentation of person's honesty (No. 243), 605.
- for criminal conversation (No. 244), 606.
- for enticing away wife, etc. (Nos. 245-246), 606.
- for malicious prosecution and false imprisonment (No. 247), 607.
- for maliciously causing arrest (Nos. 248-249), 607.
- for malicious prosecution of civil case (No. 250), 607.
- for seduction (No. 251), 608.
- for enticing away workmen (No. 252), 609.
- against physician for negligence (No. 253), 610.
- against attorney, for negligence in examining title (No. 254), 610.
- for negligence in defending case (No. 255), 610.
- for waste, by cutting trees, etc. (No. 256), 611.
- by injuring premises, etc. (No. 257), 611.
- against sheriff, for false return (No. 258), 612.
- for not levying (No. 259), 612.
- for taking insufficient bond in replevin (No. 260), 612.
- for excessive levy, etc. (No. 261), 612.
- for negligence in running foul of vessel (No. 262), 613.
- in running down boat (No. 263), 613.
- against steamboat owner for causing dangerous swell in river, etc. (No. 264), 613.
- for untying boats, etc. (No. 265), 613.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DECLARATION, FORM OF, IN "CASE"—*(Continued).*

- against warehouseman for not forwarding goods (No. 266), 614.
- for diverting watercourse (Nos. 267-268), 615.
- for overflowing meadow (No. 269), 615.
- against commissioners of highways for overflowing land by ditch (No. 270), 615.
- for obstructing public way by vessel (No. 271), 616.
- for obstructing private way (No. 272), 616.
- for obstructing window lights (No. 273), 616.
- for neglecting to produce papers (No. 274), 617.
- for libel, general form (No. 275), 618.
- directly charging offense not requiring inducement (No. 275), 618.
- not directly charging offense, requiring inducement (No. 276), 618.
- not directly charging plaintiff with perjury, requiring inducement (No. 277), 618.
- averment of special damages (No. 278), 618.
- contained in letter from employer (No. 279), 618.
- published in newspaper (No. 280), 618.
- by letter intimating insolvency (No. 281), 618.
- for slander, directly charging offense and not requiring inducement (No. 282), 618.
- not directly charging offense requiring inducement (No. 283), 619.
- by accusation of false swearing (No. 284), 619.
- of school mistress (No. 285), 619.
- charging want of chastity (No. 286), 619.
- regarding profession (No. 287), 619.
- imputing dishonesty, etc. (Nos. 288-289), 619.
- imputing insolvency (No. 290), 619.
- in foreign language (No. 291), 619.
- see "Case," "Trespass" and "Forms."

DECLARATION, FORM OF, IN COVENANT:

- conclusion (No. 162), 573.
- averment of damages (No. 163), 574.
- by lessor against lessee, for rent (No. 164), 575.
- for not repairing, etc., for removing fixtures (No. 165), 575.
- by lessor against assignee of lessee for rent (No. 166), 575.
- by heir of lessor against lessee (No. 167), 575.
- by devisee of lessor against lessee for rent, etc. (No. 168), 575.
- on land contract against vendor, for not conveying (No. 169), 576.
- for purchase money (No. 170), 576.
- for breach of warranty, assignee of grantee against previous grantor (No. 172), 577.
- grantee against grantor, in deed of conveyance (No. 173), 577.
- devisee of grantee against grantor (No. 174), 577.
- of quantity of land (No. 175), 577.
- after settlement of estate, grantee against heir of grantor (No. 176), 577.
- against incumbrances (No. 177), 578.
- for quiet enjoyment (No. 178), 579.
- of seizin and power to convey (No. 179), 580.
- see "Covenant" and "Forms."

DECLARATION, FORM OF, IN "DEBT:"

- on common accounts (No. 145), 565.
- on common money bond (No. 146), 566.
- setting out, condition (No. 147), 566.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DECLARATION, FORM OF, IN "DEBT"—Continued.

- on bond assigned (*No. 148*), 566.
- on several bonds (*No. 149*), 566.
- on bond, surviving obligee against surviving obligor (*No. 150*), 566.
- assignee of an assignee of obligee against obligor (*No. 151*), 566.
- of indemnity to secure fidelity of employe (*No. 152*), 567.
- of appeal (*No. 153*), 567.
- of executors, etc., by distributee (*No. 154*), 567.
- of sheriff (*No. 155*), 567.
- of replevin (*No. 156*), 567.
- on a judgment (*No. 157*), 568.
- of justice of the peace (*No. 158*), 568.
- on a recognizance in a criminal case (*No. 159*), 569.
- on license bond, for use of person injured, etc. (*No. 160*), 570.
- on a statute for penalty or forfeiture (*No. 161*), 571.

DECLARATION, FORM OF, IN EJECTMENT:

- general (*No. 292*), 620.
- see "Ejectment" and "Forms."

DECLARATION, FORM OF, IN REPLEVIN:

- general (*No. 203*), 593.
- see "Replevin" and "Form."

DECLARATION, FORM OF, IN TRESPASS:

- for assault, battery and wounding (*No. 184*), 590.
- for assault with firearm, wounding, etc. (*No. 185*), 590.
- for riding and against plaintiff (*No. 186*), 590.
- for false imprisonment (*No. 187*), 590.
- for criminal conversation (*No. 188*), 590.
- for assault upon plaintiff's wife (*No. 189*), 590.
- by husband and wife for assault on the latter (*No. 190*), 590.
- for debauching plaintiff's daughter (*No. 191*), 590.
- for goods taken and carried away (*No. 192*), 591.
- against officer for seizing exempt property (*No. 193*), 591.
- for chasing sheep (*No. 194*), 591.
- for shooting dog (*No. 195*), 591.
- for running vehicle against plaintiff's horse (*No. 196*), 591.
- for running vehicle against plaintiff's vehicle and injuring plaintiff and vehicle (*No. 197*), 591.
- for cutting rope and loosening boat (*No. 198*), 591.
- for injury to dwelling house and goods (*No. 199*), 592.
- for expulsion from house (*No. 200*), 592.
- quare clausum fregit*, stating many injuries (*No. 201*), 592.
- for tearing up railroad and making another across same (*No. 202*), 592.

DECLARATION, FORMS OF, IN TROVER:

- (*Nos. 204-207*), 594.
- by executor for conversion in testator's lifetime (*No. 206*), 594.
- by an executor for conversion after testator's death (*No. 207*), 594.
- see "Trover" and "Forms."

DECLARATION, IMPERFECTIONS IN:

- availed of by demurrer, 635.
- see "Demurrer" and "Amendment."

DECLARATION IN ATTACHMENT:

- generally, 343.
- see "Attachment" and "Form."

[The references are to sections: Vol. I., §§ 1 787; Vol. II., §§ 788-1276.]

DECLARATION IN DISTRESS FOR RENT:
generally, 1226.

see "Distress for Rent" and "Forms."

DECLARATION IN LOCAL ACTIONS:
statement of venue in, 491.

see "Venue" and "Forms."

DECLARATION IN TRANSITORY ACTIONS:
statement of venue in, 493.

see "Venue" and "Forms."

DECLARATION IN TRESPASS:
statement of, venue, 490.

see "Venue," "Trespass" and "Forms."

DECLARATION IN TRESPASS, QUARE CLAUSUM FREGIT:
stating many injuries (*Form No. 201*), 592.

see "Land," "Trespass" and "Forms."

DECLARATION, INDUCEMENT IN:
illustrated, 489.

rule relating to, 515.

when to be traversed by plea (*Form No. 348*), 710, note.

use of, in slander (*Forms Nos. 283-284*), 619.

see "Inducement" and "Forms."

DECLARATION, INNUENDO:
use of, 618, note.

see "Innuendo."

DECLARATION, INSUFFICIENCIES OF:
availed of by demurrer, etc., 482.

see "Demurrer," "Irregularities" and "Amendment."

DECLARATION, IRREGULARITIES IN:
must be questioned before pleading, 480.

see "Demurrer," "Irregularities" and "Amendment."

DECLARATION, JOINDER OF COUNTS IN:
rule governing, 525.

"Trespass" and "Case," 525.

see "Counts" and "Joinder of Counts."

DECLARATION, MISJOINDER OF COUNTS IN:
rule governing, 525.

see "Count" and "Misjoinder of Counts."

DECLARATION, MISJOINDER OF CAUSES OF ACTION:
demurrable, 525.

see "Demurrer."

DECLARATION, MISNOMER IN:
how availed of, 18.

see "Misnomer," "Names" and "Parties."

DECLARATION, MODEL OF:
illustrating the various parts, 489.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276]

DECLARATION, "MONEY COUNTS" IN:

use of, 503.

see "Common Counts."

DECLARATION, NAMES OF PARTIES IN:

public officers et al., 499.

not in issue unless denied, 499.

see "Names," "Misnomer" and "Parties."

DECLARATION, NEW COUNTS:

may be added to, any time before judgment 502, 525.

see "Amendment" and "Counts."

DECLARATION, OFFICE OF:

general statement, 478.

DECLARATION, OMISSION OF VENUE FROM:

cured by verdict, when, 490.

see "Venue" and "Amendment."

DECLARATION ON AN AWARD:

in *assumpsit* (*Form No. 69*), 527.

see "Arbitration and Award," "Award" and "Assumpsit."

DECLARATION ON BILL OF EXCHANGE:

in *assumpsit*, drawer being payee, against acceptor (*Form No. 123*), 545.

drawer not being payee, against acceptor (*Form No. 124*), 545.

payee not being drawer, against acceptor (*Form No. 125*), 545.

avertment of delivery necessary (*Form No. 125*), 545, note.

indorsee against maker (*Form No. 126*), 545.

payee against drawer for non-acceptance (*Form No. 127*), 545.

indorsee against drawer for non-acceptance (*Form No. 128*), 545.

indorsee against indorser for non-acceptance (*Form No. 129*), 545.

indorsee against drawer for default in payment by drawee (*Form No. 130*), 545.

indorsee against indorser for default of drawee (*Form No. 131*), 545.

holder against drawer and indorser (*No. 132*), 545.

indorsee against drawer, bill drawn and accepted payable at particular place (*No. 133*), 545.

drawer against acceptor on condition (*Form No. 134*), 545.

against drawer, default of payment, drawee not found (*Form No. 135*), 545.

indorsee against drawer where drawee is dead (*No. 136*), 545.

where presentment waived (*Form No. 137*), 545.

executor of drawer on promise to testator (*No. 138*), 545.

executor of indorser against drawer (*No. 138*), 545, note.

executor of drawer against acceptor on promise to plaintiff as executor (*Form No. 139*), 545.

see "Notes," "Negotiable Instruments," "Bills of Exchange" and "Forms."

DECLARATION ON BOND:

form of in debt, setting out condition (*No. 147*), 566.

for payment of money, setting out conditions (*Form No. 147*), 566.

on common money bond (*Form No. 146*), 566.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1278.]

DECLARATION ON BOND—*Continued.*

- on bond, assigned (*Form No. 148*), 566.
- surviving obligee against surviving obligor (*No. 150*), 566.
- assignee of obligee against obligor (*Form No. 151*), 566.
- bond of indemnity, to secure fidelity of employee (*Form No. 152*), 567.
- variance in (*Form No. 152*), 567, note.
- on bond of appeal in debt, form of (*No. 153*), 567.
- on bond of executors, etc., by distributee (*No. 154*), 567.
- on bond of sheriff in debt (*Form No. 155*), 567.
- on bond of replevin in debt (*Form No. 156*), 567.
- on bail bond taken by justice of the peace (*Form No. 159*), 569.
- on bond for license, etc., for use of person injured (*Form No. 160*), 570.
- on bond in *capias* cases, 471, note.
- on bond executed in name differing from true name, 483.
- see "Action of Debt," "Bond" and "Forms."

DECLARATION ON BREACH OF WARRANTY:

- in land contract, in covenant, against vendor for not conveying (*Form No. 169*), 576.
- in land contract, in covenant, for purchase money (*Form No. 170*), 576.
- grantee against grantor (*Form No. 171*), 577.
- assignee of grantee against previous grantor (*Form No. 172*), 577.
- grantee against grantor in deed of conveyance (*Form No. 173*), 577.
- devisee of grantee against grantor (*Form No. 174*), 577.
- of quantity of land (*Form No. 175*), 577.
- after settlement of estate, grantee against heir of grantor (*Form No. 176*), 577.
- against incumbrances (*Form No. 177*), 578.
- see "Warranty" and "Covenant."

DECLARATION ON BUILDING CONTRACT:

- in *assumpsit*, non-performance of part, negligence as to residue (*Form No. 105*), 541.
- see "Contract," "Breach of Contract" and "Assumpsit."

DECLARATION ON CONTRACT:

- assumpsit*, generally, 503.
- common accounts sufficient in, 504.
- form of *indebitatus* count (*No. 41*), 506.
- forms of, when party sues, or is sued in representative capacity, 513.
- special contract, 514.
- in writing, payable in trade, time and place not specified, *assumpsit* (*Form No. 122*), 545.
- payable in trade, time and place specified, *assumpsit* (*Form No. 122, second form*), 545.
- payable in trade, price, time and place agreed upon, *assumpsit* (*Form No. 122, third form*), 545.
- in form of "debt," 551.
- the inducement, 554.
- the consideration, 555.
- avermment of time, 556.
- stating contract itself, 558.
- avermment of performance or readiness to perform, 559.
- breach, 560.
- on a statute, 561.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DECLARATION ON CONTRACT—Continued.

- in form of "debt," on a statute, conclusion of, 562.
- assignment of breach (*Forms Nos. 142-143*), 563.
- allegation of damages (*Form No. 144*), 564.
- common counts in (*Form No. 145*), 565.
- in form of covenant, 572.
- in account, generally (*Forms Nos. 180-183*), 518.
- see "Account," "Covenant," "Contract," "Assumpsit," "Debt," "Form."

DECLARATION ON CORPORATION BY-LAWS:

- in *assumpsit* (*Form No. 107*), 542.
- see "Corporations" and "By-laws."

DECLARATION ON FIRE INSURANCE POLICY:

- in *assumpsit* (*Forms Nos. 109-110*), 544.
- see "Assumpsit," "Policy of Insurance," "Insurance" and "Forms."

DECLARATION ON GUARANTY:

- in *assumpsit*, of house rent (*Form No. 78*), 530.
- of debt of third person, consideration running to defendant (*Form No. 79*), 530.
- of price of goods to be supplied to a third person (*Forms Nos. 76, 77*), 530.
- see "Guaranty," "Indorsement," "Surety," "Warrant."

"DECLARATION ON A JUDGMENT:"

- in debt (*Form No. 157*), 568.
- of justice of the peace (*Form No. 158*), 568.
- see "Judgment" and "Forms."

DECLARATION ON LABOR CONTRACT:

- in *assumpsit*, for discharging plaintiff before completing work (*Form No. 106*), 541.
- see "Contract," "Breach of Contract," "Assumpsit" and "Labor."

DECLARATION ON LIFE INSURANCE POLICY:

- in *assumpsit*, form of (*No. 111*), 544.
- see "Insurance," "Policy of Insurance," "Assumpsit," "Debt" and "Covenant."

DECLARATION ON NOTE:

- necessary averments, 83.
- see "Assumpsit," "Debt," "Note," "Negotiable Instrument," "Bills of Exchange" and "Forms."

DECLARATION ON PROMISSORY NOTE:

- in *assumpsit*, payee against maker (*Form No. 112*), 545.
- indorsee against maker (*Form No. 113*), 545.
- second (or subsequent) indorsee against maker (*Form No. 114*), 545.
- indorsee against payee or other indorser (*Form No. 115*), 545.
- holder against maker and indorsers (*Form No. 116*), 545.
- payable at a particular place, payee against maker (*Form No. 117*), 545.
- payable in installments, all due (*Form No. 118*), 545.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DECLARATION ON PROMISSORY NOTE—*Continued.*
 in *assumpsit*, payable in installments, not all due (*Form No. 119*), 545.
 payable to bearer (*Form No. 120*), 545.
 surviving payee against maker (*Form No. 121*), 545.
 see "Assumpsit," "Notes," "Negotiable Instruments," etc.

DECLARATIONS ON SEALED INSTRUMENTS:
 generally, 95.

see "Covenant" and "Assumpsit."

DECLARATION ON STATUTE:

what facts to aver, 481.

how set forth, 561.

what need not be averred in, 571, note.

for penalty or forfeiture (*Form No. 161*), 571.

against railway company, for not ringing bell or sounding whistle,
 case (*Form No. 219*), 599.

for not fencing road, case (*Form No. 221*), 599.

for not maintaining cattle guards (*Form No. 222*), 599.

see "Statute," "Averments" and "Requisites."

"DECLARATION ON WARRANTY:"

in *assumpsit*, on exchange of horses (*Form No. 103*), 539.

in case (*Form No. 238*), 604.

see "Warranty," "Breach of Warranty" and "Covenant."

DECLARATION ON PROMISE TO PAY DIFFERENCE:

in exchange of horses, *assumpsit* (*Form No. 104*), 540.

see "Contract," "Breach of Contract," "Assumpsit," "Covenant," etc.

DECLARATION ON WRITTEN CONTRACT:

averments necessary, 481.

see "Contract in Writing," "Covenant," etc.

DECLARATION ON AN ORDINANCE:

averments necessary, 481.

see "Ordinance," etc.

DECLARATION, PLEA TO:

general issue, 685.

in abatement, 660.

see "Pleas," "Abatement" and "Form."

DECLARATION, PROFERT IN:

abolished (*Form No. 138*), 545, note.

DECLARATION, "PROMISE" IN:

illustrated, 489.

when necessary to aver, 517.

see "Promise," "Requisites" and "Forms."

DECLARATION, TO RECOVER:

mesne profits, 280, 281.

reward offered by advertisement for discovery of offender, *assumpsit* (*Form No. 89*), 535.

see "Profits," "Ejectment," "Assumpsit" and "Forms."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DECLARATION, GENERAL REQUISITES OF:

- statement, 479.
- must correspond with process, 480.
- must state cause of action, 480.
- must contain all necessary facts, 481.
- must aver facts with certainty, 482.
- artistic, 482.
- the names of the party, 483.
- avermment of time, etc., 484.
- must aver place or location, 485.
- must aver cause of action, 486.
- necessary averments, variance, amendment, 487.
- certainty required in, in statement of promise, 517.
- must correspond with process, 480.
- requisites of, in case, 595.
- see "Requisites," "Pleading" and "Averment."

DECLARATION, SIGNATURE TO:

- who may affix, 547.
- signing and indorsing, 547.

DECLARATION, SPECIAL COUNTS:

- use of, in, 503.
- necessary to recover rent, 510.
- six points to be observed, 514.
- the "consideration," 516.
- the "inducement," 515.
- the "promise," 517.
- avermment of notice, 519.
- avermment of request, 520.
- avermment of breach, 521.
- avermment of two breaches, 522.
- form of assigning the breach, 523.
- avermments, damages, 524.
- joinder of counts, 525.
- in "account," tenant in common against co-tenant (*Forms Nos. 180-183*), 581.
- in *assumpsit*, necessary averments, 518.
- against agents (*Forms Nos. 61-68*), 526.
- on awards (*Forms Nos. 69-70*), 527.
- against bailee (*Form No. 71*), 528.
- against common carriers (*Forms Nos. 72-75*), 529.
- against guarantor or surety (*Forms Nos. 76-79*), 530.
- against hirer of chattels (*Form No. 80*), 531.
- against tenant (*Forms Nos. 81-84*), 532.
- for breach of promise of marriage (*Forms Nos. 85-87*), 533.
- for discharge from service (*Form No. 88*), 534.
- to recover reward (*Form No. 89*), 535.
- for goods sold (*Forms Nos. 90-97*), 536.
- for stock subscriptions (*Form No. 98*), 537.
- for hire of storage room (*Form No. 99*), 538.
- on warranty of chattels (*Forms Nos. 100-103*), 539.
- for money in exchange of chattels (*Form No. 104*), 540.
- building or labor contract (*Forms Nos. 105-106*), 541.
- on corporation by-laws (*Form No. 107*), 542.
- for professional services (*Form No. 108*), 543.
- on insurance policy (*Forms Nos. 109-111*), 544.
- on negotiable instrument, "payable in money" (*Forms Nos. 112-139*), 545.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DECLARATION, SPECIAL COUNTS—*Continued.*

- in covenant on leases (*Forms Nos. 164-168*), 575.
- on contract to purchase land (*Forms Nos. 169-170*), 576.
- for breach of warranty (*Forms Nos. 171-176*), 577.
- on breach of warranty against incumbrances (*Form No. 177*), 578.
- on breach of warranty of seizin and power to convey (*Form No. 178*), 580.
- for breach of warranty, quiet enjoyment (*Form No. 178*), 579.
- in debt, on common bond (*Forms Nos. 146-151*), 566.
- on indemnity bonds, penal bonds (*Forms Nos. 152-156*), 567.
- on judgments (*Forms Nos. 157-158*), 568.
- on recognizance (*Form No. 159*), 569.
- on license bond for use, etc. (*Form No. 160*), 570.
- on a statute for penalty or forfeiture (*Form No. 161*), 571.
- see "Count" and "Special Count."

DECLARATION, SUFFICIENCY OF:

- how determined on demurrer, 640, note.
- see "Amendments."

DECLARATION, SURPLUSAGE IN:

- effect of, 482.
- see "Surplusage" and "Variance."

DECLARATION:

- title term, statement of in, illustrated, 480.
- see "Formal Parts" and "Requisites."

DECLARATION, USE OF INDUCEMENT IN:

- for libel (*Forms Nos. 276-277*), 618.
- see "Inducement" and "Libel."

DECLARATION, VARIANCE IN:

- as to a statement of contract, 517.
- pleaded in abatement, 665.
- as to process, 480.
- how taken advantage of, 487.
- cannot be urged in appellate court, 480.
- must be urged by plea in abatement or motion in apt time, 480.
- in name of defendant from that sued on, 483.
- what cured by verdict, 487.
- from instrument sued on, 557.
- from instrument sued on, how taken advantage of, 694.
- see "Variance," "Pleading" and "Proof."

DECLARATION, VENUE IN:

- statement of, illustrated, 489.
- statement of, 490.
- in local actions, 491.
- in local actions, transitory in certain cases, 492.
- in transitory actions, 493.
- see "Venue" and "Formal Requisites."

DECLARATION, WITHDRAWAL OF COUNTS:

- waives right of recovery, 525.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DEEDS:

in evidence in action of forcible entry and detainer, 1215.
 from client to attorney, not even color of title, when, 1269, note.
 from client to attorney, set aside when, 1272.
 see "Documents."

DEFAULT:

of defendant, generally, 623, 624.
 cognovit, 624.
 when more than one, 801, note.
 for want of plea, when to be entered, 801, note.
 in abatement, 676.
 for want of abstract, 1070.
 see "Pleas," "Demurrer" and "Amendment."

DEFAULT JUDGMENT:

general rule relating to, 995.
 for plaintiff in absence of defendant, 801.
 for plaintiff, defendant cannot prevent by improper act, 801.
 note.
 when plaintiff entitled to, 995.
 what admitted by, 995.
 of one of several defendants, effect, 995.
 where plea states no defense, 716, note.
 in ejectment, 277, note.
 guardian of infant cannot admit, 39.
 may be entered on all matters which plea does not answer, 701.
 in distress for rent, 1228.
 —in suggestion of damages in ejectment, 284, note.
 in garnishment, how made final, 376.
 in *capias* cases, 472.
 for want of affidavit of merits, when may be entered, 550.
 on plea of payment (*Form No. 322*), 710, note.
 on set-off when plaintiff absent, 798.
 against defendant, how prevented, 712.
 how set aside, 802. —
 see "Judgment."

DEFAULT IN MANDAMUS:

rule, 1110.
 see "Mandamus."

DEFAULT, MOTION TO SET ASIDE:

when to be made, 802.
 affidavit to support, 802.
 entered on mistaken appearance, 629.
 see "Motions."

DEFAULT, NOTICE OF:

in filing abstract of evidence in upper court, 1070, note.
 see "Notice," etc.

DEFAULT, SETTING ASIDE:

not for erroneous return, 802, note.
 see "Motions."

DEFECTS:

in pleading, availed of by demurrer, 635.
 in declaration, cured by verdict, what will be, 487.
 see "Demurrer" and "Amendment."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DEFENDANTS:

- to action on note assigned, 35.
- to action on note, 83.
- joint, recovery of in "debt," 94.
- in trespass, joint or several, 131.
- in action on case, for negligence causing death, 227.
- for injury caused by liquor, 230.

DEFENDANT:

- which party is, 12.
- member of plaintiff's firm cannot be, 15.
- in action on contract, as between original parties, 33.
 - in cases of assignment, 33.
 - who to join or sever, 34.
 - partners as defendants on contracts, 34.
 - non-joinder of, how availed of, 34.
 - where interest assigned, 35.
 - when contractor dies, 36.
 - where assigned for benefit of creditors, 37.
 - when female contractor marries, 38.
 - in case of infancy, 39.
 - assignee as, 37.
 - infants as, 39.
- in actions for tort, as between original parties, 41.
 - in case of death, 42.
 - by acts of animals, 43.
 - who to join or omit, 43.
 - joinder of, 44.
 - misjoinder of, how availed of, 44.
 - where interest is assigned, 45.
 - where wrong doer marries, 47.
 - in case of infant wrong doer, 48.
- death of, in action of ejectment, 36.
- death of, after personal service in attachment, 330.
- in action on case for waste, 234.
- possession of, must be shown in ejectment, 259.
- in action of ejectment, generally, 264.
 - when premises unoccupied, 265.
 - effect of death of, 267.
- exemption in suggestion of damages in ejectment, 285.
- summoning, in suggestion damages in ejectment, 280.
- appearance of, by bond to pay judgment in attachment, 332.
- by appeal from justices' court, 418.
- non-resident, effect on commencement of suit, 429.
- arrest of in civil cases, 455.
- arrest of by *capias ad respondendum*, 455.
- arrest of, on criminal warrant discharges bail in *capias* cases, 466.
- arrest of upon *capias*, proceedings, surety may arrest defendant until surrender, 469.
- surrender of in *capias* cases, 461, 462, 463.
 - in term time, 462.
 - in vacation, 463.
 - pending suit commenced by *capias*, 464.
 - powers of sureties to apprehend defendant, 469.
 - judgment on motion, 472.
 - suit on bail bond, 470.
- discharge of, on surrender by special bail, 467.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276]

DEFENDANT—Continued

- judgment against, in *capias* cases on motion, 472.
- must be named in declaration, 483.
- character of, how stated in declaration, 501.
- how named in action of "debt," 552.
- averment of duty of, in action for tort, 585.
- proceedings of, desiring not to appear and defend, 622.
 - where plaintiff's cause of action admitted, default, 623.
 - default of, *cognovit*, 624.
 - paying money into court, 625.
 - tender, 626.
- default of, generally, 623, 624.
- cognovit* of, when unnecessary, 624.
- (*Form No. 295*), 624.
- "tender" by, at commencement of suit, 626.
- staying proceedings by paying demand, 627.
- appearance of, effect of, generally, 628.
 - what is not, 628, note.
 - may be general, 629.
 - when to be entered, 630.
 - effected by demurrer or plea, 630.
 - special, how made, 631.
 - effected by demurrer, 633.
- infancy of, plea in abatement for (*Form No. 306*), 674.
- misnomer of, plea in abatement for (*Form No. 308*), 674.
- misjoinder of, plea in abatement for (*Form No. 303*), 674.
- verification of, plea by one of several, effect of, 692.
- disability of, pleaded in abatement, 659.
- joint and several, judgment relating to, 994.
- new, added by amendment, 741, note.
- names of, in *mandamus* proceeding, 1102, note.
- in *mandamus*, the respondent, 1107.
 - to recover costs, when, 1010.
- new, in *mandamus*, not interpleaders, 1112.
- death of, in *mandamus*, does not abate writ, 1113.
- to proceedings by *quo warranto*, 1128.
- in error, name of party to proceedings for review, 1040.
- not served with process, made parties to judgment by *scire facias*, 1165.
- in forcible entry and detainer, 1209.
 - see "Parties."

DEFENDANT IN ERROR:

- which party is, 12.
- see "Parties."

DEFENDANTS, JOINT:

- in actions on contract, 34.
- see "Parties."

DEFENDING ANOTHER:

- form of averment of, in special plea or notice with general issue (*No. 346*), 710.
- see "Self Defense" and "Trespass."

DEFENSES:

- to action, on special contract, 19.
- in actions "for use," 14.

[The references are to sections: Vol. I., §§ 1-757; Vol. II., §§ 758-1276.]

DEFENSES—Continued.

- provocation as, in action of trespass, 115.
- self, justification of trespass, when, 115.
- self, when assaulted by animal, 118.
- when trespassing animal may be killed, 127, note.
- to suit, on bond in replevin, 181.
- in action for slander, 192.
- to action of libel, 195-196.
- to action to libel, when published in newspaper, 196.
- in action to criminal conversation, 216.
- in action for breach of promise, 218.
- probable cause as, in malicious prosecution, 202.
- advice of counsel as, in *mal. pros.* 204.
- in action of ejectment, color of title, 253, note.
- outstanding title, as, 272.
- adverse possession by tenant in common, 271.
- title or possession sufficient, 268.
- must be legal, not equitable, 269.
- adverse possession, 270.
- to suggestion of damages, 282.
- for negligence, due care is, 223.
- of garnishee, generally, 365.
- must be averred in his answer, 369.
- proceedings, where defendant desires not to make, 622.
- where plaintiff's cause of action admitted, default, 623.
- paying money into court, 625.
- when demurrer proper, 633.
- special matter of, notice with general issue, 700.
- notice of, with general issue, requisites of, 701.
- form of notice of, to accompany general issue (*No. 317*), 710.
- proof in, of action of account, 705.
- statutes of limitations, how and by whom interposed (*Form No. 325*), 710, note.
- to action on judgment (*Form No. 321*), 710, note.
- statute of frauds as, form of plea (*No. 323*), 710.
- to action on insurance policy, increased risk, form of plea (*No. 334*), 710.
- affidavits of merits to be filed with plea, 712.
- several pleas may be filed in same cause, 714. —
- plea in abatement to part, in bar to part and demurrer to part, 714.
- of set-off, generally, 721.
- to motion, showing cause, 775.
- to motion for continuance, that delay is sought, 793.
- proof in, when to be offered, 815.
- to judgment confessed, when leave granted to plead, 999, note.
- to *mandamus*, plea or answer, 1110.
- on *habeas corpus*, generally, 1151.
- to *scire facias*, 1174.
- how interposed—See "Pleas" and "Actions."

DEFINITION:

- of "action," 12.
- of "advocate," 1231.
- of "assumpsit," 54.
- of "attorney at law," 1231.
- of "attorney in fact," 1231.
- of "barrister," 1231.
- of "bill of particulars," 641.
- of "bill of exceptions," 1021.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DEFINITION—Continued.

- of "cause of action," 12.
- of "certiorari," 391.
- of "citizen," as used in declaration for libel, 618, note.
- of "close," 121, 123.
- of "concealment," in attachment, 307.
- of "counselor at law," 1231.
- of "court," 1.
- of "criminal conversation," 216.
- of "custodian," as used in action of account (*Form No. 183*), 581, note.
- of "declaration," 477.
- of "demurrer," 632.
- of "distress for rent," 1220.
- of "duplicity," 525.
- of "ejectment," 239.
- of "exception," 894.
- of "exceptions," 1021.
- of "final judgment," 989.
- of "forcible," within forcible entry and detainer act, 1206.
- of "forcible detainer," 1205.
- of "forcible entry," 1205.
- of "franchise," 1017, note.
- of "garnishment," 355.
- of "general issue," 683.
- of "habeas corpus," 1138.
- of "interlocutory judgment," 989.
- of "instantner," as used in pleading, 719.
- of "issue," 684.
- of "judgment," 987.
- of "judgment," under statute of appeals from justice, 410.
- of "jurisdiction," 3, 4.
- of "land," 122.
- of "lawyer," 1231.
- of "libel," 194.
- of "malicious prosecution," 199.
- of "mandamus," 1097.
- of "motion," 769.
- of "negligence," 220.
- of "nil debet," 689.
- of "non assumpsit," 689.
- of "non cepit," 689.
- of "non culpabilis," 689.
- of "non detinet," 689.
- of "non est factum," 689.
- of "notice," as used in ejectment law, 285, note.
- of "novation," 35.
- of "nul tiel record," 689.
- of "objection," 894.
- of "pleading," 475.
- of "pleas," 651.
- of "preponderance," as used in law of evidence, 821.
- of "primary evidence," 858.
- of "privileged communications," 189.
- of "proctor," 1231.
- of "prohibition," 1116.
- of "quo warranto," 1124.
- of "real estate," 122, 1003, note.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 783-1270]

DEFINITION—Continued.

- of "recoupment," 729.
- of "reference," 1198.
- of "referee," 1198.
- of "rent," 510.
- of "secondary evidence," 860.
- of "sergeant at law," 1231.
- of "sollicitor," 1231.
- of "special plea," 683.
- of "ss.," 171, note.
- of "territorial jurisdiction," 4.
- of "tort," 112.
- of "trover," 136.
- of "writ of error," 1037.

DEGREE OF CARE:

- required to be proven in negligence cases, 220.
- required of children, and others of weak mind, 226.
- required of a person passing over public way, 228.
- required of municipal corporation in management of sidewalks, bridges, streets, etc., 228.
- see "Care," "Dilligence" and "Due Care."

DELAYING JUDGMENT:

- rule, 991.
- see "Judgment."

DELIVERY:

- averment of, in declaration, when necessary (*Form No. 125*), 545, note.
- demand for, averment of, when necessary in declaration, 490, note.
- see "Averments" and "Requisites."

DECISION OF COURT:

- see "Judgment."

DEMAND:

- averment of, in declaration on written instrument not payable in money (*Form No. 122*), 545, note.
- compromise of, authority of counsel to make, 1268.
- in forcible entry and detainer, when necessary, 1210.
- for possession, to precede action for forcible entry and detainer, 1210.
- form of, of possession to precede action of forcible entry and detainer (*No. 396*), 1210.
- payment of, stay of proceedings by, 627.
- of possession, must be shown in ejectment, when, 259.
- previous to suit, unnecessary in judgment, confessed, 624.
- in replevin, when necessary, 166, 168.
- who must make, 167.
- special, when necessary to aver in declaration, 520.
- in trover, by and of whom made, 151.
- necessary before suit, when, 149.
- not necessary, when, 150.
- in writing, to precede action for forcible entry and detainer, when, 1210.
- whole must be sued upon, 53.
- see "Replevin" and "Trover."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1278.]

DEMURRER:

- abiding by, 640, 737, note.
- admits what, 633.
- amendment after, proper, when, 638.
- to answer in *mandamus*, 1110.
- appearance of defendant, effected by, 629, 630.
- calling up, 639.
- argument of, 639.
- in attachment, 344.
- "carrying back," rule, 739.
- to declaration, for insufficiency, 482. -
 - for error in statement of time, 484.
 - when amendment allowed, after, 487.
 - in common counts for not averring express promise, 505.
 - for lack of averment and notice, 519.
 - cause of misjoinder of counts, 525.
 - when consideration not stated to "promissory note," payable in other than money (*Form No. 122*), 545, note.
 - for not describing "close," in action for injury to land, 583.
- how sufficiency of declaration determined, 640, note.
- definition of, 632.
- of defendant, when proper, 633.
- to evidence, motion to strike out is, nature of, 900.
 - general rule regarding, 919.
 - takes case form jury, practice, 920.
 - the proceeding, 920, note.
 - admits what, 921.
 - asking verdict directed, in the nature of, 936.
- forms of, generally, 637.
 - to declarations in special cases, 637, note.
 - "general," to declaration or replication (*No. 297*), 637.
 - to interplea in garnishment, 364.
- joinder in, generally, 639.
 - form (*No. 298 1-2*), 639.
- judgment on, permission to amend or plead over, 640.
 - sustaining, not final and not appealable, 640, note.
 - to plea to the jurisdiction, 655.
 - when carried back, 739.
 - to statute of limitations is a final judgment and may be reviewed, 1013, note.
- kinds of, general and special, 634.
- leave to amend or plead over, 737, note.
- misjoinder of plaintiff's ground for, in action for torts, 27.
- misjoinder of defendants in torts, ground for, 44.
- overruling, form of judgment, 993, note.
- to petition for *mandamus*, 1110, note.
- by plaintiff, to plea in abatement, 677.
- to pleas, rules regarding, 636, 737.
 - for inconsistency in, two or more, 714.
 - in abatement, always general, 637.
 - in abatement for misnomer of parties, 662.
 - in bar, requisites of, 637, 688.
- of contravention (*Form No. 340*), 710, note.
- of general issue, in debt, 693.
 - judgment on, 737, note.
- prevents final judgment, when undisposed of, 640.
- to *quo warranto*, 1132.
 - to replication and rejoinder, 1133.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DEMURRER—Continued.

- to replication, general rules, 738.
- admission by, 738.
- to set-off, effect of overruling, 738, note.
- judgment on, 738, note.
- > "special," form of, to declaration or replication (No. 298), 637.
- to special pleas, amounting only to general issue, 692.
- waives motion and arrests judgment, 980.
- when and how to be interposed, 635.
- when to be interposed to only a part, 636.
- to writ of prohibition, 1123.
- wrong name of plaintiff ground for, 19.
- see "Declaration," "Pleading," "Replication," etc.

DENIAL:

- on oath, of title from common source, 251.
- of part, tender of residue, form of averment of, in special plea, or notice with general issue (No. 328), 710.
- of execution of instrument in writing, 711.
- of execution or assignment of written instrument, when interposed as set off, 725.
- see "Affidavit," "Defenses" and "Pleas."

DE NOVO:

- trial, on *scire facias* to make party to judgment, 1165, note.
- see "Trial De Novo."

DEPARTURE:

- from state, with intent, etc., is ground for attachment, 308.
- intention to make, as grounds for attachment, 309.
- see "Attachment" and "Grounds."

DEPOSIT:

- in bank, when *assumpsit* will lie for, 67.
- see "Assumpsit" and "Actions."

DEPOSITIONS:

- absence of, ground for continuance, when, 791.
- evidence, objection to, when to be made, 895.
- witness need not be objected to at time of taking, 895, note.
- see "Evidence," "Proof," "Testimony" and "Witnesses."

DEPUTY OFFICER:

- may serve summons, when, 436.
- return of summons by, 445.
- special, appointment of, form, 436.
- service and return of *scire facias* by, 1173, note.
- see "Officers" and "Sheriff."

DERIVATION:

- of word "court," 1.
- see "Definition," "Origin," "History," etc.

DESCRIPTION:

- variance in proof of, 819, note.
- see "Variance," "Pleading" and "Proof."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DESCRIPTION OF CLOSE:

in declaration in action for injury to land, 583.
see "Close," "Trespass" and "Ejectment."

DESCRIPTION OF GOODS:

in declaration in trover (*Form No. 205*), 594.
see "Trover" and "Forms."

DESCRIPTION OF LOCALITY:

must be contained in declaration, 485.
see "Place," "Location," "Venue" and "Averments."

DESCRIPTION OF PREMISES:

in declaration of ejectment, 620.
see "Ejectment."

DESCRIPTION OF PROPERTY:

necessary in affidavit for replevin, 171.
in declaration in trover (*No. 205*), 594.
see "Replevin," "Trover" and "Forms."

DETINET:

see "Replevin."

DETINWET:

see "Replevin."

DIAGRAM:

use of in evidence, 811.
see "Evidence," "Proof," etc.

DIGGING BANK:

declaration in case for injury to plaintiff's wall (*Form No. 227*), 600.
see "Trespass" and "Negligence."

DILATORY PLEAS:

definition of, 651.
general rules relating to, 653-664.
see "Pleas in Abatement."

DILATORY MOTIONS:

when to be interposed, 769, 773.
not entertained after lapse of term, 779.
motion for continuance is, 794, note.
see "Motions."

"DILIGENCE:"

to be used in bringing suit where note, etc., assigned, 35.
law requiring as against parties to note, 83.
proof of, in negligence cases, 220.
and care, synonymus terms, 222.
by common carrier, form of averment of in special plea or notice
with general issue (*No. 350*), 710.
plea of, by common carrier (*Form No. 350*), 710.
required of attorney for client, 1269.
see "Due Care," "Negligence," "Evidence" and "Proof."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DIMINUTION OF THE RECORD:

suggestion of, and issuance of writ of *certiorari* to amend, 1044.
 suggestion of, practice, 1058, note.
 see "Record."

DIRECT EXAMINATION:

preliminary, 837.
 leading questions not permitted on. 842.
 see "Witnesses," "Proof" and "Evidence."

DIRECTING VERDICT:

for defendant, when proper, 901.
 general rule regarding, 919.
 the practice, 922.
 how defendant's motion defeated, 923.
 by instructing jury, general rule, 934.
 for plaintiff, by instructing jury, 935.
 for defendant, by instructing jury, 936.
 motion for, in the nature of demurrer to evidence, 936.
 see "Instructions" and "Verdict."

DISABILITY OF ATTORNEY:

from becoming bail or surety, 1258.
 from acting on both sides, 1259.
 from buying demand for suit, 1260.
 from being witness in case, 1261.
 see "Attorneys."

DISABILITY OF DEFENDANT:

plea in abatement, 659.
 see "Abatement," "Plea" and "Defendants."

DISABILITY OF PLAINTIFF:

plea in abatement for, 657.
 see "Plaintiff," "Parties," "Abatement" and "Plea."

DISBARING ATTORNEY:

see "Striking Name From Roll" and "Attorneys."

DISCHARGE:

form service, declaration in *assumpsit*, before expiration of time
 (Form No. 88), 534.
 may be shown under general issue, 692.
 pleaded specially in trover, 707.
 of bail in *capias* cases, 458.
 of bail on surrender of defendant in *capias* cases, 465.
 of bail by arrest of defendant on criminal warrant, 466.
 of defendant held on *capias*, *habeas corpus*, 455, 458.
 on surrender by special bail, 467.
 of prisoner on *habeas corpus*, when ordered, 1152.
 on *habeas corpus*, when not ordered, 1153.
 see "Dismissal," "Release" and "Bail."

DISCONTINUANCE:

in replevin, 178.
 see "Continuance," "Dismissal" and "Dissolution."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DISCREDITING WITNESS:

on cross-examination, 877.

see "Witnesses."

DISCRETION OF COURT:

in granting *certiorari*, 393.

must be sound and legal, 394.

regarding amendments, must be sound, 742.

regarding time of pleading, 476.

regarding continuances, 790.

in granting new trial, 964, note.

in striking out evidence, 898.

in writ of error, 1053.

see "Courts" and "Jurisdiction."

DISCRETIONARY ACT:

cannot be compelled by *mandamus*, 1098.

DISCRETIONARY WRIT:

when *certiorari* is, 1043.

see "Writs."

DISHONESTY:

slander, imputing, declaration in case for (*Forms Nos. 283-289*), 619.

see "Trespass on the Case" and "Forms."

DISMISSAL:

of appeal from justice's court, 421.

for want of prosecution, 421.

effect of, 421.

in forcible entry and detainer, 1219, note.

of cause, in absence of plaintiff at call for trial, 798.

motion for, by defendant, when plaintiff in default, 757.

judgment of, costs on, 1010.

of writ of error, for want of security for costs, 1055, note.

of suit, when defendants in torts misjoined, 44, note.

because of irregular service of *capais*, 455.

after notice of set-off, 727.

stipulation for, 665, note.

setting aside, of appeal from justice's court, 422.

see "Non Suit," "Discontinuance," "Default" and "Judgment."

DISSOLUTION OF APPEAL:

in forcible entry and detainer, 1219, note.

see "Appeal," "Discontinuance" and "Judgment."

DISSOLUTION OF ATTACHMENT:

for insufficient bond, 316.

by bond to pay judgment, 332.

by plea in abatement, 341.

on motion, 341.

see "Attachment."

DISSOLUTION OF MOTION:

for bond of security for costs, 430.

see "Security for Costs," "Bond for Costs" and "Costs."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

DISPOSITION OF PROPERTY:

by sale in garnishment, 383.

see "Sale" and "Distribution."

DISPOSSESSION OR OUSTER:

in ejectment, need not be shown, 260.

see "Ouster."

DISPUTING LANDLORD'S TITLE:

when tenant may, 272, note.

see "Landlord and Tenant."

DISTRACTED PERSON:

guardian for defendant in action on contract, 40.

see "Insanity" or "Idiocy," "Guardian" and "Conservator."

DISTRESS OF CATTLE, DAMAGE FEASANT:

replevin for, 162.

see "Cattle" and "Replevin."

DISTRESS FOR RENT:

classification of action, 50.

definition, nature and history, 1220.

security for costs to be given by non-resident plaintiff, 1220.

maintainable only when rent due, when, 1220.

right of, when not waived, 1220.

what property may be distrained, 1221.

when a trespass, 1221, note.

may be made against sublessee or assignee, 1221.

when landlord may make, 1222.

when must be begun, 1222.

release of right, limited to rent then due, 1221, note.

abandonment or removal, ground for, 1222.

before rent due, ground for, 1222.

how proceedings begun, warrant, inventory, 1223.

form of warrant (*No. 400*), 1223.

tender of the amount due destroys right to, 1222, note.

who may levy, 1223.

form of inventory (*No. 401*), 1223.

summons, issuance and return (*Form No. 402*), 1224.

notice to non-residents, 1225.

pleading, practice, 1226.

set-off in, 1227.

recoupment in, 1227.

plea of payment in, 1227.

judgment for the plaintiff in, 1228.

effect of, when defendant served, 1228.

effect of, when defendant not served, 1228.

on defendant's set-off, 1228.

release of property by giving bond, 1229.

perishable property, disposition of, 1230.

DISTRESS WARRANT:

see "Distress for Rent."

DISTRIBUTION OF PROCEEDS:

after judgment in attachment, 349.

see "Attachment" and "Sale."

[The references are to sections: Vol. I, §§ 1-787; Vol. II, §§ 788-1276.]

DIVISION OF COSTS:

on appeal, 1011.

see "Appeal" and "Costs."

DIVISION FENCE:

liability concerning, 43, note.

duty of adjoining owners regarding, 127.

DOCKAGE:

of ships and vessels, declaration on common counts of (XXIII), 510.

DOCKET:

call of, case presumed to be called in its order, 1021, note.

placing case on, in upper court for review, 1061.

calling in upper court, 1075.

striking case from effect of, 799.

how reinstated, 800.

DOCKETING CAUSE:

on change of venue, 767.

in upper court, 1075.

DOCTOR'S BILLS:

declaration in common counts for, (XVIII), 510.

declaration for, in *assumpsit* (Form No. 108), 543.

DOCUMENTS:

production of, on notice, when required, 861, 863.

when not required, 862.

when excused, 866.

compelled in action of account, 106.

notice to produce (Form No. 363), 864.

on *subpoena duces tecum*, 865.

order to produce, when court has no authority to make, 1276, note.

exception for disobedience to, order, 865.

how offered in evidence, 867.

neglect to produce on notice, etc., declaration in case (Form No. 274), 617.

contents of, how proved, generally, 857.

how proved, by primary evidence, 858.

how proved by attested copies, 859.

how proved, by secondary, evidence, 860.

as evidence, how offered, 867.

translation of by witness without being sworn as interpreter, 839.

how explained by oral evidence, 868.

contradicting by oral evidence, rule, 869.

inspection of, in court, 892.

reading to jury, rule regarding, 811.

to be taken to the jury room, 918.

no part of record unless by bill of exceptions, 1023.

where placed in bill of exceptions, 1025, note.

not to be transcribed in record, for review, 1058.

intrusted to attorney, rule regarding, 832.

attorneys lien upon, for fees, 1276.

trover will lie, for conversion of, 143.

DOG:

when owner liable for acts of, 43.

no joint defendants in action for damage by, 44.

[The references are to sections: Vol. I., §§ 1-7c7; Vol. II., §§ 788-1276.]

DOG—Continued.

- action for trespass for injury to, 116.
- when killing of justifiable, 118.
- trespass for shooting, declaration (*Form No. 195*), 591.
- declaration in case for shooting (*Form No. 237*), 603.
- negligence in keeping, declaration in case for (*Form No. 234*), 603.
- negligence in keeping, accustomed to bite sheep, etc., declaration in case for (*Form No. 235*), 603.

DOMESTIC ANIMALS:

- which are, 43.
- liability for acts of, 43.
- liability for injury done by, 118.
- trespass for injury to land, by, 127.
- liability of owner of, for trespass by them (*Form No. 201*), 592, note.
- trespass for inquiry to, 118.
- see "Animals."

DOOR:

- outer, officer may break in executing writ, 175.

DOUBLE PLEADING:

- rules regarding, 715.

DOWER:

- when trespass will lie to recover, 123.
- see "Ejectment."

DRAWEE:

- see "Bills of ~~Exchange~~."

DRAWER:

- see "Promissory Notes" and "Bills of Exchange."

DRIVING:

- declaration in case for negligence in (*Form No. 211*), 597.
- against servant, for negligence in (*Form No. 212*), 597.
- against plaintiff, declaration in trespass for (*Form No. 186*), 590.
- see "Negligent Driving."

DRUNKARD:

- guardian for defendant, in action on contract, 40.

DRUNKENNESS:

- plaintiff in action for damages, occasioned by, 30.
- see "Intoxication."

DUE CARE:

- plaintiff is charged with, 223.
- what is, 222.
- determined by court, 912.
- when exercised, question for the jury, 914.
- as applied to stock on railroads, 118.
- in action for negligence, 223.
- in use of machinery, 225.
- plea averring on part of common carrier (*Form No. 350*), 710.
- proof of, when required to be made, 818.
- by plaintiff, in negligence cases, 223.
- see "Degree of Care."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

"DUE DILIGENCE:"

to be used in bringing suit, where note, etc., assigned, 35.
law requiring as against parties, to note, 83.
when excused, 83.

"DUPLICITY:"

definition of, 525.
in pleading, rules regarding, 715.
erroneous, 701.
effect of, 525.

DURESS:

money paid under recoverable, in *assumpsit*, 60.
illegal tax is not paid under, 66.
pleaded specially in *assumpsit*, 702.
form of averment of, in special plea, or notice with general issue
(No. 344), 710.
burden of proof, regarding, 820.

DUTY:

of attorney to client, generally, 1269.
of counsel, in examination of witness, relevant questions, 841.
of court, on hearing of motion for new trial, 976.
of defendant, averment of, in declaration for tort, 585.
of employer, regarding machinery, 225.
of officer, in taking bond in replevin, 173.
to return replevin bond, with writ, 174.
to make inventory in replevin, 175.
in service of summons, 436.
breach of, debt will lie upon bond, 92.
of railroad company, to give warning of approaching train, 220.
to fence road, 231.
in regard to fire from engine, 231.
of warehouseman, upon service of writ of replevin, 138.
proof of performance of, in negligence cases, 220.
ministerial, compelled by *mandamus*, 1100.

E.

EASEMENT:

effect of, in ejectment, 242.
see "Ejectment."

ECCLESIASTICAL COURTS:

what are, 2.
see "Courts" and "Classification."

EDUCATION, BOARD OF:

mandamus will lie to, when, 1105.
see "Officers" and "Municipal Corporations."

EFFECT OF DEATH:

of parties to *certiorari*, 407.
see "Death" and "Parties."

EJECTMENT, ACTION OF:

nature and history of, 238.
consent rule abolished, 238.
definition of, 239.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276]

EJECTMENT, ACTION OF—Continued.

- when and for what property it will lie, 240.
- for land under water, 241.
- for land in public highway, 242.
- effect of easement upon, 242.
- for land in street or village, 243.
- when it must be begun, 244.
- when it accrues, 245.
- accrues when disseizin occurs, 245.
- when accrues to heir or devisee, 245.
- right of possession necessary to sustain, 246.
- what title or right of possession will support, 246.
- legal title necessary to sustain, 246.
- plaintiff must recover on strength of his own title, 247.
- plaintiff must recover on legal title, 248.
- equitable title will not sustain, 248.
- effect of transferring title pending suit, 249.
- plaintiff must prove identical title claimed, 250.
- of title derived from common source, 251.
- possessor of deed presumed to have title, 252.
- color of title in, 253.
- plaintiff's prior possession alone sufficient, 254.
- what prior possession alone sufficient, 255.
- length of possession sufficient against legal title, 256.
- supported by color of title and payment of taxes, 257.
- supported by right of possession alone, 258.
- possession of defendant necessary to be shown, 259.
- ouster need not now be shown, 260.
- proof in, of lease, entry and ouster need not be made, 260.
- who can maintain it, 261.
- joint tenants, tenants in common, etc., may maintain, 262.
- by landlord against tenant, 263.
- forcible entry and detainer preferable to, when, 263.
- against whom maintained, 264.
- defendant, when premises unoccupied, 265.
- death of plaintiff, effect of, 266.
- death of defendant, effect of on suit, 267.
- what title or possession will defeat, 268.
- defense to, what title or possession sufficient, 268.
- must be legal, not equitable, 269.
- adverse possession, 270.
- by tenant in common, 271.
- outstanding title as, 272.
- verdict in, generally, 273.
- form of, 274.
- where plaintiff's right expires, 275.
- judgment in, generally, 276.
- effect of, 277.
- writ of possession in, 278.
- recovery of rents and profits in, 279, 280.
- form of suggestion of damages in, 280.
- suggestion of damages, defense to, 282.
- joinder of issue in, 283.
- rights of parties on trial, 284.
- defendant's exemption, 285.
- recovery of value of improvements by defendant, 286.
- appointment of commissioners to assess value of improvements, 286, 287, 288, 289.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

EJECTMENT, ACTION OF—*Continued.*

- limitation of statute relating to, 290.
- declaration in action of, rules regarding, 620.
 - must aver time of possession, 484.
 - form (Nos. 293-294), 620.
- plea in general issue, form of, 709, note.
- special plea in, or notice with general issue, when required; 709.
- set-off in, 724.
- new trial in, 277, note, 964, note.
 - "second," 964, note.
 - what may be shown in bar of, 277, note.
- effect of death of plaintiff, 21.
- does not abate by death of defendant, 36.

ELECTION OF REMEDIES:

- see "Choice of Remedies."

ELECTION OF COUNTS:

- when inconsistent, 514.
- on which to make proof, 905.
 - see "Declaration," "Counts" and "Averments."

ELEMENTS OF AN ACTION:

- what are, 52, 477.
- see "Actions."

EMANCIPATION:

- proof of, 39, 23, note.
- see "Infants," "Minors," "Evidence" and "Proof."

EMPLOYES:

- assumes risk of employment, 225.
 - see "Servant," "Due Care," "Negligence" and "Master and Servant."

EMPLOYER:

- duty of, regarding machinery, 225.
- liability of, for negligence of servant, 229.
 - see "Master and Servant."

ENCOURAGEMENT:

- see "Aiding and Abetting."

ENACTING CLAUSE:

- exceptions in, of statute must be set forth in declaration, 561.

ENDORSEMENT:

- copy of, to be set out in copy of instrument sued on, when (*Form No. 113*), 545, note.
 - see "Assignment" and "Indorsement."

ENDORSEE OF NOTE:

- may sue in his own name, 13.
 - see "Indorsee," "Negotiable Instruments" and "Notes."

END OF PLEADING:

- issue is, 684, 736.
- see "Issue."

[The references are to sections: Vol. I., §§ 1-707; Vol. II., §§ 788-1376.]

ENEMY, PUBLIC:

act of, excuses breach of contract, 61.
see also "Act of God" and "Contract."

ENFORCEMENT OF RETURN:

rule, 447.
see "Return," "Officers," "Attachment," "Contempt" and
"Mandamus."

ENGINE:

sparks from, liability of railroad for, 231.
see "Locomotive," "Fire," "Negligence," "Railroad."

ENTRY OF APPEARANCE:

by attorney, liability when unauthorized, 1263.
see "Appearance."

ENTRY OF EXCEPTION:

to evidence, when to be made, 897, 1021.
on overruling motion for new trial, 964.
to instruction, 941.
see "Exceptions" and "Bills of Exceptions."

ENTRY OF JUDGMENT:

a ministerial act, 990.
refusal to make, 992.
default, general rule relating to, 995.
before maturity of note, when authorized, 996, note.
by confession, conditions, practice, 997.
affidavit of warrant of attorney and that maker is alive, 997.
note.
how set aside, 999.
by clerk on confession, a ministerial act, 996.
how and when to be made, 990.
nunc pro tunc, after death of party, 1001, 1079, note.
in upper court, general rule, 1079.
of affirmance, execution, 1080.
of reversal in whole, execution, 1081.
of reversal in part, remittitur, execution, 1082.
of dismissal, execution, 1083.
correcting errors of fact in, 1002.
see "Judgment."

ENTICING AWAY:

servant to leave employment, action on case for, 215.
workmen, declaration in case for (*Form No. 252*), 609.
wife, etc., declaration in case for (*Forms Nos. 245-246*), 606.
and criminal conversation, distinction between, 606, note.
see "Abduction" and "Seduction."

ENTRIES IN BOOKS:

as evidence, 850.
see "Books," "Documents" and "Proof."

ENUMERATION:

of formal parts of declaration, 488.
see "Declaration" and "Forms."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

EQUITABLE ASSIGNEE:

in whose name to sue, 14.

see "Assignments" and "Parties."

EQUITABLE POWERS OF COURTS:

in garnishment, regarding sales and liens, 384.

see "Courts" and "Jurisdiction."

EQUITABLE TITLE:

not considered in ejectment, 248.

will not sustain ejectment, 248.

see "Ejectment" and "Title."

EQUITY COURTS:

what are, 2.

see "Courts."

EQUITY OF REDEMPTION:

attachable when, 295.

see "Attachment."

ERROR:

jurisdiction of supreme court in, 7.

wrong name of plaintiff ground for, 19.

misjoinder of plaintiff in action for torts, 27.

misjoinder of defendants in torts is, when, 44.

cured by verdict, 950.

averment of notice, 519.

judgment on insufficient declaration is, 633, note.

in law, when refusing an amendment is, 742, note.

when refusal of cross examination is, 874.

when instructions to jury not, 928.

in choosing jury, ground for *venire facias de novo*, 962.

overruling motion for new trial, may be assigned for, 967.

what will be reviewed only by aid of bill of exceptions, 1023.

"error without prejudice on ground for reversal" applied to instructions, 938.

see following headings.

ERROR IN ARGUMENT OF COUNSEL:

how availed of, 908.

see "Argument of Counsel," "Opening Statement" and "Bill of Exceptions."

ERROR IN ADMISSION OF EVIDENCE:

cured by striking out, 898.

cured to what extent by striking out, 902.

how far cured by instructions, 939.

see "Evidence" and "Proof."

ERROR, ASSIGNMENT OF:

on bill of exceptions, only way to procure review of evidence, 844.

not necessary on *certiorari*, 1048.

rule governing, 1062.

not when committed by party himself, 1062.

who may make, 1062.

who cannot make, 1062, note.

when there are several parties, 1062.

objections otherwise waived, 1062.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

ERROR, ASSIGNMENT OF—Continued.

- equivalent to declaration in trial court, 1062.
- leave to, *instanter*, 1062, note.
- omission of, practice, 1062, note.
- statute of limitations does not affect, 1062, note.
- no intendment indulged, 1062.
- when errors assigned will not be considered, 1063, note.
- form of (*No. 373*), 1063.
- for insufficiency of declaration, 482.
- for variance in proof, 819.
- inspection by jury, 893.
- in supreme court when reviewing appellate court decision, 1063.
- cross errors, 1064.
- see "Assignment of Errors" and "Bills of Exceptions."

ERROR, CURING:

- in admission of evidence by striking out and withdrawing, 899, 903.
- see "Amendments" and "Waiver of Objections."

ERROR OF FACT:

- in entry of judgment, how corrected, 1002.
- see "Amendments."

ERROR, JOINDER IN:

- effect of omission, 1066.
- time to plead when defendant prefers not to join in error, 1067.
- motion to dismiss appeal must be made before, 1065, note.
- see "Bill of Exceptions."

ERRORS, RELEASE OF:

- by warrant of attorney and confession of judgment, 624.

ERROR IN TRIAL, OUT OF ITS ORDER:

- reviewed only by aid of bill of exception, 1023.

ERROR, WRIT OF:

- not a writ of right, 1038.
- practice on, assignment of error on, 1062.
- assignment of error in supreme court when reviewing appellate court decision, 1063.
- form of assignment of errors (*No. 373*), 1064.
- assignment of cross-errors, 1065.
- omission to join in error, effect, 1066.
- time to plead when defendant prefers not to join in error, 1067.
- abstract, preparing and filing, 1068.
- what it shall contain, 1069.
- when to be filed, default, 1070.
- when further one required, 1071.
- brief, preparing and filing, generally, 1072.
- when to be filed, 1073.
- number of copies to be filed, 1074.
- docketing and hearing the cause, 1075.
- argument of counsel, rule governing, 1076.
- none oral upon motion for rehearing, 1077.
- oral, time allowed for, 1078.
- judgment, generally, 1079.
- of affirmance, execution, 1080.
- of reversal in whole, execution on, 1081.
- of reversal in part, *remitter*, execution, 1082.
- of dismissal, execution, 1083.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

ERROR, WRIT OF—Continued.

- practice on, remanding cause, retrial, when unnecessary, 1084.
- when case remanded for retrial, 1085.
- rehearing, petition for, 1086.
- notice, filing, 1087.
- no argument permitted in support of petition for, 1088.
- supersedas* or stay of proceedings, 1089.
- redocketing case, 1090.
- record, abstract, brief and argument, 1091.
- reply to petition, 1092.
- closing argument of petitioner, 1093.
- oral arguments, conclusion, 1094.
- motions, rules governing, generally, 1095.
- change of venue in upper court, 1096.
- to review *quo warranto* proceedings, 1137.
- to review arbitration and award, 1197.
- to review proceeding to disbar attorneys, 1251.
- to review forcible entry and detainer, 1219.
- see "Writ of Error."

ERRORS IN VERDICT:

- ground for new trial, 975.
- see "Verdict," "New Trial" and "Amendments."

ESCAPE:

- pleaded, specially in debt, 703.
- see "Pleas" and "Defenses."

ESCAPING FIRE:

- declaration in case against railroads for (*Form No. 220*), 599.
- see "Fire" and "Negligence."

ESCROW:

- pleaded, especially in debt, 703.
- see "Pleas."

ESTOPPEL:

- pleaded, specially in *assumpsit*, 702.
- may be interposed to plea in abatement, 677.
- plea of (*Form No. 335*), 710.
- form of averment of, in special pleas or notice with general issue (*No. 335*), 710.
- where set-off not interposed, 723.
- burden of proof regarding, 820.
- see "Pleas" and "Defenses."

EVICTIION:

- in ejectment.
- see "Ejectment" and "Writ of Possession."

EVIDENCE:

- what necessary in actions on contract by several plaintiffs, 19.
- "best must be produced," 821, 846.
- what is the "best," 846.
- what joint plaintiffs must give, 19, note.
- contradicting assignment of note, 13.
- to support action for goods sold, 71.
- of value of extra services, 73, note.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

EVIDENCE—Continued.

- of value of services on labor contract in writing, 74.
- of gratuitous services, when required, 75.
- memorandum book as, labor contract, 74.
- in action of account, 104.
- answer of garnishee considered as, 371.
- in support of motion, 774.
- order of presenting, generally, 814.
- order in which to be offered, 815.
- exhausting witnesses and subject, 816.
- order of offering, where there are several defendants, 817.
- what required to be made, generally, 818.
- must not be variant from pleading, 819.
- "tending to prove" issue must be received, 821.
- degree and quality required, generally, 821.
- preponderance of only, required in civil cases, 821.
- ✓ weight of, to be determined by jury, 821, 928.
- how ascertained, 821.
- when court may refuse to receive further, 821.
- not needed of facts not disputed, 822.
- need not be offered of things generally known, judicial notice; 823.
- when parties in interest may give, 825.
- when parties in interest may not give, 826.
- when partners, joint contractors, etc., may not testify, 827.
- may not be offered by agent when, 826-827.
- when husband and wife may not give, 828.
- may be given by children, when, 829.
- may be made by physician or surgeon, when, 830.
- may be made by minister or priest, when, 831.
- may be given by attorney, when, 832.
- witness not compelled to criminate himself, 834.
- where refusal to answer is, against witness, 835.
- whether compulsory answer taken against witness, 836.
- examination in chief, 840-873.
- objection to, when exception to be taken, 844.
- exceptions to, how and when taken, 844.
- review of, procured only by bill of exceptions, 844.
- number of witnesses required to give, 845.
- "admissions" as, generally, 847.
- of compromise, how shown, 847.
- primary, definition of, 858.
- proof of contents of documents by, 858, 860.
- secondary, definition of, 860.
- use of memoranda in, 848, 849.
- giving entries in books, 850.
- laying foundation for, of contents of books, 850.
- maps, charts, plans, photographs, etc., 853.
- scientific books as, 854.
- of contents of documents, how made, generally, 857.
- production of documents, generally, 857.
- of contents of document, how made, primarily, 858.
- of contents of document, how made by attested copies, 859.
- handwriting, how proved, 859, note.
- of contents of document, how made by secondary evidence, 860.
- how correspondence shown in, 861, note.
- how documents offered in, 867.
- receipts for money are *prima facie* only, 869.
- of oral agreement, what sufficient, 870.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

EVIDENCE—Continued.

- of experts, rule regarding, 871.
- all offered by one witness, on both direct and cross-examination, taken together, 880.
- how given on redirect examination, 882.
- how given on rebuttal, 883.
- impeaching witnesses, 885.
- form of question on impeachment of witness, 885.
- impeaching testimony not primary evidence, 886.
- cross-examination of impeaching witness, 887.
- supporting witnesses, generally, 888.
- cross-examination of sustaining witness, 889.
- number of supporting witnesses necessary, 890.
- inspection or view, 891.
- inspection in court, 892.
- of bodily injury, by inspection in court, 892.
- by inspection out of court, 893.
- affidavit as, when offered for continuance, 793.
- review of, how alone obtained, 894.
- objections to, and exceptions to rulings thereon, 894, 896.
- depositions, objections to when to be made, 895.
- witness need not be objected to at time of taking, 895, note.
- objection to, rule governing, 895.
- because of variance, when to be made, 895.
- must be specific, 895.
- waiver of, 895.
- exception to, who may urge, 897.
- foreign statute as, objection to, when to be made, 895, note.
- admission of, objection to, rule governing, 895.
- written instrument as, objection, when to be made, 895, note.
- the exception, 897.
- entry of exception to, when to be made, 897.
- withdrawing, power to, 898, 903.
- striking out, rule governing, 899.
- motion to strike out "entire," nature of, 900.
- when to be made, 899.
- to what extent cures error in admission, 902.
- readmission after, effect, 902.
- demurrer to, motion to strike out is in nature of, 900.
- effect of, 901.
- sufficiency of, the jury to determine, 901.
- reopening after all in, 904.
- how introduced after case once closed, 904.
- selection of counts on which to give, 905.
- whether there is or not a question for the court, 912.
- weight of to be determined by jury, 916.
- credibility of to be determined by the jury, 917.
- weight of, jury cannot be instructed as to, 928.
- documents may be taken to jury room, 918.
- demurrer to, general rule regarding, 919.
- takes case from jury, practice, 920.
- practice on, 920, note.
- asking verdict directed, in the nature of, 936.
- error in admission of, how far cured by striking out, 920.
- how far cured by instruction, 939.
- ground for new trial, when, 974.
- newly discovered, ground for new trial, when, 971.
- in action of forcible entry and detainer, 1215.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

EVIDENCE—Continued.

ruling of court on review of, how procured, 1021.
 objection to and exception, to correct improper finding of court, 960.
 review of, only procured on bill of exceptions, 1021.
 when to be all incorporated into bill of exception, 1021.
 exceptions to, no part of record unless by bill of exceptions, 1023.
 privilege of attorney from not giving, for client, 1257.
 what, attorney may give for client, 1257, 1261, 1275.
 admissions of attorneys as, 1268.
 see "Proof" and "Witness."

EVIDENCE, ABSTRACT OF:

preparing and filing, 1068.
 filing, number of copies required, 1068.
 what it shall contain, 1069.
 what it shall not contain, 1069, note.
 must be an "abridgment," 1069.
 when to be filed, default, 1070.
 when further one required, 1071.
 see "Abstract" and "Practice in Supreme and Appellate Courts."

"EVERY MAN HIS OWN LAWYER:"

a constitutional right, 1244, 1268, note.

EVOLUTION IN LAW:

illustrated by ejection, 238.

EXAMINATION IN CHIEF:

what is, 840.
 answer must be responsive, 840.
 question should tend to call for relevant answer, 841.
 narrative testimony permitted, 843.
 objection to evidence, saving exceptions, 844.
 number of witnesses, 845.
 best evidence must be produced, 846.
 refreshing recollection of witness, 848-849.
 laying foundation for evidence of contents of books, 850.
 proof of sales, with or without books, 850, 851.
 how maps, charts, plans, photographs, etc., shown, 853.
 expert testimony, generally, 871, 872, 873.
 see "Witnesses" and "Proof."

EXAMINATION, CROSS:

purpose of, as to instrument in writing, 849.
 see "Cross Examination" and "Witnesses."

EXAMINATION OF JURY:

rule regarding, 806.
voir dire, 806, 966.
 see "Jury."

EXAMINATION TO PRACTICE LAW:

affidavit, certificate, etc., 1236.
 see "Attorneys at law."

EXAMINATION OF RECORDS:

privilege of attorney in, 1255.
 see "Attorneys at Law."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

EXAMINATION OF TITLE:

duty of attorney to client in, 1273.

EXAMINATION OF WITNESSES:

- order in which made, 815
- exhausting witness and subject, 816.
- when there are several defendants, 817.
- when party in interest may testify, 825.
- when parties in interest may not testify, 826.
- partners, joint contractors, etc., may not testify, when, 827.
- husband and wife may not testify, when, 828.
- children competent to testify, when, 829.
- physician or surgeon, rule regarding, 830.
- minister or priest, rule regarding, 831.
- attorney, rule regarding, 832.
- witness not compelled to criminate himself, 834.
- when refusal to answer is evidence against witness, 835.
- whether compulsory answer to be taken against witness, 836.
- direct, preliminary, 837.
- on their *voir dire*, 837.
- oath or affirmation (*Forms Nos. 361-362*), 838.
- in chief, general rule, 840.
- leading questions not permitted on direct examination, 842.
- narrative testimony permitted, 843.
- number of witnesses, 845.
- best evidence must be produced, 846.
- admissions, generally, 847.
- refreshing recollection, 848, 849.
- proof of sales, with or without books, 850-851.
- showing entries in books, 850.
- expert testimony, generally, form, 871.
- laying foundation for expert testimony, 872.
- whether expert to hear evidence, 873.
- cross-examination, time for and importance of, 874.
- objects of, generally, 875.
- object of, to sift, explain, or modify, 876.
- extent of, rule, 876.
- object of, discrediting the witness, 877.
- object of, to develop new matter favorable to party examining, 877.
- leading questions permissible, 879.
- all testimony, taken together, on both direct and cross examination, 880.
- redirect, for what purpose allowable, 881.
- rebuttal, in what it consists, 883.
- recalling to correct testimony, 884.
- impeaching, 885.
- form of question for impeachment, 885.
- cross-examination of impeaching witness, 887.
- supporting witness, 888.
- cross-examination of sustaining witness, 889.
- number of supporting witnesses, 890.
- sufficiency of answer to be determined by court, 912.
- see "Witnesses" and "Proof."

EXCAVATION:

- when a trespass, 123.
- see "Trespass."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

EXCEPTION:

- definition of, 894.
- the objection, rule governing, 895.
- how preserved upon the record, 897.
- must be taken at trial to procure review, 1023.
- entry of, when to be made, 1021.~
- to evidence, when to be made, 897.
- to argument of counsel, when may be taken, 908.
- to bond, for release of attached property, 334.
- to correct improper finding of court, 960.
- to court's refusal to find on propositions of law, 959.
- in enacting clause of statute, must be set forth in declaration, 561.
- to rulings on evidence, generally, 894, 897.
- purpose of, 894.
- how and when taken, 844.
- for variance, when to be made, 819.
- no part of record unless by bill of exceptions, 1023.
- who may urge, 897.
- to finding by the court on propositions of law, 959.
- to instructions, when to be entered, 941.
- how entered, 941.
- to leading question, when and how to be made, 842.
- to opening statement of counsel, 813.
- to report of referee, rules governing, 1202.
- to ruling of court, on objection to argument of counsel, 1256.
- on motion for judgment on special finding, 986.
- motion for new trial, 964, 976.
- in ejectment, 277, note.
- to special verdict, 954.
- waiver of, to ruling of evidence, 897.
- see following headings.

EXCEPTIONS, AVERMENT OF:

- in declaration on statutory remedy, 481.
- see "Declaration," "Averment" and "Forms."

EXCEPTIONS, BILL OF:

- origin, nature and purpose, 1021.
- definition of, 1021.
- when not required, 1021.
- same rule applies in supreme and appellate courts, 1022.
- necessary to raise objection that copy of instrument no part of declaration, 546.
- requisites of, 1023.
- what must be preserved in, 1023.
- what not to be incorporated in, 1023.
- when must contain all the evidence, 1023.
- record cannot be corrected by, 1023.
- motion for new trial and rulings on, must be preserved in, 1023.
- form of, to evidence (*No. 365*), 1024.
- to instructions (*No. 365*), 1024.
- to denial of motion for new trial (*No. 365*), 1024.
- amendments proposed to, 1024.
- to denial of motion for new trial on ground that verdict contrary to evidence (*No. 366*), 1024.
- on refusal of non-suit (*No. 367*), 1024.
- on refusal of a continuance (*No. 368*), 1024.
- form of amendments proposed to (*No. 369*), 1024.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

EXCEPTIONS, BILL OF—Continued.

- preparation, time for, 1025.
- extension of time for, 1025.
- time for preparing cannot be extended by stipulation, 1025.
- danger of delay in preparing, 1025, note.
- preparation, party has right to aid of judge, 1025, note.
- signing, sealing and settling, 1025.
- cannot be settled by stipulation of counsel or parties, 1025, note.
- cannot be signed, settled or amended by stipulation, 1028.
- signing by other judge, when allowed, 1025, note.
- signing when trial judge dies, 1025, note.
- seal may be affixed to by amendment, 1025, note.
- certificate of judge to, conclusive, 1023, note.
- judge compelled to sign by *mandamus*, when, 1025, note, 1099, note.
- filing, etc., 1026.
- time for, how extended, 1026.
- incorporating itself into transcript of record, 1026, note.
- striking from the files, 1026.
- becomes part of record, when, 1026.
- how construed, presumptions, 1027.
- imports a verity, 1027, note.
- conclusive as to matter of fact, 1027, note.
- recitations in, take preference of other recitations in record, 1027, note.
- omissions in, cannot be supplied by the pleadings, 1027, note.
- amendment of, rule governing, 1028.
- striking amended bills from files 1028, note.
- agreed case in lieu of, rule regarding, 1029.
- see "Exceptions," "Error" and "Review."

EXCESSIVENESS OF DAMAGES:

- ground for new trial, when, 972.
- see "New Trial" and "Motion."

EXCESS OF JURISDICTION:

- reviewed by *certiorari*, 393.
- assumption of, stopped by writ of, prohibition, 1119.
- see "Jurisdiction."

EXCESSIVE LEVY:

- in attachment, effect of, 322.
- declaration in case for (*Form No. 261*), 612.
- see "Levy" and "Execution."

EXCHANGE OF HORSES:

- declaration on promise to pay difference in, *assumpsit* (*Form No. 104*), 540.

EXCLUDING EVIDENCE:

- see "Striking Out."

EXCLUDING WITNESSES:

- from court room, rule regarding, 824.
- disobedience to order, how punished, 824.
- see "Witnesses" and "Proof."

EX-CONTRACTU:

- see "Form of Actions" and "Contract."

[The references are to sections: Vol. I, §§ 1-787; Vol. II, §§ 788-1278.]

EX DELICTO:

plaintiffs in action, generally, 26.
declarations on, generally, 582.
see "Forms of Actions" and "Torts."

EXECUTION IN ATTACHMENT:

when defendant personally served, 346.
when defendant not personally served, 347C
levy of, 348.
see "Attachment."

EXECUTION OF BOND:

of appeal from justice's court, 414.
see "Bond."

EXECUTION, IN CERTIORARI:

generally, 408.
see "Certiorari."

EXECUTION IN GARNISHMENT:

when it may issue on judgment, 378.
surrender of property on, 379.
when property subject to lien, 380.
on property subject to lien, plaintiff may perform conditions when,
381.
proceedings on refusal to surrender, 382.
see "Garnishment."

EXECUTION ON JUDGMENT:

when to issue against land, 1003.
of affirmance in upper court, 1080.
of reversal in whole, in upper court, 1081.
of reversal in part, in upper court, 1082.
of dismissal, 1083.
see "Judgment."

EXECUTION LEVY:

cannot be made on property of municipal corporation, 1103, note.
and sale of real estate after seven years, 1164.
in attachment, 348.
see "Sale" and "Judgment."

EXECUTION, REVIVAL OF:

by *scire facias* after seven years, 1164.
see "Scire Facias."

EXECUTION, SALE ON:

in garnishment, garnishee with lien may take title, 385.
not vitiated by certiorari, 402.
see "Sale" and "Judgment."

EXECUTION, SPECIAL:

on judgment of foreclosure by *scire facias*, 1176.

EXECUTION, IN SCIRE FACIAS:

proceedings, 1179.
see "Scire Facias."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

EXECUTION OF WRIT:

- of replevin, 175.
- of attachment, the levy, generally, 322.
- levy, how made, 323.
- where to be made, 325.
- levy on corporate stock, 324.
- as to exempt property, 326.
- lien credited by, 327.
- on land certificate of, 328.
- see "Writ."

EXECUTIVE OFFICER:

- cannot be restrained by writ of prohibition, 1121.
- see "Officers."

EXECUTORS AND ADMINISTRATORS:

- to be suggested as plaintiffs, 21.
- when to sue for damages resulting from death, 26.
- plaintiffs in actions for tort, 29.
- as defendants in action on contract, 33.
- as defendants in action on note assigned, 35.
- as defendant when contractor dies, 36.
- when liable for torts, 46.
- liability of, for waste, 234.
- may maintain action of account, 100.
- trover by and against, 147.
- form of declaration by, on promise to testator (*No. 51*), 513.
- by, on promise to him as such (*No. 52*), 513.
- against, on promise to testator (*No. 53*), 513.
- against, on promise to him as such (*No. 54*), 513.
- by, in trover for conversion in testator's lifetime (*Form No. 206*), 594.
- by, in trover for conversion after testator's death (*Form No. 207*), 594.
- defenses of, "has fully administered," plea (*Form No. 338*), 710.
- cannot destrain for rent, when, 1220.
- see "Officers."

EXECUTORY CONTRACTS:

- require special count to obtain a recovery, 514.
- see "Contracts" and "Declaration."

EXEMPLARY DAMAGES:

- recoverable in trespass, when, 114.
- in action, on replevin bond, 182.
- for slander, 187.
- for false imprisonment, 211.
- for mal. pros. 205.
- for "crim. con.," 216.
- averment sufficient to recover in declaration for false imprisonment, (*Form No. 187*), 590, note.
- see "Damages."

EXEMPLIFICATION OF STATUTE:

- rule regarding, 856, note.
- compare "Verification."

EXEMPT PROPERTY:

- cannot be attached, 326.
- replevin for, demand unnecessary, 165.
- must be indicated in garnishee's answer, 368.
- trespass against officer for seizing, declaration for (*No. 193*), 591.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

EXEMPTION:

claim of, may be waived in attachment, 326.
from garnishment, generally, 360.
right of non-residents to, 387.
must be shown in garnishee's answer, 368.
from service of process, what persons have, 437.
from jury service, 804.
of attorneys at law, generally, 1252.
from serving as juror, 1254.
waiver of, by attorney from serving as juror, 1254.
burden of proof regarding, 820.
of defendant, in suggestion of damages in ejectment, 285.

EXHIBITS:

no part of record unless by bill of exceptions, 1023.
and documents, where placed in bill of exceptions, 1025, note.
see "Evidence" and "Proof."

EXISTENCE OF CORPORATION:

cannot be questioned collaterally, 1124.
only questioned by *quo warranto* and *scire facias*, 1124.
writ of *scire facias* to try, 1167.
see "Corporations."

EXISTENCE OF WRITTEN INSTRUMENT:

how proved, 846.
see "Evidence" and "Proof."

EXPENSE:

caring for attached property, 335.
see "Fees," "Costs" and "Custody"

EXPERT TESTIMONY:

general rule regarding, 871.
laying foundation for, form, 872.
see "Testimony" and "Witnesses."

EXPERT WITNESSES:

lawyers are as to professional matters, 1269, note.
see "Witnesses."

EXPRESS ASSUMPSIT:

what is, 54.
see "Assumpsit."

EXPULSION:

from house, declaration in trespass for (*Form No. 200*), 592.
see "Eviction" and "Trespass."

EXTENSION OF TIME:

to plead in abatement, 675.
for filing transcript of record, etc., in upper court, 1061.
for filing brief in upper court, 1073.
see "Continuance."

EXTORTION:

money paid by, recoverable in *assumpsit*, 60.
see "Assumpsit" and "Threats."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

EXTRA HAZARD:

as a defense to action on insurance policy, form of plea (*No. 334*), 710.

see "Defenses," "Plea" and "Risk."

EXTRA WORK AND MATERIAL:

assumpsit to recover for, 73, note.

see "Assumpsit," "Contract," "Labor" and "Material."

F.**FACT:**

issue of, how raised by plea, 690.

mistake of, in entry of judgment, how corrected, 1002.

questions of, to be determined by jury, 913.

finding on, final in appellate court, when, 1019.

finding on "differently," etc., entitle party to review in supreme court, 1020.

see "Issue" and "Findings."

FACTS:

only to be stated in pleading, 475.

FACTOR:

see "Bailee."

FAILURE OF CONSIDERATION:

pleaded specially in debt, 703.

as a defense, form of plea (*No. 331*), 710.

and "want of consideration," pleas of, distinguished (*Form No. 331*), 710, note.

partial, plea of, when and how interposed (*Form No. 331*), 710, note.

see "Consideration."

FALSE IMPRISONMENT:

what constitutes, 208, 209.

criminal liability, 209, note.

may arise from lawful writ, 210.

wherein it is false, 210.

confining child is, when, 210.

who to join as plaintiffs in action for, 27.

plaintiffs in action for, when interest assigned, 28.

damages recoverable in trespass, when, 115.

action on the case for, 208.

removed by *habeas corpus*, 211.

action on the case for, when to be begun, 212.

declaration for, in trespass (*Form No. 187*), 590.

in case (*Forms Nos. 247-250*), 607.

compare "Malicious Prosecution."

FALSE REPRESENTATION:

action on case for damages occasioned by, 233.

see "Fraud" and "Deceit."

FALSE RETURN:

declaration in case against officer for (*Form No. 258*), 612.

FALSE SWEARING:

accusation of, slander, declaration in case for (*Form No. 284*), 619.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

FALSE WARRANTY:

form of denial of, in special plea or notice with general issue (*No.* 342), 710.

see "Breach of Warranty," "Warranty" and "Fraud."

FALSITY OF THE CHARGE:

in malicious prosecution, 199.

see "Malicious Prosecution."

FAMILY NECESSARIES:

declaration in common counts for (*XVII*), 510.

FAMILY SUPPLIES:

who liable for, 38, note.

FATHER:

when liable for child's tort, 115.

FEDERAL COURTS:

concurrent jurisdiction with state courts, 4.

see "Courts."

FEE BILL:

replevin of, taxation of costs on, 1038, note.

when costs improperly taxed, 10, 12.

see "Fees" and "Costs."

FEELINGS, INJURY TO:

damages recoverable for in action for personal injuries, 216.

see "Injury" and "Damages."

"FEE:"

see "Seizin," also "Title."

FEES:

illegal, when money paid for recoverable, 160.

of attorney, in action on attachment bond, 317.

may be contingent, 1265.

cannot be recovered by one not licensed, 1274.

taxed as costs, when, 1274.

liability of client for, 1274.

taxed as costs in suit for wages, 1274, note.

how determined and proved, 1275.

lien for, rule, 1276.

see "Attorneys."

of auditors, in action of account, 109.

of garnishee, a part of the judgment, 375.

of officer for caring for attached property, 335.

presumed to be paid by party requiring him, 1012.

FENCE:

liability concerning division, 43, note.

division, duty of adjoining owners regarding, 127.

FENCES:

what required by law, 43.

duty of railroad to build, 231.

see "Railroads" and "Division Fences."

FENCE VIEWERS:

to determine legal fence, 43.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

FENCING RAILROAD:

declaration in case for not (*Form No. 221*), 599.

see "Railroads" and "Forms."

FICTION IN LAW:

employed in ejectment, 238.

FILES:

of the court, privilege of attorney in examining, 1255.

striking plea from, general rules, 716.

when proper, 692.

striking from, of bill of exceptions, 1026.

FILING ABSTRACT OF EVIDENCE:

in upper court, 1068, 1069, 1070, 1071.

see "Abstract" and "Practice in Appellate and Supreme Court."

FILING ADDITIONAL PLEAS:

general rules relating to, 718.

FILING AFFIDAVIT OF CLAIM:

with declaration, 550.

who may make, 550.

see "Declaration."

FILING BILL OF EXCEPTIONS:

rule, 1026.

see "Bill of Exceptions."

FILING BRIEF:

in upper court, rule governing, 1072.

time for, 1073.

number required, 1074.

see "Brief" and "Practice in Appellate and Supreme Courts."

FILING DECLARATION:

time for, 548.

default of, continuance, costs, 549.

see "Declaration."

"FILING POINTS IN WRITING:"

on motion for new trial, 964.

see "New Trial."

FILING PLEADINGS:

may be in term time or vacation, 548.

FILING RECORD:

in appellate or supreme court, on appeal, 1035.

see "Record" and "Practice in Appellate and Supreme Court."

FILING TRANSCRIPT:

with writ of error, when to operate as *supersedeas*, 1052.

of record, time for, placing case on docket, 1061.

see "Transcript" and "Practice."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

FILING WRIT OF ERROR:

and transcript, when to operate as *supersedeas*, 1052.
see "Supersedeas" and "Writ of Error."

FINAL JUDGMENT:

definition of, 989.
what is not, 1039, note.
non-suit is not, in replevin, 181.
how far judgment in ejectment is, 277.
when to be entered in garnishment, 374.
necessary to support appeals from justice, 410.
rules and orders of court are not, 779.
only can be reviewed, 1013, 1039.
when refusing to grant new trial is 1013, note.
reversing or remanding a case is not 1013, note.
in supreme court, when 7.
see "Judgment."

FINANCIAL CONDITION:

proof of, in action for breach of promise, 218.

"FINDING:"

averment of, in action for trover, 136.
of appellate court on questions of fact, final, when, 1019.
of court on special questions, no part of record unless by bill of exceptions, 1023.
"of facts differently," etc., entitle parties to review in supreme court, when, 1020.
on trial by the court, on propositions of law, 958.
exceptions to, 959.
two ways of correcting, 960.
how review of obtained, 960.
see "Verdict."

FINE:

for contempt, power of courts, 6.
for cutting trees, 124.
for injury to orchard, 125.
for injury to garden, yard, or field, 126.
for transferring claim of wages for garnishment, 388.
and imprisonment, for enticing away servant, 215.
in *quo warranto*, 1136.

FIRE:

not act of God to excuse breach of contract, 61, note.
from engine, liability of company for, 231.
escaping, declaration in case against railroads for (*Form No. 220*), 599.
negligence in kindling, declaration in case for (*Form No. 232*), 602.
escaping from locomotive, proof in action for, 818, note.
see "Negligence" and "Railroads."

FIRE INSURANCE POLICY:

declaration on, in *assumpsit* (*Forms Nos. 109-110*), 544.
see "Policy" and "Insurance."

FISH:

when trespass will lie for taking, 116.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

FIXTURES:

- removable, may be subject of replevin, 156.
- form of declaration for sale of (*IV*), 510.
- declaration in covenant for removing (*Form No. 165*), 575.
- see "Real Property."

"FOR USE:"

- how plaintiff to sue for, 14.
- see "Action for Use," "Assumpsit" and "Assignments."

FORCE:

- landlord not permitted to use, 115.
- justifiable in taking one's own property, 115.
- an element of damages in trespass, when, 115.
- see "Damages" and "Trespass."

FORCIBLE:

- definition of, within forcible entry and detainer act, 1206.

FORCIBLE DETAINER:

- definition of, 1205.
- see "Forcible Entry and Detainer."

FORCIBLE ENTRY:

- definition of, 1205.
- landlord may make to repair, 123.
- landlord cannot make, 115.
- trespass will lie for, 115.

FORCIBLE ENTRY AND DETAINER, ACTION OF:

- classification, 50.
- preferable to ejectment, when, 263.
- time for appeal from justice's court, 412.
- appeal in, 415.
- pending, cannot be pleaded in abatement, when, 665.
- judgment in, cannot be entered on confession, 996.
- cases, review of, 1019, note.
- definition and nature, 1205.
- forcible entry forbidden, 1206.
- what is "forcible," 1206.
- when maintainable, 1207.
- title to land tried on, 1207.
- right to gather crops, 1207, note.
- what detainer unlawful, 1207, note.
- plaintiffs in, 1208.
- abatement of by death of party, 1208.
- defendants of, who to make, 1209.
- demand in writing to precede, 1210.
- demand in, when necessary, 1210.
- commencement of, complaint, 1211.
- summons in, when returnable (*Form No. 397*), 1212.
- is local, 1212.
- summons, service of, publication, 1213.
- pleadings in, 1214.
- trial, how conducted, 1215.
- two questions to be determined on, 1215.
- form of verdict in, 1215.
- possession necessary to sustain, 1215, note.
- judgment in, for the whole, 1216.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

FORCIBLE ENTRY AND DETAINER, ACTION OF—*Continued.*

judgment in, damages cannot be awarded, 1216, note.
terminates right to sue for rent, 1216, note.
judgment in, for a part, 1217.
judgment by confession not entered in, 1217, note.
writ of restitution, (*Form No. 398*), 1218.
review of, 1219.

FORECLOSURE OF MORTGAGE BY SCIRE FACIAS:

formal requisites, 1172.
form (*No. 384*), 1171.
service of the writ, publication, 1173.
defenses to the proceedings, 1174.
judgment, 1175.
see "Scire Facias."

FOREIGN CORPORATIONS:

liable in attachment, when, 294.
as garnishees, 362.

see "Corporations" and "Non-Residents."

FOREIGN LANGUAGE:

slander in, declaration in case for (*Form No. 291*), 619.

FORM OF ACCOUNT STATED:

count for (*No. 44*), 509.

FORFEITED RECOGNIZANCE:

debt will lie upon, 92.
recoverable in "debt," 89.

FORFEITURE:

assumpsit will lie to collect, when, 87.
of penal bond, recoverable in "debt," 93.
or penalty, declaration on, of statute (*Form No. 161*), 571.

FORM OF ACTIONS:

history of, 49.
classification of, 50.
real, what are, 50.
personal, what are, 50.
mixed, what are, 50.
ejectment is, 239.
ex contractu, what are, 50.
ex delicto, what are, 50, 112.
determent by averments in body of declaration, 487, 503.
assumpsit, 49.
when the only remedy, 55.
substitution of, for others, 56.
waiving tort and suing in, 57.
on contract under seal, 58.
for damages for breach of contract, generally, 60.
choice of, or trespass, 60, note.
acts excusing breach of contract, 61.
attachment, generally, 291.
on ground of fraudulent conveyance, 311, note.
garnishment, 355.
ejectment, 238.
on contract, account, generally, 99.
covenant, generally, 95.
debt, declaration in, 88, 551.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

FORM OF ACTIONS—Continued.

- for torts, trespass, 112.
- trespass on the case, 183.
- trover, 136.
- replevin, generally, 155.
- on right given by statute, 85.
- when statute silent as to remedy, 85.
- to recover penalty, 85.
- recital of in commencement of declaration, 497.
- see following headings.

FORM OF AFFIDAVIT:

- in replevin (*No. 1*), 171.
- in attachment (*No. 4*), 303.
- in garnishment, on judgment (*No. 8*), 357.
- for *capias* (*No. 23*), 451.
- of plaintiff's claim should be filed with declaration (*No. 141*), 550.
- of truth of plea in abatement (*No. 302*), 674.
- denying execution or assignment of written instrument (*No. 351*), 711.
- of merits to be filed with plea (*No. 352*), 713.
- of service of notice of motion (*No. 357*), 373.
- for placing case on short cause calendar (*No. 358*), 783.
- for continuance (*No. 360*), 793.
- see "Affidavit."

FORM OF AFFIRMATION:

- of witness (*No. 362*), 838.
- see "Oath."

FORM OF AGREEMENT:

- to arbitrate matter not in suit (*No. 388*), 1182.
- see "Stipulation."

FORM OF ALLEGATION OF DAMAGES:

- in declaration in debt (*No. 144*), 564.

FORM OF ALLOWANCE:

- of *capias* (*No. 24*), 452.
- of *certiorari* (*No. 11*), 397.

FORM OF AMENDMENTS:

- proposed to bill of exception (*No. 369*), 1024.
- see "Amendments."

FORM OF APPEAL BOND:

- to appellate or supreme court (*No. 370*), 1032.
- see "Appeal Bond" and "Bond."

FORM OF ASSIGNING THE BREACH:

- in the declaration, 523.
- in debt (*Nos. 142-143*), 563.

FORM OF ASSIGNMENT OF ERROR:

- general (*No. 373*), 1063.

FORM OF ATTACHMENT:

- bond (*No. 5*), 317.
- writ (*No. 6*), 318.
- see "Attachment."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

FORM OF AVERMENT:

- in declaration, 518.
- of notice, 519.
- of damages in declaration, 524.
- of damages in covenant (*No. 163*), 574.
- in plea of general issue, in *assumpsit* (*No. 309*), 692.
 - in debt (*No. 310*), 693.
 - in covenant (*No. 311*), 694.
 - in trespass (*No. 312*), 695.
 - in trover (*No. 313*), 696.
 - in replevin (*No. 314*), 697.
 - in case (*No. 315*), 698.
- in special pleas or notice in writing with general issue (*Nos. 319-350*), 710.

FORM OF AWARD:

- on arbitration (*No. 389*), 1189.

FORM OF BAIL BOND:

- for release of defendant held by *captas* (*No. 27*), 456.
- see "Bonds."

FORM OF BILL OF PARTICULARS:

- general (*No. 299*), 645.

FORM OF BILL OF EXCEPTIONS:

- to evidence (*No. 365*), 1024.
- to instructions (*No. 365*), 1024.
- to denial of motion for new trial (*No. 365*), 1024.
- to denial of motion for a new trial on ground that verdict contrary to evidence (*No. 366*), 1024.
- on refusal of nonsuit (*No. 367*), 1024.
- on refusal of a continuance (*No. 368*), 1024.

FORM OF BOND FOR APPEAL:

- from justice (*No. 14*), 414.
- in forcible entry and detainer (*No. 16*), 415.
- in forcible entry and detainer (*No. 399*), 1219.

FORM OF CERTIFICATE:

- that writ of error to operate as *supersedeas* (*No. 372*), 1052.

FORM OF CERTIORARI:

- bond (*No. 12*), 398.
- writ (*No. 13*), 400.
- see "Certiorari."

FORM OF COGNOVIT:

- of defendant desiring not to appear (*No. 295*), 624.
- who has been served (*No. 295*), 624, note.
- see "Confession of Judgment."

FORM OF COMMENCEMENT:

- of pleas in bar, 688.
- of plea in abatement, 669.
- to special pleas (*No. 318*), 710.
- see "Commencement" also "Declaration."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

FORM OF COMMON COUNTS:

consolidated (*No. 45*), 512.

see "Common Counts" and "Declaration."

FORM OF CONCLUSION:

in declaration on covenant (*No. 162*), 574.

to special pleas, 710.

see "Conclusion" and "Formal Parts."

FORM OF COPY:

of account sued on, to be printed with declaration (*No. 46*), 512.

FORM OF DECLARATION:

illustrating the various parts, model, 489.

in common counts, for goods sold and delivered (*I*), 510.

for goods bargained and sold (*II*), 510.

for crops sold to defendant (*III*), 510.

for fixtures (*IV*), 510.

for land sold and conveyed (*V*), 510.

✓ for labor and services (*VI*), 510.

for labor and services of horses and carriages, etc. (*VIa*), 510.

for labor and material (*VII*), 510.

for money lent (*VIII*), 510.

for money paid to defendant's use (*IX*), 510.

for money had and received (*X*), 510.

for interest (*XI*), 510.

for use and occupation (*XII*), 510.

for board and lodging (*XIII*), 510.

for hire of horses, carriages, etc., (*XIV*), 510.

for pasturage (*XV*), 510.

for boarding and stabling horses, cattle, etc., (*XVI*), 510.

for necessaries (*XVII*), 510.

for physician's bill (*XVIII*), 510.

for attorneys' fee (*XIX*), 510.

✓ for wages and salary (*XX*), 510.

for warehouse room, storage, etc. (*XXI*), 510.

for dockage of ships and vessels (*XXII*), 510.

for freight or carriage of goods by land (*XXIII*), 510.

for freight of carriage of goods by water (*XXIV*), 510.

for freight of goods, another form (*XXV*), 510.

consolidated (*No. 45*), 512.

in account, tenant in common against cotenant (*No. 180*), 581.

not averring relation of tenants in common (*No. 181*), 581.

partner against partner (*No. 182*), 581.

against "custodian" to account (*No. 183*), 581.

in *assumpsit*, by surviving partner on promise to both partners (*No. 47*), 513.

on promise to him to pay debts due firm before death of member (*No. 48*), 513.

against a surviving partner, on promise of both (*No. 49*), 513.

on his promise after death of his partner (*No. 50*), 513.

by executor, on promise to testator (*No. 51*), 513.

on promise to him as such (*No. 52*), 513.

against executor, on promise to testator (*No. 53*), 513.

on promise by him as such (*No. 54*), 513.

by administrator, on promise to intestate (*No. 55*), 513.

laying debt to intestate by promise to plaintiff (*No. 56*), 513.

on cause of action arising after death of intestate (*No. 57*), 513.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

FORM OF DECLARATION—Continued.

- in *assumpsit*, against an administrator, on promise by intestate (No. 58), 513.
- laying debt from intestate and promise by administrator (No. 59), 513.
- on cause of action arising after death of intestate (No. 60), 513.
- against agent, for not accounting for goods, etc., intrusted to him to sell (No. 61), 526.
- for not using due care in selling goods (No. 62), 526.
- for not obeying orders in selling goods (No. 63), 526.
- for selling part under price, not accounting, not delivering, etc. (No. 64), 526.
- on implied promise that he had authority to sell, etc. (No. 67), 526.
- against forwarding agent, a warehouseman, for not forwarding goods, etc. (No. 65), 526.
- for lack of care and not forwarding as directed (No. 66), 526.
- against *del credere* agent on his guaranty (No. 68), 526.
- indebitatus* count, on an award (No. 69), 527.
- on an award made on parole submission, time for making prolonged (No. 70), 527.
- against bailee for reward for not using due care in repairing, etc., and not returning on request (No. 71), 528.
- by common carrier against consignee for not receiving goods, etc. (No. 72), 529.
- against common carrier, for gross neglect and loss of goods (No. 73), 529.
- for carelessness and delay in delivery (No. 74), 529.
- of passengers for negligent injury to persons, etc. (No. 75), 529.
- on a guaranty of the price of goods to be supplied to a third person (Nos. 76-77), 530.
- of house rent (No. 78), 530.
- of debt of third person, consideration running to defendant (No. 79), 530.
- against hirer of goods, for carelessness (No. 80), 531.
- for non-payment of rent, lease under seal (No. 81), 532.
- against tenant, for not keeping premises in repair (No. 82), 532.
- of farm, for not cultivating according to custom (No. 84), 532.
- for breach of promise of marriage, on request (No. 85), 533.
- where defendant has married another person (No. 86), 533.
- for breach of promise of marriage within a reasonable time, no request made (No. 87), 533.
- for discharge from service before expiration of time (No. 88), 534.
- to recover reward offered by advertisement for discovery of offender (No. 89), 535.
- for goods sold at market price, vendee not accepting (No. 90), 536.
- for timber sold and taken away (No. 91), 536.
- for article taken on trial to be returned or paid for at certain time (No. 92), 536.
- against vendor for not delivering (Nos. 93-94), 536.
- for not delivering goods at a particular place within a reasonable time (No. 95), 536.
- for non-delivery of goods whereby plaintiff procured others at higher price (No. 96), 536.
- for sum deposited to be returned if goods unsatisfactory (No. 97), 536.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

FORM OF DECLARATION—Continued.

- in *assumpsit*, on subscription for stock of corporation (No. 98), 537.
- for hire of warehouse room (No. 99), 538.
- for breach in warranty, of horse (No. 100), 539.
 - that goods equal sample (No. 101), 539.
 - that goods were fit for purpose intended (No. 102), 539.
- on warranty of horse in exchange (No. 103), 539.
- on promise to pay difference in exchange of horses (No. 104), 540.
- on building contract, non-performance of part, negligence as to residue (No. 105), 541.
- for discharging plaintiff before completing work (No. 106), 541.
- on corporation by-laws (No. 107), 542.
- for doctor's bill (No. 108), 543.
- on fire insurance policy (Nos. 109-110), 544.
- on life insurance policy (No. 111), 544.
- on promissory note, payee against maker (No. 112), 545.
 - indorsee against maker (No. 113), 545.
 - second (or subsequent) indorsee against maker (No. 114), 545.
 - indorsee against payee or other indorser (No. 115), 545.
 - holder against maker and indorser (No. 116), 545.
 - made payable at a particular place, payee against maker (No. 117), 545.
 - payable in installments, all due (No. 118), 545.
 - payable in installments, not all due (No. 119), 545.
 - payable to bearer (No. 120), 545.
 - surviving payee against maker (No. 121), 545.
- on contract in writing, payable in trade, time and place not specified (No. 122), 545.
 - payable in trade, time and place specified (No. 122, *second form*), 545.
 - payable in trade, price, time and place agreed upon (No. 122, *third form*), 545.
- on bill of exchange, drawer, being payee, against acceptor (No. 123), 545.
 - drawer, not being payee, against acceptor (No. 124), 545.
 - payee, not being drawer, against acceptor (No. 125), 545.
 - indorsee against maker (No. 126), 545.
 - payee against drawer for non-acceptance (No. 127), 545.
 - indorsee against drawer for non-acceptance (No. 128), 545.
 - indorsee against indorser for non-acceptance (No. 129), 545.
 - indorsee against drawer for default in payment of drawee (No. 130), 545.
 - indorsee against indorser for default by drawee (No. 131), 545.
 - holder against drawer and indorser (No. 132), 545.
 - indorsee against drawer, bill drawn and accepted, payable at particular place (No. 133), 545.
 - drawer against acceptor on condition (No. 134), 545.
 - against drawer, default of payment, drawee not found (No. 135), 545.
 - indorsee against drawer where drawee is dead (No. 136), 545.
 - indorsee against drawer where presentment waived (No. 137), 545.
 - executor of drawer on promise to testator (No. 138), 545.
 - executor of drawer, against acceptor on promise to plaintiff as executor (No. 139), 545.
 - executor of indorser against drawer (No. 138), 545, note.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

FORM OF DECLARATION—Continued.

in case, by agents, 595.

against bailee for negligence (*No. 208*), 596.

without reward, for negligence and non-delivery (*No. 209*), 596.

for immoderately driving a horse (*No. 210*), 596.

for careless driving against plaintiff's carriage (*No. 211*), 597.

by employer against employee for careless driving (*No. 212*), 597.

by owner of vessel against captain for negligence in care of goods (*No. 213*), 598.

against common carrier, by land, for negligence (*No. 214*), 598.

for negligently unloading goods (*No. 215*), 598.

against inn keeper for loss of chattel (*No. 216*), 598.

against railroad company for negligence in running train across highway (*No. 217*), 599.

against railroad company by administrator for negligence, causing death (*No. 218*), 599.

for not ringing bell, etc. (*No. 219*), 599.

for negligence regarding escape of fire (*No. 220*), 599.

for not fencing road (*No. 221*), 599.

for not maintaining cattle guards (*No. 222*), 599.

for injury to passenger (*No. 223*), 599.

for injury to person by collision (*No. 224*), 599.

against municipal corporation for negligence regarding sidewalk (*No. 225*), 600.

for digging away bank and injuring plaintiff's wall (*No. 227*), 600.

for obstructing street (*Nos. 228-229*), 600.

for injury by intoxicated person (*No. 230*), 600.

for nuisance, in keeping slaughter house (*No. 231*), 601.

in kindling fire (*No. 232*), 602.

regarding partition fence (*No. 233*), 602.

for keeping ferocious dog (*No. 234*), 603.

for keeping dog accustomed to bite sheep, etc. (*No. 235*), 603.

for injury to plaintiff by defendant's bull (*No. 236*), 603.

for shooting dog (*No. 237*), 603.

upon warranty (*No. 238*), 604.

for fraud in sale of horse (*No. 239*), 605.

for fraud in selling goods (*No. 240*), 605.

for selling unmerchable goods deceitfully packed (*No. 241*), 605.

for deceit in exchange of horses (*No. 242*), 605.

for misrepresentation of person's honesty (*No. 243*), 605.

for criminal conversation (*No. 244*), 606.

for enticing away wife, etc. (*Nos. 245-246*), 606.

for malicious prosecution and false imprisonment (*No. 247*), 607.

for maliciously causing arrest (*Nos. 248-249*), 607.

for malicious prosecution of civil case (*No. 250*), 607.

for seduction (*No. 251*), 608.

for enticing away workman (*No. 252*), 609.

against physician for negligence (*No. 253*), 610.

against attorney for negligence in examining title (*No. 254*), 610.

for negligence in defending case (*No. 255*), 610.

for waste, in cutting trees, etc. (*No. 256*), 611.

by injuring premises, etc. (*No. 257*), 611.

against sheriff for false return (*No. 258*), 612.

for not levying (*No. 259*), 612.

against sheriff for excessive levy, etc. (*No. 261*), 612.

against sheriff for taking insufficient bond in replevin (*No. 262*), 612.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

FORM OF DECLARATION—Continued.

- in case, for negligence in running foul of vessel (No. 262), 613.
 - in running down boat (No. 263), 613.
 - against steamboat owner for causing dangerous swell in river, etc. (No. 264), 613.
 - for untying boat, etc. (No. 265), 613.
 - against warehouseman for not forwarding goods (No. 266), 614.
 - for diverting water course (Nos. 267-268), 615.
 - for overflowing meadow (No. 269), 615.
 - against commissioner of highways for overflowing land by ditch (No. 270), 615.
 - for obstructing public way by vessel (No. 271), 616.
 - for obstructing private way (No. 272), 616.
 - for obstructing window-lights (No. 273), 616.
 - for neglecting to produce papers (No. 274), 617.
 - for libel, general form (No. 275), 618.
 - directly charging offense, not requiring inducement (No. 276), 618.
 - not directly charging offense, requiring inducement (No. 276), 618.
 - averment of special damages (No. 278), 618.
 - contained in letter from employer (No. 279), 618.
 - published in newspaper (No. 280), 618.
 - in letter intimating insolvency (No. 281), 618.
 - for slander, directly charging offense, not requiring inducement (No. 282), 619.
 - not directly charging offense, requiring inducement (No. 283), 619.
 - by accusation of false swearing (No. 284), 619.
 - of school mistress (No. 285), 619.
 - in charging want of chastity (No. 286), 619.
 - regarding profession (No. 287), 619.
 - imputing dishonesty, etc. (Nos. 288-289), 619.
 - imputing insolvency (No. 290), 619.
 - in foreign language (No. 291), 619.
- in covenant, by lessor against lessee for rent (No. 164), 575.
 - by lessor against lessee for not repairing, etc., for removing fixtures, etc. (No. 165), 575.
 - against assignee of lessee for rent (No. 166), 575.
 - by heir of lessor against lessee, for rent, etc. (No. 167), 575.
 - by devisee of lessor against lessee for rent, etc. (No. 168), 575.
 - on land contract against vendor for not conveying (No. 169), 576.
 - on land contract for purchase money (No. 170), 576.
 - for breach of warranty, grantee against grantor (No. 171), 576.
 - assignee of grantee against previous grantor (No. 172), 577.
 - grantee against grantor in deed of conveyance (No. 173), 577.
 - devisee of grantee against grantor (No. 174), 577.
 - of quantity of land (No. 175), 577.
 - after settlement of estate, grantee against heir of grantor (No. 176), 577.
 - against incumbrances (No. 177), 578.
 - for quiet enjoyment (No. 178), 579.
 - of seizin and power to convey (No. 179), 580.
- in debt, on common counts (No. 145), 565.
 - on common money bond (No. 146), 566.
 - on money bond setting out condition (No. 147), 566.
 - on bond, assigned (No. 148), 566.
 - surviving obligee against surviving obligor (No. 150), 566.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

FORM OF DECLARATION—*Continued.*

- in debt, on bond, assignee of an assignee of obligee against obligor (No. 151), 566.
 - of indemnity, to secure fidelity of employee (No. 152), 567.
 - of appeal (No. 153), 567.
 - of executors, etc., by distributee (No. 154), 567.
 - of sheriff (No. 155), 567.
 - of replevin (No. 156), 567.
- on several bonds (No. 140), 566.
- on a judgment (No. 157), 568.
 - of a justice of the peace (No. 158), 568.
- on a recognizance in a criminal case (No. 159), 569.
- on license bond for use of person injured, etc. (No. 160), 570.
- on statute for penalty or forfeiture (No. 161), 571.
- in ejectment (No. 292), 620.
- in replevin (No. 203), 593.
- in trespass, for assault, battery, and wounding (No. 184), 590.
 - for assault with firearms, wounding, etc. (No. 185), 590.
 - riding or driving against plaintiff (No. 186), 590.
 - for false imprisonment (No. 187), 590.
 - for criminal conversation (No. 188), 590.
 - for assault upon plaintiff's wife (No. 189), 590.
 - by husband and wife for assault upon the latter (No. 190), 590.
 - for debauching plaintiff's daughter (No. 191), 590.
 - for goods taken and carried away (No. 192), 591.
 - against officer for seizing exempt property (No. 193), 591.
 - for chasing sheep (No. 194), 591.
 - for shooting dog (No. 195), 591.
 - for running vehicle against plaintiff's horse (No. 196), 591.
 - for running vehicle against plaintiff's vehicle and injuring plaintiff and vehicle (No. 197), 591.
 - for cutting rope and loosening boat (No. 198), 590.
 - for injury to dwelling house and goods (No. 199), 592.
 - for expulsion from house (No. 200), 592.
 - quære clausum fregit, stating many injuries (No. 201), 592.
 - for tearing up railroad and making another across same (No. 202), 592.
- in trover (Nos. 204-207), 594.
 - by executor, for conversion in testator's lifetime (No. 206), 594.
 - for conversion after testator's death (No. 207), 594.
- objected to by demurrer and not by plea of general issue. 691.
- against attorney. 1269, note.
- see "Declaration."

FORM OF DEMAND:

- of possession to precede action of forcible entry and detainer (No. 396), 1210.

FORM OF DEMURRER:

- "general," to declaration or replication (No. 297), 637.
- "special," to declaration or replication (No. 298), 637.
- in special cases. 637, notes.
- see "Demurrer."

FORM OF EXCEPTIONS:

- to referee's report (No. 395), 1202.
- see "Exceptions."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276]

FORM OF FORTHCOMING BOND:

in attachment, 333.

see "Attachment," "Release of Property" and "Bond."

FORM OF FOUNDATION:

for expert testimony, 872.

FORM OF INDEBITATUS, ASSUMPSIT COUNT:

general (No. 41), 506.

by a surviving partner on promise to both partners (No. 47), 513.

FORM OF INSTRUCTIONS TO JURY:

care required of counsel, court need not correct, 932.

see "Instructions."

FORM OF INVENTORY:

in distress for rent (No. 401), 1223.

FORM OF JOINDER IN DEMURRER:

general (No. 298 1-2), 639.

see "Demurrer."

FORM OF JUDGMENT:

generally, 276, 993.

in assumpsit, 993, note.

in action of debt, 94, 993, note.

on a bond, 993, note.

in garnishment, 377, 993, note.

on *scire facias*, 1178.

in action of trover, 154.

amendment of, by judge's minutes after expiration of term, 990.

see "Judgment."

FORM OF JUSTICE'S TRANSCRIPT:

general (No. 17), 416.

see "Appeal" and "Certiorari."

FORM OF MOTION:

for new trial (No. 364), 964.

see "Motions" and "New Trials."

FORM OF NOTICE:

of motion (No. 357), 773.

or plea of recoupment (No. 354), 732.

to produce documents (No. 363), 864.

of set off (No. 353), 726.

of special defense to accompany plea of general issue (No. 317), 710.

see "Notice."

FORM OF OATH:

of witness (No. 361), 838.

for admission to practice law (No. 403), 1240.

in the United States Supreme court (No. 404), 1244.

of arbitrators, 1187.

see "Oath" and "Affirmation."

FORM OF ORDER:

of reference (No. 391), 1199.

see "Referees and References."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1278.]

FORM OF PETITION:

- for *certiorari*, to justice (No. 10), 397.
- to court of record (No. 371), 1047.
- for writ of *habeas corpus* (No. 374), 1143.
- ad testificandum* (No. 375), 1143.
- see "Application" and "Petition."

FORM OF PLEA:

- to the jurisdiction (No. 300), 654.
- of *nul tiel* corporation (No. 307), 674.
- of misnomer of defendant (No. 308), 674.
- verification of (No. 302), 674.
- in abatement for non-joinder (No. 301), 674.
- for misjoinder of defendants (No. 303), 674.
- of suit pending (No. 304), 674.
- of infancy of plaintiff (No. 305), 674.
- of infancy of defendant (No. 306), 674.
- of general issue, in *assumpsit* (No. 309), 692.
- in case (No. 315), 698.
- in covenant (No. 311), 694.
- in debt (No. 310), 693.
- in ejectment, 709.
- in trover (No. 313), 696.
- in trespass (No. 312), 695.
- in replevin (No. 314), 697.
- entire (No. 316), 710.
- of note given in satisfaction (No. 319), 710.
- arbitration and award (No. 320), 710.
- of payment, of services (No. 322), 710.
- in money (No. 322), 710.
- in *scire facias* (No. 386), 1177.
- of statute of frauds (No. 323), 710.
- of *ultra vires* corporation (No. 324), 710.
- of statute of limitation (No. 325), 710.
- to book account (No. 326), 710.
- of tender (No. 327), 710.
- of denial of art, tender of residue (No. 328), 710.
- of want of capacity (No. 329), 710.
- of partnership of plaintiff (No. 330), 710.
- of want or failure of consideration (No. 331), 710.
- of gambling debt (No. 332), 710.
- of infancy of defendant (No. 333), 710.
- of increased risk in policy of insurance (No. 334), 710.
- of notice of estoppel (No. 335), 710.
- of fraud (No. 336), 710.
- of usury (No. 337), 710.
- of *plene administravit* (No. 338), 710.
- in debt on indemnity bond (No. 339), 710.
- of *non damnificatus* (No. 341), 710.
- of false warranty (No. 342), 710.
- of conditions performed (No. 343), 710.
- of duress (No. 344), 710.
- of self defense in trespass (No. 345), 710.
- of defending another (No. 346), 710.
- of libel (No. 347), 710.
- of justification of libel (No. 348), 710.
- of that accusation is true (No. 349), 710.
- of diligence by common carrier (No. 350), 710.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

- FORM OF PLEA**—*Continued.*
 or notice of recoupment (*No. 345*), 732.
plus darrein continuance (*No. 356*), 754.
 of *nul tiel record in scire facias* (*No. 385*), 1177.
 of death in *scire facias* (*No. 387*), 1177.
 see "Pleas" and "Defenses."
- FORM OF PRÆCIPE:**
 general (*No. 18*), 428.
 for *scire facias* (*No. 378*), 1162.
 see "Præcipe."
- FORM OF QUANTUM MERUIT COUNT:**
 (*No. 42*), 507.
 see "Counts" and "Declaration."
- FORM OF QUANTUM VALEBANT COUNT:**
 (*No. 43*), 508.
 see "Counts" and "Declaration."
- FORM OF REPORT:**
 of referee, dismissing the action (*No. 392*), 1201.
 general (*No. 393*), 1201.
 in action for negligence (*No. 394*), 1201.
- FORM OF REPLEVIN BOND:**
 general (*No. 3*), 173.
 see "Replevin."
- FORM OF REPLICATION:**
 general (*No. 355*), 733.
 see "Replication" and "Pleadings."
- FORM OF RETURN OF SUMMONS:**
 not found (*No. 21*), 444.
 found (*No. 22*), 444.
 see "Summons" and "Return."
- FORM OF SECURITY:**
 for costs (*No. 19*), 430.
 see "Costs" and "Security for Costs."
- FORM OF SIMILITER:**
 general, 734.
 see "Similiter" and "Pleadings."
- FORM OF SPECIAL PLEA:**
 general (*No. 318*), 710.
 see "Pleas" and "Form of Plea."
- FORM OF STIPULATION:**
 to refer the issues (*No. 390*), 1199.
 see "Stipulation" and "Agreement."
- FORM OF SUGGESTION OF DAMAGES:**
 in ejectment, 280.
 generally (*Nos. 293-294*), 620.
 see "Damages" and "Suggestion of Damages."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

FORM OF SUGGESTION OF DEATH:

general, 759.

see "Death" and "Suggestion of Death."

FORM OF SUMMONS:

to commence action (*No. 20*), 434.

in garnishment (*No. 9*), 357.

in forcible entry and detainer (*No. 397*), 1212.

in distress for rent (*No. 402*), 1224.

see "Summons."

FORM OF SUPERSEDEAS BOND:

to justices' court (*No. 14*), 414.

see "Supersedeas," "Bond," "Appeal," "Certiorari" and "Review."

FORM OF TITLE COURT, TITLE TERM, VENUE AND COMMENCEMENT:

of declaration generally (*No. 29*), 498.

when attorney sues in his own behalf (*No. 30*), 498.

where an infant sues (*No. 31*), 498.

where partners sue (*No. 32*), 498.

where surviving partner sues (*No. 33*), 498.

when assignee sues in his own name (*No. 34*), 498.

when assignee sues in name of assignor (*No. 35*), 498.

when assignee of choses in action sues in name of assignor, for use (*No. 36*), 498.

where an executor sues (*No. 37*), 498.

where an administrator sues (*No. 38*), 498.

where corporation sues (*No. 39*), 498.

in suit begun by a national bank (*No. 40*), 498.

see "Declaration."

FORM OF TITLE, COMMENCEMENT AND CONCLUSION:

to pleas, 687.

to special pleas (*No. 318*), 710.

see "Pleas."

FORM OF VERDICT:

in ejectment, 274.

where plaintiff's right expires, 275.

general, 946.

correcting, 948.

in action of forcible entry and detainer, 1215.

see "Verdict" and "Finding."

FORM OF VERIFICATION:

to special pleas (*No. 318*), 710.

see "Verification" and "Pleas."

FORM OF WARRANT IN DISTRESS FOR RENT:

general (*No. 400*), 1223.

see "Distress for Rent."

FORM OF WARRANT OF ATTORNEY:

what sufficient, 996, note.

to confess judgment (*No. 296*), 624.

see "Confession of Judgment" and "Cognovit."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

FORM OF WRIT:

- of *capias ad respondendum* (No. 25), 453.
- of *habeas corpus*, general (No. 376), 1146.
- ad testificandum* (No. 377), 1146.
- of possession in ejectment (No. 4), 278.
- in replevin (No. 2), 172.
- of restitution in forcible entry and detainer (No. 398), 1218.
- of *scire facias*, to revive a judgment (No. 379), 1163.
- to make party to a judgment (No. 380), 1165.
- to make party to justice's judgment, 1165, note.
- against bail (No. 381), 1168.
- against sureties on appeal bond (No. 382), 1169.
- against garnishee (No. 383), 1170.
- to foreclose mortgage (No. 384), 1171.
- of *supersedeas* (No. 15), 414.
- see "Writ."

FORMAL PARTS:

- of declaration, enumerated, 488.
- of plea in abatement, 667.
- of pleas in bar, 686.
- see "Declaration," "Plea," "Averments" and "Allegations."

FORMAL REQUISITES:

- of affidavit of merits, 713.
- see "Affidavit of Merits," "Requisites" and "Forms."

FORMER ADJUDICATION:

- see "Former Judgment."

FORMER JUDGMENT:

- form of averment of, in special plea, or notice with general issue (No. 321), 710.
- see "Res Adjudicata" and "Pleas."

"FORMER RECOVERY:"

- how pleaded in trespass, 695.
- pleaded specially in *assumpsit*, 702.
- form of averment of, in special plea, or notice with general issue (No. 321), 710.
- see "Res Adjudicata."

FORNICATION:

- words charging, is slander, 190.
- see "Criminal Conversation."

FORTHCOMING BOND:

- to release attached property, 331.
- action on, 332, note.
- form of in attachment (No. 7), 333.
- in attachment, return of, 334.
- exceptions to, 334.
- see "Bond," "Release of Property" and "Attachment."

FOUNDATION FOR IMPEACHMENT:

- of witnesses, how laid, 885.
- see "Proof," "Evidence" and "Witnesses."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

FRANCHISE:

definition of, 1017, note.
 appellate court, no jurisdiction in cases of, 8.
 when involved, appeal taken direct to supreme court, 1017.
 when not involved, appeal taken to appellate court, 1018.
 right to exercise, questioned by *quo warranto*, 1125.

FRAUD:

assumpsit to recover money paid because of, 69.
 when contract may be rescinded for, 71.
 possession obtained through, is trespass, 123.
 will sustain replevin, 160.
 in possession, effect on action of replevin, 168.
 in sale of horse, declaration in case for (*Form No. 239*), 605.
 in selling goods, declaration in case for (*Form No. 240*), 605.
 declaration in case for, in selling unmerchable goods, deceitfully-
 packed (*Form No. 241*), 605.
 for deceit in exchange of horses (*Form No. 242*), 605.
 for misrepresentation of person's honesty (*No. 243*), 605.
 statute of—See "Statute of Frauds."
 plea of (*Form No. 336*), 710.
 as a defense, plea of (*Form No. 336*), 710.
 form of averment of in special plea, or notice with general issue
 (*No. 336*), 710.
 burden of proof regarding, 820.
 in award on arbitration, 1193.
 proof of, alleged as ground for attachment, 311.
 absence of proof of fairness of attorney to client, construed as,
 1275.
 in arbitration, effect, 1184.
 award set aside for, 1193.
 see "Deceit" and "Misrepresentation."

FRAUD AND COLLUSION:

how pleaded, 706, note.

FRAUD AND DECEIT:

action for survives, 29.
 money paid because of, recovered in *assumpsit*, 60.
 ground for trover, when, 144.
 action on the case for, damages occasioned by, 233.
 preferable to *assumpsit*, 237.
 declaration in case for (*Forms Nos. 239-243*), 605.

FRAUDULENT ASSIGNMENT:

as ground for attachment, 311-313.
 see "Assignment" and "Attachment."

FRAUDULENT CONCEALMENT:

as ground for attachment, 312.
 see "Attachment" and "Grounds."

FRAUDULENT CONTRACT:

as ground for attachment, 314.
 see "Attachment" and "Grounds."

FRAUDULENT CONVEYANCE:

as ground for attachment, 311.
 see "Attachment," "Sale," "Assignment" and "Grounds."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

FRAUDULENT JUDGMENT:

a defense (*Form No. 321*), 710, note.

see "Judgment."

FREEHOLD:

when involved, appeal taken direct to supreme court, 1017, 1018.

not involved, in forcible entry and detainer, 1017, note.

unless title in issue, 1017, note.

appellate court, no jurisdiction in cases of, 8.

FREIGHT:

for carriage of goods by land, declaration of common counts (*XXIII*), 510.

by water, declaration in common counts (*XXIV*), 510.

of goods, declaration in common counts for, general form (*XXV*), 510.

see "Declaration" and "Forms."

FRIEND:

appointment of, for defendant in action on contract, 39.

for defendant in action on contract, in case of insanity, idiocy, etc., 40.

see "Next Friend," "Guardian" and "Conservator."

FURTHER PLEAS:

right to file generally, 718.

see "Pleas" and "Amendments."

G.**GAMING:**

assumpsit to recover money lost by, 65.

money lost by recoverable in *assumpsit*, 60.

declaration to recover (*Form No. 204*), 594.

see "Wager" and "Assumpsit for Money Paid Without Consideration."

GAMBLING DEBT:

form of averment of in special plea or notice with general issue (*No. 332*), 710.

as a defense, form of plea (*No. 332*), 710.

see "Wager" and "Assumpsit."

GARDEN:

action of trespass for injury to, 126.

see "Trespass" and "Case."

GARNISHEE:

who may be, 362.

partners as, 362.

corporation as, answer under seal and oath, 367.

when must be filed, 367.

answer of, must show exempt character of fund or property, 368.

considered as evidence, 371.

must set up his defenses, 369.

must not be evasive or uncertain, 371.

will prevail, unless questioned by plaintiff, 369.

proceedings, when unsatisfactory, 372.

taken as true unless questioned, 365.

questioned by demurrer, replication, etc., of plaintiff, 369.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

GARNISHEE—Continued.

- answer of, traverse of, 372.
 - should claim set-off, 370.
 - must be in writing, etc., 367.
- defenses of, must be averred in his answer, 369.
 - generally, 365.
- fees of, a part of the judgment, 375.
- interrogatories to, must be filed, 366.
- liability of, generally, 365.
 - on insurance policy, 369, note.
 - to surrender property on execution, 382.
 - how compelled to make supplemental answer, 373.
- summons, issuance and service of, 357.
- refusing to surrender property, proceedings on, 382.
- having lien, may take title at sale, 385.
- scire facias* against, 1170.

GARNISHMENT:

- definition of, 355.
- nature of, 355.
- and attachment, compared, 355.
- and attachment, distinguished, 356.
- parties in, generally, 359, 361.
- classification of, 356.
- action of, classification of, 50.
 - definition and nature, 355.
 - how writ procured and served, 357.—
 - service and return of writ, 358.
 - what may be reached by, 359.
 - what may not be reached by, 360.
 - parties necessary to, 361.
 - who may be garnishee, 362.
- interpleader in, 363.
- interplea in, trial of claimant's rights, 364.
- position occupied by garnishee, 365.
- interrogatories to be filed, 366.
- when answer of garnishee must be filed, 367.
- answer in, must show exempt character of fund or property, 368.
- garnishee must set up his defenses, 369.
- answer in, should claim set-off, 370.
 - considered as evidence, 371.
- proceedings when answer unsatisfactory, 372.
- second or supplemental answer, 373.
- proceedings when garnishee refuses to surrender property, 382.
- sale of property in, application of proceeds, 383.
- equitable powers of courts in, relating to sales and liens, 384.
- garnishee with lien may take title at sale, 385.
- appeals in, how taken, 386.
- oppressive, statute concerning, 387.
- exemption rights of non-resident, 360, 387.
- transfer of claims for, prohibited, 387.
- transferring claims for, penalty of, 388.
- affidavit in, form of on judgment (No. 8), 357.
- appeals in, how taken, 386.
- costs in, 375.
- declaration in, general rules, 621.
- execution in, when it may issue on judgment, 378.
- proceedings on refusal to surrender, 382.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

GARNISHMENT—Continued.

- execution in, surrender of property on, 379.
 - when property subject to lien, 380.
 - on property subject to lien, plaintiff may perform conditions when, 381.
- judgment in, form of, 993, note.
 - form and effect of, 377.
 - cannot be entered without interrogatories and time to answer, 366.
 - when final, to be entered, 374.
 - for costs and fees, 375.
 - conditional on default, 376.
- of a judgment, 355, 356.
- liens in, equitable power of court relating to, 384.
- plaintiff, who to be, 359.
- in case of partnership, 362.
- receivers in, power of court to appoint, 384.
- sale in, application of proceeds, 383.
- summons in, form of (*No. 9*), 357.
- trial of interplea in, 364.
- writ of, how procured and served, 357.
 - service and return, 358.
 - compare "Attachment."

GENERAL APPEARANCE:

- after appeal from justices' court, 417.
- of defendant, equivalent to service of process, 436, 439.
 - effect of, 629.
- of counsel, rule governing, 1266.
 - see "Appearance."

GENERAL AVERAGE:

- verdict cannot be determined by, 943, note.
- in arriving at verdict, ground for new trial, 968.

"GENERAL ISSUE:"

- defined, 683.
- similiter to, 734.
- plea of, generally, 685.
 - what may be shown by, in action on contract, 19. — 691
 - formal parts of, 686.
 - title to, 687.
 - form of commencement, 688.
 - body of pleas in bar, 689.
 - raises question of fact, 690.
 - what may be shown under, 691.
 - what it admits and denies, 691. ✓
 - effect of, by one of several defendants, 691.
 - in *assumpsit*, what may be shown under, 692.
 - verification by one of several defendants, effect of, 692.
 - admits partnership, 692.
 - with special pleas, amounting to same, obnoxious on demurrer, 692.
- form of, in *assumpsit* (*No. 309*), 692.
 - in debt, what may be shown under (*No. 310*), 693.
 - in covenant, what may be shown under, 694.
 - form, entire (*No. 316*), 710.
 - in covenant (*Form No. 311*), 694.

[The references are to sections: Vol. I., §§ 1-737; Vol. II., §§ 738-1276.]

"GENERAL ISSUE"—Continued.

- form of, in trespass, what may be shown under, 695.
- in trespass, form of (*No. 312*), 695.
- in trover, what may be shown under, 696.
- in action for negligence under statute, 695, note.
- in trover (*No. 313*), 696.
- in replevin (*No. 314*), 697.
- what may be shown under, 697.
- in case (*No. 315*), 698.
- what may be shown under, 698.
- notice with, equivalent to special plea, 699.
- when alone not sufficient, 699.
- notice with, of special matter of defense, 700.
- notice of special defense, requisites of, 701.
- in ejectment, 700, note.
- form of notice of special defense to accompany (*No. 317*), 710.
- with notice and special plea, not both, to be filed in same case, 710, note.
- see "Plea of General Issue, Form of."

GENERAL REQUISITES:

- of declaration, 479.
- must correspond to process, 480.
- of judgments, 987.
- see "Requisites," "Declaration" and "Judgments."

GENERAL VERDICT:

- rules governing, 944.
- form of, 946.
- distinction between special verdict, 951.
- see "Verdict."

GEOGRAPHICAL JURISDICTION:

- what is, 4.
- see "Jurisdiction."

GIST OF ACTION:

- what is, 51.
- against municipal corporation for damages, is negligence, 228.
- in forcible entry and detainer, 1210.
- of malicious prosecution, 201.
- on penal bond, 93.
- for slander is malice, 192.
- of trespass, injury to possession, 123.
- for seizing property, 591, note.
- quare clausum fregit*, 592.
- the finding, 136.
- of trover, 142.
- see also "Cause of Action" and "Elements of."

GOD, ACT OF:

- excuses breach of contract, 61.
- see "Act of God."

GOOD FAITH:

- as a defense in malicious prosecution, 202.
- see "Malicious Prosecution" and "Malice."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

GOODS:

- conversion of, form of declaration in trover for (*No. 204*), 594.
- description of, declaration in trover (*Form No. 205*), 594.
- freight of, declaration on common counts for, 510.
- right to hold till paid for, 71.
- sale of, for cash, payment a precedent to title, 158.
- action on case for false statements made on, 233.
- sold, declaration for in *assumpsit* (*Forms Nos. 90-97*), 536.
- bargained and sold, *assumpsit* for, generally, 60.
- declaration on common counts for (*II*), 510.
- sold and delivered, *assumpsit* for, generally, 60.
- assumpsit* to recover for, 71.
- statement of cause of action for (*I*), 510.
- declaration for, averment of consideration, 516, note.
- declaration in case for fraud in sale of (*Form No. 240*), 605.
- taken on trial, declaration for in *assumpsit*, to be returned or paid.
- for at certain time (*Form No. 92*), 536.
- taken and carried away, declaration for in trespass (*Form No. 192*), 591.
- stolen, trover will lie for, 143.
- see "Chattels."

GOVERNOR:

- cannot be restrained by writ of prohibition, 1121.
- mandamus* will not lie to, 1100.
- see "Officers."

GRAIN:

- cannot be recovered in replevin, when, 164.
- see "Crops."

GRATUITOUS SERVICES:

- what is not, 73, note.
- when *assumpsit* will lie for, 75.

GOSS NEGLIGENCE:

- what is, 222.
- see "Negligence."

GROUND FOR ATTACHMENT:

- generally, 305.
- denial of, 341.
- non-residence as, 306.
- absence from state as, 306.
- that debtor conceals himself, 307.
- that debtor has departed with intent, etc., 308.
- that debtor is about to depart with intent, etc., 309.
- that debtor is about to remove property to the injury of, etc., 310.
- that debtor has within two years fraudulently conveyed, 311.
- that debtor has within two years fraudulently concealed, etc., 312.
- that debtor is about to fraudulently conceal, etc., 313.
- that debt was fraudulently contracted, 314.
- see "Attachment."

GROUND FOR MOTION FOR NEW TRIAL:

- enumerated, 965.
- for want of proper jury, 966.
- that juror is a non-resident is not, 966.
- misbehavior of prevailing party, 967.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276]

GROUND FOR MOTION FOR NEW TRIAL —*Continued.*

surprise is, when, 967, 970.
 improper remarks of counsel are, when, 967.
 misconduct of the jury, 968.
 absence of party, or counsel, or witness, 969.
 newly discovered evidence, 971.
 that lost instrument sued on has been found, etc., 971, note.
 waiver of, 972.
 excessiveness of damages, 972.
 smallness of the damages, 973.
 misconduct of court in, etc., 974.
 that the verdict is against the law or the evidence, 975.
 that witness may be impeached, when, 975, note.
 in action of trover, 153.
 where several defendants, 131, note.
 see "New Trials" and "Motions."

GROWING WHEAT:

on land of decedent, 147.
 see "Growing Crops" and "Crops."

GUARANTY OF "COLLECTION:"

liability incurred by, 84.
 see "Guaranty."

GUARANTOR OF PAYMENT:

when indorser will be, 83.
 see "Guaranty," "Surety" and "Indorsement."

GUARANTY:

declaration on in *assumpsit*, against *del credere* agent (*Form No. 68*), 528.
 of price of goods to be supplied to third person (*Forms Nos. 76, 77*), 530.
 of debt of third person, consideration running to defendant (*Form No. 79*), 530.
 of house rent (*Form No. 78*), 530.
 see "Surety," "Warranty" and "Declaration."

GUARDIAN:

when to be plaintiff, 23.
 the parent is the natural one, 39.
 commencement of suit by, what name to use, 998.
 appointment of, for defendant in action on contract, 39.
 see "Next Friend."

GUARDIAN AD LITEM:

appointment of, 23.
 in case of idiocy, 25.
 for defendant in action on contract in case of insanity, idiocy, etc., 40.
 for infant defendant in tort, 48.
 appearance of in defense, 628.
 see "Next Friend" and "*Prochiem Ami.*"

GUARDIAN AND WARD:

plaintiff in cases of, 23.
 see "Guardian."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

GUARDIAN'S BOND:

action on, plea to, 703, note.

see "Bond" and "Action on Bond."

H.**HABEAS CORPUS:**

writ of, origin and nature, 1139.

definition of, 1138.

ranks in power above all other writs, 1139.

a civil process in this state, 1139.

what courts may issue, 1140.

jurisdiction of supreme court in, 7.

circuit courts may issue, 9.

to remove false imprisonment, 211.

to discharge defendant held on *capias*, 455, 458.

when suspended, 1140.

who entitled to, 1141.

to bring prisoner to testify, 1141.

what it will not relieve, 1141.

to determine right of custody of child, 1141.

application for, how made, 1142.

petition for, form of (*No. 374*), 1143.

ad testificandum (*Form No. 375*), 1143.

"probable cause" must be shown to procure, 1144.

when to be granted, penalty, 1145.

form of, general (*No. 376*), 1146.

subpœna for witnesses to be issued, when, 1147.

service of, who to make, 1148.

how made, 1149.

expenses must be paid, exception, 1149.

return of, form, 1150.

producing the body, 1150.

obedience to, enforced by attachment, 1150, note.

emergency proceedings on, 1150, note.

proceedings on return of, generally, 1151.

when prisoner held on process will be discharged, 1152.

will not be discharged, 1153.

new commitment, recognizance of witnesses, penalty for omission, 1154.

remanding prisoner, order, 1155.

second, limit of court's power, 1156.

discharged person cannot be imprisoned for same cause, exceptions, 1157.

proceedings on, cannot be reviewed, 1039, 1157.

penalty for re-arresting person discharged, 1159.

penalty for avoiding, 1160.

penalties in, how recovered, 1161.

see "Writ of, etc."

HANDWRITING:

how proven, 859, note.

see "Proof" and "Evidence, Secondary."

HEARING CASE:

out of its order, 797.

in upper court, 1075.

see "Trial."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

HEARING OF MOTION:

for new trial, 976.
duty of court on, 976.
costs on, 977.
see "Motions."

HEARING, NOTICE OF:

before auditors, in action of account, 106.
on review by *certiorari*, 1049.
before referee, 1190.
see "Notice."

HIGHWAY:

turning animals in, 127.
actions on case for injury caused by defect in, 228.
liability of public for use of (*Form No. 270*), 615, note.
declarations in case for obstructing (*Forms Nos. 271-272*), 616.
see, also, "Street" and "Public Highway."

HIGHWAY COMMISSIONERS:

declaration in case against, for overflowing land by ditch (*Form No. 270*), 615.
mandamus will lie to, when, 1101, 1102.
see "Officers" and "Municipal Corporations."

HIRE:

cannot be recovered, when, 75.
of property, *assumpsit* for, generally, 60.
of horses, carriages, etc., declaration in common counts for (*XIV*), 510.

HIRER:

declaration against, in *assumpsit*, for carelessness (*Form No. 80*), 531.
see "Declaration" and "Forms."

HISTORY:

of forms of actions, 49.
of action of ejectment, 238.
of distress for rent, 1220.
see "Origin" and "Actions."

HOGS:

liability for trespass of, 128.
see "Animals" and "Trespass."

HOLDING OVER:

quantum meruit, *assumpsit*, against lessee, 76.
see "Landlord and Tenant" and "Tenant."

HOLIDAYS:

writs may not issue on, 9.
see "Writs" and "Service."

HORSE:

trespass for injury to, 117.
declaration or common counts for use of (*Via*), 510.
carriages, etc., hire of, declaration in common counts for (*XIV*), 510.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

HORSE—Continued.

cattle, etc., declaration in *assumpsit* for stabling, boarding, etc. (XVI), 510.

warranty of, breach, declaration in *assumpsit* (Form No. 100), 539.

trespass, for killing, declaration (Form No. 196), 591.

injury to, declaration in case for (Form No. 212), 597.

see "Animals," "Bailments" and "Trespass."

HORSE TRADE:

fraud and deceit in, declaration in case for (Form No. 242), 605.

see "Exchange of Horses."

HOTEL KEEPER:

duty of, 222.

see "Inn Keeper."

HOUSES:

see "Lands."

HUSBAND'S RIGHT OF ACTION:

for injury to wife, 30.

see "Trespass" and "Parties Plaintiff."

HUSBAND AND WIFE:

joinder as plaintiffs, in action for tort, 27.

in actions for tort, 30.

as defendants in action on contracts, 38.

in *assumpsit*, 73.

not to be joined as defendants in tort cases, when, 47.

trover as to separate property, 145.

proof of criminal conversation, 216.

declaration in trespass for assault upon the latter (Form No. 190), 590.

may not testify, when, 828.

appearance in foreclosure by *scire facias*, 1173, note.

see "Wife" and "Married Women."

HYPOTHETICAL QUESTION:

to be asked of expert, 872.

see "Experts" and "Witnesses."

I.

IDEM SONANS:

rule regarding, 483.

IDENTIFICATION:

of the person, the purpose of a name, 13.

of property, not required in trover, 142.

necessary to action of ejectment, 240.

see "Names," "Parties," "Trover" and "Ejectment."

IDIOCY:

plaintiff in case of, 25.

defendants in action on contract, 40.

see "Guardians" and "Conservators."

ILLEGAL FEES:

when recoverable, 60.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

ILLEGAL TAX:

assumpsit to recover money paid as, 66.
when recoverable, 60.

ILLNESS OF COUNSEL:

ground for new trial, when, 969.
see "Attorney at Law" and "Counsel."

IMMATERIAL ISSUE:

need not be traversed (*Form No. 348*), 710, note.

IMPANELING JURY:

general rules, 804.
see "Jury."

IMPEACHING TESTIMONY:

not primary evidence, 886.

IMPEACHING WITNESSES:

general rule, 885.
cross-examination of, 887.
see "Witnesses."

IMPEACHMENT:

of award on arbitration for fraud, 1184.
for fraud, 1193.
of return, 446.
of verdict, not by affidavit of jurors, 968.

IMPORTANCE:

certificate of, from appellate court to procure review, 1019.

IMPLICATION OF MALICE:

want of probable cause raises, when, 203.
see "Malice."

IMPLIED ASSUMPSIT:

what is, 54.
arises in favor of surety, when, 84, note.
see "Assumpsit."

IMPLIED MALICE:

in spoken slander, 187.

IMPLIED PROMISE:

for beneficial services, when, 75.
corporation may make, 86.

IMPLIED WARRANTY:

of indorser without recourse, 83.

IMPRISONMENT:

see "False Imprisonment."

IMPROPER INSTRUCTIONS:

grounds for reversal, when, 938.

IMPROPER TRIAL:

out of its order, reviewed only by aid of bill of exceptions, 1023.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

IMPROVEMENT IN LAW:

illustrated by liability of attorney to arrest, 1253.

IMPROVEMENTS:

recovery for, by defendant in ejectment, 286.

value of, in ejectment, oath, power and report of commissioners
287, 288.

see "Mesne Profits" and "Ejectment."

INCOMING TENANT:

must maintain action for possession, 1208.

see "Landlord and Tenant."

INCOMPETENCY OF WITNESS:

need not be urged when taking depositions, 895, note.

attorney in recovery of fees for services, 1275.

see "Witnesses."

INCONSISTENCY:

between "general" and "special" verdict, 956.

INCORPORATORS:

suff not to be brought in name of, 13, note.

see "Corporations."

INCREASED RISK:

form of averment of, in special plea or notice with general issue
(*Form No. 334*), 710.

see "Insurance" and "Policy of Insurance."

INDEBITATUS ASSUMPSIT:

when it lies, generally, 60, 505.

for work, labor and material, 73.

count in, 62.

form of (*No. 41*), 506.

see "Assumpsit."

INDEMNITY BOND:

in action of replevin, 175.

see "Bonds of Indemnity" and "Bonds."

INDICTMENTS:

malicious, action on case for, 184.

INDIVIDUALS:

not sue, in own name when incorporated, 13, note.

INDIVIDUAL MEMBERS OF PARTNERSHIP, ETC.:

when to be named as defendants in action on contract, 33.

INDORSEE:

see "Promissory Notes" and "Bills of Exchange."

INDORSEMENT:

liability incurred by, 83.

see "Assignment."

INDORSEMENT OF DECLARATION:

how and where required, 547.

see "Signature."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

INDORSEMENT OF NOTE:

to plaintiff, when necessary, 13.

see "Negotiable Instruments" and "Bills of Exchange."

INDORSEMENT OF WRIT OF ERROR:

when to operate as *supersedes*, 1052.

see "Writ of Error."

INDORSER OF NOTE:

when may be sued, 83.

liability of, without recourse, 83.

when may sue on note, 83.

entitled to note after payment, 83.

see "Promissory Notes" and "Bills of Exchange."

INDUCEMENT:

in special count, 515.

averment of, in declaration in debt, 554.

in declaration, illustrated, 489.

when to be traversed by plea (*Form No. 343*), 710, note.

use in declaration for slander (*Forms Nos. 283-284*), 619.

use of in declaration for libel (*Forms Nos. 276-277*), 618.

when required to be proved, 818.

see "Declaration" and "Forms."

INFANCY:

burden of proof regarding, 820.

pleaded specially in *assumpsit*, 702.

in debt, 703.

as a defense, plea of (*Form No. 333*), 710.

effect upon real actions, 41.

effect upon defendant in tort cases, 48.

when question of to be raised, 23, note.

INFANCY OF PLAINTIFF:

plea in abatement for (*Form No. 305*), 674.

see "Plea in Abatement."

INFANCY OF DEFENDANT:

plea in abatement for (*Form No. 306*), 674.

form of averment of in special plea or notice with general issue
(*No. 339*), 710.

see "Abatement" and "Plea in Abatement."

INFANT:

laches will not be imputed to, 23, note.

plaintiff in suits brought for, 23.

rule of contributory negligence as applied to, 226.

plaintiffs in actions for tort, 31.

as defendants in actions on contract, 39.

who liable for necessities furnished to, 39.

liable for their own torts, 41.

as defendants in real actions, 41.

as defendants in tort cases, 48.

disabilities of as plaintiffs, plea in abatement, 657.

see "Minors" and "Children."

INFANTS AS TRESPASSERS:

liability of, 48.

see "Trespass."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

INFLUENCE:

undue, as ground for change of venue, 762.

INFORMATION:

in proceedings to disbar attorney, 1249.

see "Attorneys at Law."

INFORMATION AND BELIEF:

affidavit for replevin made on, 171, note.

see "Belief."

INFORMATION IN THE NATURE OF A QUO WARRANTO:

requisites of, 1129.

leave to file, how asked, counter showing, 1127.

who may file, 1126.

when it may be filed, 1125.

competent for what, 1124.

review of, 1137.

judgment, ouster, fine, costs, 1136.

issues and trial thereof, 1135.

extension of time to plead in, 1134.

replication and rejoinder, demurrer, 1133.

defendant must plead or demur, 1132.

what not sufficient, 1129, note.

construed as a declaration, 1129.

see "Quo Warranto."

INJUNCTION:

circuit courts may issue writs of, 9.

compared with *mandamus*, 1097, note.

with prohibition, 1117.

INJURY:

by intoxicated person, declaration in case for (*Form No. 230*), 600.

by vehicle, declaration in trespass for (*Form No. 197*), 591.

to feelings, damages recoverable for, in actions for personal injuries, 216.

to house and goods, declaration in trespass for (*Form No. 199*), 592.

to horses, declaration in case for (*Form No. 212*), 597.

to land, declaration for averment of quality, 583.

to orchard, trespass will lie for, 125.

to person, declaration for (*Forms Nos. 184-191*), 590.

who to sue for, generally, 26.

to personal property, who to join as plaintiffs for, 27.

declaration for in trespass (*Forms Nos. 192-198*), 591.

declaration in case for (*Forms Nos. 232-233*), 602.

to property occasioned by improper custody and use, action on case for, 232.

to railroad, declaration in trespass for (*No. 202*), 592.

to reputation, action on the case for, 184.

to real property, declaration in action for (*Forms Nos. 199-202*), 592.

to wall, declaration in case for (*Form No. 227*), 600.

averment of, in declaration for tort, 584.

when immediate, 586.

when consequent, 587.

proof of, by inspection in court, 892.

see "Damages."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

INN KEEPER:

duty of, 222.

declaration against for loss of chattel, in case (*Form No.* 216), 598.

INNOCENT PURCHASER:

trover will not lie in case of, 144.

INNUENDO:

use of in slander, 191.

office of in declaration, 618, note.

"IN PERSONAM:"

see "Action In Personam."

INQUIRY, WRIT OF:

judgment on, 284, note.

to assess value of *mesne* profits in ejectment, 284.

see, also, "Writ."

"IN REM:"

see "Action in Rem."

INSANITY:

plaintiff in case of, 25.

defendants in action on contracts in case of, 40.

who to sue for damages in case of, 32.

INSANITY OF PLAINTIFF:

plea in abatement for, 657.

see "Parties," "Plaintiffs" and "Plea in Abatement."

INSOLVENCY:

plaintiffs in cases of, 24.

commencement of declaration in case of, 499.

when excuse for lack of "due diligence," 83.

libel charging, declaration in case for (*Form No.* 281), 618.

slander imputing, declaration in case for (*Form No.* 290), 619.

INSOLVENT CORPORATION:

plaintiffs in cases of, 24.

see "Parties," "Plaintiffs" and "Corporations."

INSPECTION:

out of court, proof by, 893.

is circumstantial evidence, 891.

of person, in court, 892.

of documents, in court, 892.

see "View."

INSTANTER:

definition of, as used in pleading, 719.

INSTRUCTIONS TO JURY:

purpose of, 924.

none as to comparative negligence, 223.

when plaintiff fails to prove his case, 900, note.

to find for defendant, when proper, 901.

regarding argument of counsel, 908.

on mixed question of law and fact, 915.

to find for the defendant, practice, 922.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

INSTRUCTIONS TO JURY—Continued.

- waiver of right to request, 925.
- request for, to be in writing, 925.
- allowing or refusing request for, 926.
- marking those "given" or "refused," 926.
- modifying those requesting, 926.
- when not grounds for reversal, 928.
- regarding joint defendants in actions for tort, 131, note.
- requisites of, 929.
 - must be in writing, 927.
 - must state rules of law only, 928.
 - must be based on the evidence, 929.
 - must relate to the material fact in issue, 929.
 - must be restricted to case as made out by legitimate evidence, 929.
 - not to assume facts not proven, 930.
 - not to direct their conclusions, 930.
 - may be to legal effect of evidence, admitted, 930.
 - may be informed what facts constitute negligence, 930.
 - may direct attention to circumstances to be considered, 930.
 - not to caution the weight to be given to evidence, 930.
 - when great strictness required, 931.
 - may use language of statute regarding liability, 932.
- on former trial given at rehearing, 932.
- form of, care required of counsel, court need not correct, 932.
- need not be repeated, 933.
- directing a verdict, general rule, 934.
- directing a verdict for plaintiff, 935.
- for defendant, 936.
- "error without prejudice no ground for reversal," 938.
- erroneous, ground for reversal, when, 938.
- by court's own motion to modify or supersede those already given, 938.
- to cure errors in admission of evidence, 939.
- to be in writing and read to them by judge, 940.
- modified by court, even after being read, 940.
- how construed, 937.
- presumed to be understood in their common sense, 940.
- exceptions to, how entered, 941.
 - must be shown by a bill of exceptions, 941.
 - when to be taken, 941.
- to be taken to their room, 942.
- to be returned with verdict into court, 942.
- giving or refusing no part of record unless by bill of exceptions, 1023.
- lost, no ground for a new trial, 974, note.
- see "Jury."

INSTRUMENT IN WRITING:

- sued on, with declaration, 546.
- denial of execution of, 711.
- denial of execution or assignment, when set-off, 725.
- set-off, copy must accompany, 725.
- purpose of cross-examination as to, 849.
- see "Written Instrument."

INSTRUMENT SUED ON:

- copy of indorsement to be set out in, when (*Form No. 113*), 545, note.
- see "Declaration."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

INSTRUMENT UNDER SEAL:

action of covenant upon, 95.

see "Covenant," "Action" and "Seal."

INSUFFICIENCY:

of declaration availed of by demurrer, etc., 482.

of return, how corrected, 448.

in service of process, how corrected, 448.

see "Declaration," "Return," "Irregularity" and "Amendments."

INSURANCE:

pleaded specially in covenant, 704.

see "Pleas" and "Policy."

INSURANCE POLICY:

action on, how brought, 20, note.

who may bring suits on, 13.

assumpsit upon, generally, 60.

trover will lie for conversion of, 143.

liability of garnishee on, 369, note.

limitation in (*Form No. 325*), 710, note.

defense to action on increased risk, etc., form of plea (*No. 334*), 710.

see "Policy of Insurance" and "Fire Insuree Policy."

INSURERS:

carriers of freight are, 61.

see "Common Carriers."

INSURRECTION:

see "War."

INTENDMENT:

aids return of summons, 444.

favors assignment of breach, in declaration, 523.

may aid misjoinder of counts, when, 525, note.

not indulged in favor of statutory cause of action, 85.

INTENT:

effect of, in attachment for removal, etc., 308.

effect of, in action of trover, 138.

to depart, as ground for attachment, 309.

material only for what, 114.

criminal, at what age child may have, 41.

see "Attachment" and "Grounds."

INTERCOURSE:

averment of, necessary in declaration for crim. con., 603, note.

see "Criminal Conversation."

INTEREST:

when recoverable, 70.

when recoverable in trespass or trover, 119.

declaration on common counts to recover (*XI*), 510.

usurious, when not recoverable, 68.

of mortgagee, attachable, when, 295.

INTEREST AND POSSESSION:

sufficient to sustain trespass, 117.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

INTERLOCUTORY JUDGMENT AND ORDERS:
 no part of record unless by bill of exceptions, 1023.
 what is, 989.
 cannot be reviewed, 1013, note.
 reviewed only by aid of bill of exceptions, 1023.
 cannot be assigned for error, 1062.

INTERPLEA:
 trial of, in garnishment, 364.
 in attachment by claimant of property, 345.

INTERPLEADER:
 in garnishment, 363.
 new defendant in *mandamus*, not, 1112.
 see "Attachment" and "Garnishment."

INTERVENTION:
 in attachment, 345.
 burden of proof on, 820, note.
 see "Attachment" and "Garnishment."

INTERPRETER:
 privilege from giving testimony, 1257.
 who may act as, 839.
 sworn, rule regarding, 839.
 may be contradicted, 839.
 see "Proof" and "Evidence."

INTERROGATORIES:
 to garnishee must be filed, 366.
 see "Garnishment."

INTOXICATING LIQUOR:
 action on case for injury caused by, 230.

INTOXICATION:
 declaration in case for injury by (*Form No. 230*), 600.
 plaintiff in action for damages occasioned by, 30.
 infant may sue for injuries caused by, 31.

INTRODUCTION OF EVIDENCE:
 general rule regarding, 815.
 see "Proof."

INVENTORY OF PROPERTY:
 in levy of replevin, 175.
 form of, in distress for rent (*No. 401*), 1223.

INVESTIGATION OF TITLE:
 duty of attorney to client in, 1273.
 see "Attorney at Law."

INVOICE:
 see "Inventory."

INVOLUNTARY NON-SUIT:
 what is, 798.
 see "Judgment" and "Non-suit."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

IRREGULARITIES:

waiver of, by taking appeal from justice's court, 417, 418.
 in *mandamus*, 1114.
 in bill of exceptions, cannot be supplied by pleadings, 1027, note.
 in declaration must be questioned before pleading, 480.
 on change of venue, cured by verdict, 768.
 cured by verdict, general rules, 750.
 cured by judgment, 1000.
 see "Amendments."

ISSUE:

defined, 684.
 the end of pleading, 736.
 general, plea of raises question of fact, 690.
 pleas to the merits, generally, 685.
 immaterial, need not be traversed (*Form No. 348*), 710, note.
 joinder of, in suggestion of damages in ejectment, 283.
 tender of, how made in plea in bar, 690.
 by conclusion of special plea, required, 701.
 in action of account, 104.
 trial of, in action of account, 105, 108.
 before auditors in action of account, 106, 107.
 on garnishee's answer, 372.
 on plea in abatement, 679, 680.
 in *quo warranto*, 1135.
 on *habeas corpus*, trial of, generally, 1151.
 on writ of *mandamus*, how made up and tried, 1110.

ISSUE OF FACT:

how raised by plea, 690.
 in *mandamus*, how raised, 1110.

ISSUES OF LAW:

in *mandamus*, how raised, 1110.

ISSUANCE OF PROCESS:

is the commencement of suit, 432.
 see "Process" and "Writ."

ISSUANCE OF SUMMONS:

not complete until delivered to officer, 432.
 see "Summons" and "Writ."

ISSUANCE OF WRIT OF ATTACHMENT:

to other counties, 321.
 when to be made, 320.
 see "Attachment" and "Writ of Attachment."

ISSUANCE OF THE WRIT OF CAPIAS AD RESPONDENDUM:

rule governing, 453.
 see "Capias ad Respondendum."

ISSUANCE OF WRIT OF ERROR:

practice regarding, 1053.
 see "Writ of Error."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

J.

JEOFAILS:

cures irregularities after judgment, 1000.
see "Amendments."

JEW:

oath to, how administered, 838, note.

JOINDER OF ACTIONS:

when allowable, 53.
see "Actions."

JOINDER OF COUNTS:

in declaration, 525.
when repugnant, effect of, 514.
"trespass and case," 525.
replevin and trover proper, 707, 708.

JOINDER OF DEFENDANTS:

in actions for torts, 44.

JOINDER IN ERROR:

motion to dismiss appeal must be made before, 1065, note.
effect of omission, 1066.
time to plead, when defendant prefers not to join in error, 1067.
see "Error" and "Writ of Error."

JOINDER OF HUSBAND AND WIFE:

in action for torts, 30.
as defendants in action on contract, 38.
in tort cases, 47.
in *assumpsit*, 73.
see "Parties."

JOINDER IN DEMURRER:

generally, 639.
form (*No. 298 1-2*), 639.
see "Demurrer."

JOINDER OF ISSUE:

in suggestion of damages in ejectment, 288.
see "Issue."

JOINDER OF PARTIES:

as plaintiffs in action for tort, 27.
see "Parties."

JOINDER OF PLAINTIFFS:

in action for torts, 27.
see "Plaintiffs."

JOINT CONTRACTORS:

may not testify when, 827.

JOINT DEBTORS:

interests attachable when, 296.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

JOINT DEFENDANTS:

in action on contract, 34.
recovery of, in "debt," 94.
see "Defendants."

JOINT LIABILITY:

of trespassers, parties defendant, 131.
of plaintiffs questioned by plea in abatement, 663.
on written instrument, how denied, 711.

JOINT PLAINTIFFS:

when persons to be, 19.
see "Plaintiffs."

JOINT POSSESSION:

of plaintiffs in action for trespass to land, effect of, 592, note.

JOINT TENANCY:

plaintiffs in action relating to, 27.

JOINT TENANTS:

as plaintiffs, 27.
may maintain action of account, 100.
may maintain ejectment, when, 262.
may maintain action of forcible entry and detainer, 1209.
account will lie at suit of, 101.
may have action of account or bill in chancery, 110.
see "Tenants in Common."

JOINT AND SEVERAL JUDGMENTS:

rule relating to, 994.
see "Judgments."

JUDGE:

powers of, in vacation, 9.
remarks of, during trial, not "instructions," 924.
death of, signing bill of exceptions in case of, 1025, note.
of county court, *mandamus* will lie to, when, 1101.

JUDGES:

of circuit courts, powers of, in vacation, 9.
may sit as city judge, 11.
of city courts may sit as circuit judge, 11.

JUDGE'S MINUTES:

not required by law, 990.

JUDGMENT:

definition of, 987.
under statute on appeals from justice, 410.
an entirety, 993.
admission to practice law is, 1243.
affirmance of, what implied by, 1020, note.
against defendant in *capias* cases on motion, 472.
against plaintiff in replevin, 178.
against sureties, *scire facias*, necessary to entry of, when, 1168.
alternative in replevin, 178.
amendments after, when allowable, 743.
supplied by the court, 751.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

JUDGMENT—Continued.

- amendment of, as to form by judge's minutes after expiration of term, 990.
- as to facts, 1002.
- appeal from.
 - see "Appeal."
- arrest of, wrong name of, plaintiff's ground for, 19.
- for misjoinder of plaintiffs, 19.
- when not granted for irregularity, 750.
- on ground of variance in proof, 819.
- will be ordered, when, 979.
- motion for, nature, 979.
- when to be made, 980.
- how to be made, 981.
- exceptions to ruling, when unnecessary, 982.
- effect of granting, 983.
- attachment on, affidavit in, 304.
- by confession, general rule regarding, 996.
- cannot be appealed from, 409.
- by defendant in open court, 624.
- warrant for (*Form No. 296*), 625.
- may be entered in vacation, 996.
- cannot be made in forcible entry and detainer, 996, 1217, note.
- consolidation of notes for, 996, note.
- attorney's fee included in, when, 996, note.
- conditions upon which entered, practice, 997.
- affidavit of warrant of attorney and that maker is alive, 997.
- note.
- jurisdiction of person, how acquired on, 997, note.
- presumptions entertained regarding, 997, note.
- what court may set aside, 999.
- proof and presumptions, 998.
- motion to set aside, where and by whom made, 999.
- how set aside, practice, 999.
- entered in term time, how set aside, 999.
- in vacation, when set aside plaintiff may amend, 999, note.
- defense to, on leave to plead, 999, note.
- presumptions favoring, 1000, note.
- by default, general rule relating to, 995.
- for want of affidavit of merits, when may be entered, 550.
- may be entered on all matters which plea does not answer, 701.
- against defendant, how prevented, 712.
- for plaintiff in absence of defendant, 801.
- defendant cannot prevent by improper act, 801, note.
- in *capias* cases, 472.
- in ejectment, 277, note.
- in garnishment, how made final, 376.
- in suggestion of damages in ejectment, 284, note.
- on plea of payment (*Form No. 322*), 710, note.
- on set-off, when plaintiff absent, 798.
- of one of several defendants, effect, 995.
- how set aside, 802.
- what admitted by, 995.
- when plaintiff entitled to, 995.
- in distress for rent, 1228.
- by *nil dicet*, where plea states no defense, 716, note.
- classification of, generally, 988.
- according to their nature, 989.
- collateral attack on, general rule, 1007.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

JUDGMENT—Continued.

- conclusiveness of sister state, 987, note.
- general rule regarding, 987, note.
- conditional, how made final in garnishment, 376.
- costs, general rule relating to, 1008.
- entry of, in upper court, general rule, 1079.
 - in upper court, of affirmance, execution, 1080.
 - of reversal in whole, execution, 1081.
 - of reversal in part, remittitur, execution, 1082.
 - of dismissal, execution, 1083.
- is a ministerial act, 990.
- before maturity of note, when authorized, 996, note.
- by clerk on confession, a ministerial act, 996.
- nunc pro tunc*, 1001.
 - after death of party, 1079, note.
- correcting errors of fact in, 1002.
- erroneously entered, powers of supreme court over, in vacation, 8, note.
- execution on, when to issue against land, 1003.
 - of affirmance in upper court, 1080.
 - of reversal in whole, 1081.
 - of reversal in part in upper court, 1082.
 - of dismissal, 1083.
- extent of, in action of trespass to land, 121.
- final, what is, 989.
 - what is not, 1039, note.
 - in supreme court, when, 7.
 - when to be entered in garnishment, 374.
 - necessary to support appeal from justice, 410.
 - cannot be entered when demurrer not disposed of, 640.
 - rules and orders of court are not, 779.
 - only can be reviewed, 1013, 1039.
 - when refusing to grant new trial is, 1013, note.
 - reversing or remanding a case is not, 1013, note.
- for breach of promise, 218.
- for damages, favor of defendant in replevin, 178.
- cannot be awarded in forcible entry and detainer, 1216, note.
- in *certiorari* after execution and sale, 403.
- for false imprisonment, 211.
- for plaintiff in replevin, 178.
- in torts, when several defendants, 994.
- in action for use, 14.
- force of, against insane person, 25.
- form of, generally, 993.
 - in *assumpsit*, 993, note.
 - averment of in special plea or notice with general issue (*No. 321*), 710.
 - in debt, 94, 993, note.
 - on a bond, 993, note.
 - in ejectment, generally, 276.
 - in garnishment, 377, 993, note.
 - on *scire facias*, 1178.
 - in trover, 154.
- fraudulently obtained a defense (*Form No. 321*), 710, note.
- garnishment of, 355.
- how and when entered, 990.
- in attachment, when there has been no personal service, 329, 347.
- when defendant personally served, 346.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

JUDGMENT—Continued.

- in attachment, remittitur, 347.
 - execution levy thereon, 348.
 - in aid, 353.
- in covenant, amount of, 98.
- in distress for rent, 1228.
- in ejectment, generally, 276.
 - effect of, 277.
- in forcible entry and detainer, cannot be entered by confession, 996.
 - for the whole, 1216.
 - for a part, 1217.
 - damages cannot be awarded, 1216, note.
- in garnishment, cannot be entered without interrogatories and time
 - to answer, 366.
 - based on admissions of answer, 371.
 - when final to be entered, 374.
 - for costs and fees, 375.
 - conditional on default, 376.
 - form and effect of, 377.
- in *mandamus*, default, *nil dicet*, and peremptory writ, 1110.
 - concludes litigation, 1111.
- in *quo warranto*, by default, how entered, 1132.
 - ouster, fine, costs, 1136.
- in replevin, fixes right of parties, 178.
- irregularities cured by, 1000.
- interlocutory, what is, 989.
- joint and several, rule relating to, 994.
- jurisdiction of court over, in term time, 6.
- lien created by, on real property, 1003.
 - on personal property, 1004.
 - against the body, 1005.
 - priority of, 1006.
- merger by, rule regarding, 987.
- motion for, against defendant in *capias* cases, 472.
- motion in arrest of, after overruling motion for new trial, 976.
- motion to set aside, affidavit to support, 1007.
- must be on all the issues, 993.
- defenses to (*Form No. 321*), 710, note.
- delaying, rule, 991.
 - of a justice of the peace (*Form No. 158*), 568.
- declaration on in debt (*Form No. 157*), 568.
- non obstante veredicto.
- motion for, general rule, 984.
 - motion for, when must be made, 985.
- in account, 104.
 - how rendered, 109.
- of acquittal, costs on, 1010.
- of appellate court, when final, 8.
 - must be incorporated into record for review in supreme court, 1059.
- of city courts, how enforced, 11.
 - effect of, 11.
- cost, in suit on replevin bond, 182, note.
- county court, *mandamus* will lie to, when, 1101.
- in debt, amount of, 94.
- of dismissal, costs on, 1010.
- of non-suit, when defendant entitled, 798.
- in supreme court, final, 7.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

JUDGMENT—Continued.

- in trover, amount of, 152.
- on award on arbitration, 1191.
 - for other than the payment of money, enforcement of, 1192.
- on *certiorari*, to justice, 405.
 - from appellate or supreme court, 1050.
- on contract, when several defendants, 994.
- in "debt," the proper form, 89.
- on demurrer, permission to amend or plead over, 640.
- on demurrer to plea, 737, note.
 - to plea to the jurisdiction, 655.
 - to replication, 738, note.
 - to statute of limitations, is a final judgment and may be reviewed, 1013, note.
- on plea, in abatement, replevin, plea in, 680, note.
 - to the jurisdiction, 655.
 - puis darrien* continuance, 758.
 - of payment, by default, for defendant (*Form No. 322*), 710, note.
 - of tender (*Form No. 328*), 710, note.
- on reference of issues to referee, 1203.
- on replevin bond, 182.
- on *scire facias*, damages, costs, 1178.
 - to foreclose mortgage, not "personal," 1175.
- on set-off in distress for rent, 1228.
- on special finding, motion for, when contrary to general verdict, 986.
- on trial of set-off, 728.
- on verdict, how set aside, 1007.
- on writ of inquiry in ejectment, 248, note.
 - of prohibition, 1123.
- order setting aside is not a judgment, 1007, note.
- overruling a demurrer, form of judgment, 993, note.
- parties to, defendants *scire facias* to make, 1165.
- pleaded especially in debt, 703.
- record "Authenticated copy, etc." of what to consist, 1058.
 - see "Record."
- refusal to enter *remittitur*, 992.
- rendering is a judicial act, 990.
- requisites of, 987.
 - must be an entirety, 993.
 - respondeat* ouster on demurrer, 640.
- reversal of, for using individual names of incorporators, 13, note.
 - effect of, in action of trover, 154.
 - not for mere error in form, 743, note.
 - for want of cross-examination, when, 875.
 - for remarks of judge, when, 924.
 - plaintiff may procure, 1014, note.
- review of, extent, general rule, 1000.
- revival of, by *scire facias*, 1163.
 - by *scire facias*, form of writ (*No. 379*), 1163.
 - unnecessary in behalf of the people, 1163.
- satisfaction of, authority of counsel to make, 1268.
- setting aside, does not set aside verdict, 1007, note.
 - order for, is not itself a judgment, 1007, note.
 - entered on verdict against several, 1007, note.
- stay of, motion for new trial effects, 964.
- vacation of, entered on confession, 999.
- surplusage over *ad damnum* clause cured by *remittitur*, 524.
- sustaining demurrer not final and not appealable, 640, note.
- taking case under advisement, rule governing, 991.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

JUDGMENT—Continued.

when several defendants, 994.

when interest included in trespass or trover, 119.

JUDICIAL ACT:

making bill of exceptions is, 1025.

rendering judgment is, 990.

JUDICIAL FUNCTION:

when may be exercised, 9, note.

JUDICIAL NOTICE:

things generally known need no proof, 823.

will be taken of what facts, 823.

see "Presumption."

JUDICIAL OFFICER:

liable in trespass, when, 130.

see "Officers."

JUDICIAL POWER:

where vested, 3.

see "Jurisdiction."

JURAT:

words "before me" necessary in, 171, note.

added to affidavit for attachment by amendment, 315.

JURIES:

instructions to, none as to comparative negligence, 223.

see "Jury" and "Instructions."

JURISDICTION:

admitted by demurrer, 633.

appellate, what is, 5.

cannot be waived, 652.

classification of, 4.

conflict of, 6.

between state and federal court in *habeas corpus*, 1141.

concurrent, of state and federal courts, 4.

defined, 3, 4.

excess of, reviewed by *certiorari*, 393.

assumption of, stopped by writ of prohibition, 1119.

general, when presumed, 6.

geographical, what is, 4.

in *personam*, what is, 4.

in *rem*, what is, 4.

lack of, liability of officer in trespass, 129.

necessity of, 4.

of appeal, given by appearance, 418.

appellate court, 8.

in *certiorari*, 8.

in *mandamus*, 8.

in *supersedeas*, 8.

circuit courts, 9.

to issue writs of *quo warranto*, *scire facias*, *habeas corpus*, etc., 389.

of court on appeal no greater than justices' court, 424.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

JURISDICTION—Continued.

- of courts, 1.
 - of record, 6.
 - in term time, 6.
 - over judgment in term time, 6.
 - as to adjournments, 6.
 - in attachment, 293, 298.
 - not lost by striking case from docket, 799.
 - to set aside judgment, extent of, 1007.
 - summary, over attorneys, generally, 1245.
 - in *habeas corpus*, limit to number of writs, 1156.
- of city courts, 11.
- of superior court of Cook county, 9.
- of supreme court, generally, 5, 7.
- of person, necessity of, 4.
 - how acquired on confession of judgment, 997, note.
- on appeal, when acquired by upper court, 420.
- original, what is, 5.
- plea to, what is, 651.
 - general rules relating to, 653.
 - need not show "better writ," 653.
 - need not be verified, 653.
 - when to be filed (*Form No. 300*), 654.
 - judgment on, 655.
 - must show proper forum, 666.
- presumption regarding, 653.
- presumption favoring, when not shown in bill of exceptions, 1027, note.
- of the *res*, necessity of, 4.
 - necessary in garnishment, 362.
- of subject matter, necessity of, 4.
 - see "Courts, Jurisdiction of."

JURORS:

- number of, 804.
- qualification of, 804.
 - relationship disqualifies, 806, note.
 - interest in subject matter to disqualify, 806, note.
 - when wanting, no ground for new trial, 806, note.
- exemptions, 804.
- may be excused without being challenged, 807.
- withdrawal of, to prevent judgment for defendant, 923.
- affidavits of, not received to contradict verdict, 949.
 - not received to impeach verdict, 968.
 - to sustain verdict, 968.
- examination of, on *voir dire*, 806, 966.
- privilege of attorney from serving as, 1254.
 - see "Jury."

JURY:

- allowed refreshments, when, 943.
- argument to, by counsel, rule governing, 906, 907.
- attorney may not serve upon, 1254.
- challenge of, generally, 806.
 - when improper, ground for *venire facias de novo*, 962.
- conduct of, rule relating to, 943.
 - may be sent back to determine verdict, 946.
- return and statement of verdict, 946.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

JURY—Continued.

- conduct of, error in, ground for *venire facias de novo*, 962.
 - when "tampered" with ground for new trial, 967.
- erroneous, ground for new trial, 968.
- error in choosing, ground for *venire facias de novo*, 962.
- exemption from service on, 804.
- general verdict, form of, 946.
- impaneling, general rules, 804. —
- inspection by, out of court, 893.
- ✓ instructions to, purpose of, 924.
 - requisites of, 929.
 - must be in writing, 927.
 - regarding joint defendants, in actions for tort, 132.
 - regarding argument of counsel, 908.
 - when plaintiff fails to prove his case, 900, note.
 - on mixed question of law and fact, 915.
 - request for, to be in writing, 925.
 - waiver of right to request, 925.
 - allowing or refusing request for, 926.
 - marking those "given" or "refused," 926.
 - modifying those requested, 926.
 - when great strictness required, 931.
 - when not ground for reversal, 928.
 - must state rules of law only, 928.
 - must relate to material facts in issue, 929.
 - must be based on the evidence, 929.
 - must be restricted to case, as made out by legitimate evidence, 929.
 - not to assume facts not proven, 930.
 - not to direct their conclusions, 930.
 - not to caution the weight to be given to evidence, 930.
 - may be to legal effect of evidence admitted, 930.
 - may direct attention to circumstances to be considered, 930.
 - may inform them what facts constitute negligence, 930.
 - may use language of statute regarding liability, 932.
 - form of, 932.
 - care required of counsel, court need not correct, 932.
 - on former trial, given at rehearing, 932.
 - need not be repeated, 933.
 - directing a verdict, general rule, 934.
 - for plaintiff, 935.
 - for defendant, 936.
 - how construed, 937.
 - by court's own motion to modify or supersede those already given, 938.
 - "error without prejudice, no ground for reverses," 938.
 - erroneous, ground for reversal, when, 938.
 - ✓ to find for the defendant, practice, 922.
 - to cure errors in admission of evidence, 939.
 - to be in writing and read by judge, 940.
 - to be returned with verdict into court, 942.
 - to be taken to their room, 942.
 - presumed to be understood in their common sense, 940.
 - modified by court, even after being read, 940.
 - exceptions to, how entered, 941.
 - must be shown by bill of exceptions, 941.
 - when to be taken, 941.
 - lost, no ground for new trial, 974, note.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

JURY—Continued.

- instructions to, giving or refusing no part of record unless by bill of exceptions, 1023.
- malice a question for in slander, 188.
- may imply malice, when, 203.
- misconduct of, 943.
- new, motion for trial by, 962.
- number and qualification, 804.
- opinion of Justice Brease, regarding, 976.
- part of the court, when sworn, 808.
- polling, rule governing, 947.
- power of, in reforming verdict, 948.
- province of, to determine sufficiency of evidence, 901.
 - general rule, 910.
 - to determine questions of fact, 913.
 - to determine credibility of witness, 821.
 - to determine weight of evidence, 821.
 - to determine credibility of witness, 821.
 - to determine case when any evidence tends to support it, 922.
 - to determine what facts proven, 930.
 - to weigh evidence, 916.
 - regarding questions of libel, 915.
 - limited to facts proven, 917.
 - must not be instructed as to matters within, 930.
- purpose of examining, rule regarding, 806.
- reading documents to, rule regarding, 811.
- reading law to, counsel not permitted, 907.
- return of, and statement of verdict, 946.
- selecting and summoning the panel, 805.
- how reviewed, 809.
- selections of, challenges, 806.
- sending back, motion for, when error in special verdict, 957.
 - to find special verdict, 955.
- special, in replevin, 179.
- taking case from, general rule regarding, 919.
 - manner of, 920.
 - effect of, 921.
 - why it may be done, 922.
- to assess damages in replevin, 179.
- to take documents to room, 918.
- trial by, in absence of defendant, 801.
 - right of, waiver, 803.
 - when defendant not entitled to, 803.
- verdict of, cannot be arrived at by general average, 943, note.
 - where there are several counts in declaration, 944.
 - "general" rule regarding, 944.
 - "sealed verdict," 945.
 - how stated on return, 946.
 - may be sent back to correct, 946.
 - polling the jury, 947.
 - recording, 948.
 - correcting the form, 948.
 - entry of *nunc pro tunc*, 948.
 - not set aside for defective count, 948, note.
 - impeachment of, 949.
 - presumed correct until contrary shown, 949.
 - conclusiveness of, 949.
 - finding by the court, equivalent to, 949, note.
 - errors, caused by, 950.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

JURY—Continued.

- verdict of, distinction between "general" and "special" verdict, 951.
- purposes of special verdicts, 952.
- may be, of its own motion, found specially, 953.
- "special" prevails over "general," 949.
- special, origin and nature of, 952.
- either party may require, 953.
- questions limited in number, 953.
- exceptions to, 954.
- taking advantage of failure to return, 955.
- duty of court to construe, 956.
- taking advantage of error in, 957.
- effect of inconsistency between "general" and "special," 956.
- imperfection or ambiguity in, ground for *venire facias de novo*, 962.
- determined by casting lots, ground for new trial, 968.
- not impeached by affidavit of jurors, 968.
- sustained by affidavit of jurors, 968.
- influenced, ground for new trial, 968.
- mistake in, ground for new trial, when, 975.
- against the law or the evidence, ground for new trial, 975.
- motion for judgment, notwithstanding, 984.
- too great, *remittitur*, 992.
- on penal bond, 93.
- view of premises by, general rule, 891.
- want of, proper ground for new trial, 966.
- see "Instructions" and "Verdicts," also "Finding by the Court."

JURY ROOM:

- what documents may be taken to, 918, 942.
- instructions may be taken to, 942.

JUSTICE'S COURT:

- certiorari* to, 391.
- appeal from, who may take, and when, 409.
- must be on final judgment, 409.
- cannot be from confession of judgment, 409.
- new plaintiff may be joined on, 409.
- what is a "judgment" from which appeal will lie, 410.
- to what court may be taken, 411.
- within what time to be taken, 412.
- when to be taken in forcible entry and detainer cases, 412, 415.
- how to be taken, filing bond, 413.
- how made a *supersedeas*, 413.
- practice on *supersedeas*, 413.
- form of the bond (*No. 14*), 414.
- filing transcript of justice, 416.
- waiver of irregularities, by taking, 417, 418.
- amendments of proceedings on, 419.
- when jurisdiction acquired by upper court, 420.
- dismissal of, 421.
- setting aside dismissal, 422.
- pleadings required in, 423.
- trial of, 424.
- damages and costs, 425.
- see "Appeals" and "Courts."

[The references are to sections: Vol. I., §§ 1-737; Vol. II., §§ 738-1276.]

JUSTICE'S RETURN:

on appeal, 416.

see "Return," "Transcript."

JUSTICE'S TRANSCRIPT:

filing of, gives jurisdiction on appeal, 420.

when to be filed on appeal, 416.

form of (No. 17), 416.

see "Transcript."

JUSTIFICATION:

in action, of replevin, 708.

for torts, must be specially pleaded (*Form No. 348*), 710, note.

of assault and battery, 213.

burden of proof regarding, 820.

of killing animals, 118, 127, note.

form of plea (*No. 348*), 710.

of libel, publication in good faith, 195.

of malicious prosecution by showing advice of counsel, 204.

of officer, when writ is, 163.

under writ of replevin, 163, note.

plea of, in action for slander, 191.

in *quo warranto*, 1132.

in forcible entry and detainer, 1214.

when is an aggravation (*Form No. 348*), 710, note.

proof in of slander (*Form No. 348*), 710, note.

of slander, 187.

may be shown under plea of general issue, 698.

when self defense is, 115.

under legal process, 129.

see "Defenses" and "Pleas."

K.**KEEPER:**

see "Custodian."

KEEPING TENDER GOOD:

proceedings by defendant, 626.

see "Tender."

KILLING OF ANIMALS:

when justifiable, 118, 127, note.

see "Animals" and "Trespass."

KILLING HORSE:

declaration in trespass for (*Form No. 196*), 591.

see "Trespass."

KILLING STOCK:

trespass, to recover for, 118.

KINDS OF JUDGMENTS:

generally, 988.

see "Judgments."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

L.

LABOR:

assumpsit to recover for, 73.
work and, declaration on contract for (*Forms Nos. 105-106*), 541.

LABOR CONTRACT:

declaration on in *assumpsit*, non-performance of part, negligence as to residue (*Form No. 105*), 541.

see "Contract," "Breach" and "Assumpsit."

LABOR AND MATERIAL:

declaration in common counts for (*VII*), 510.

see "Assumpsit," "Declaration" and "Forms."

LABOR AND SERVICES:

declaration of common counts for (*VI*), 510.

of horses, carriages, etc., declaration on common counts for (*Via*), 510.

of infant, who is to sue for, 23.

see "Assumpsit," "Declaration" and "Forms."

LACHES:

will not be imputed to infant, 23, note.

see "Infants" and "Minors."

LACK OF CONSIDERATION:

burden of proof on plea averring (*Form No. 331*), 710, note.

see "Consideration" and "Failure of Consideration."

LAND:

attachment of, certificate of levy, 328.

definition of, 122, 1003, note.

description of, in declaration in ejectment, 620.

injury to, declaration for, averment of quality, 583.

in public highway, recoverable in ejectment, 242.

in street, recoverable in ejectment, when, 243.

overflow of, declarations in case for (*Forms Nos. 269-270*), 615.

title to, slander of, 189.

not determined in action of forcible entry and detainer, 1215.

under water, recoverable in action of ejectment, 241.

vacant, payment of taxes, defense in ejectment, 244.

see "Real Estate" and "Real Property."

LAND CONTRACT:

when trespass will lie upon, 123.

declaration on in covenant for purchase of money (*Form No. 170*), 576.

against vendor for not conveying (*Form No. 169*), 576.

LANDLORD:

may sue in replevin, when, 156.

may have ejectment against tenant, when, 263.

not permitted to use force, 115.

may make forcible entry to repair, 123.

see also "Innkeeper."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276]

LANDLORD AND TENANT:

- ejectment between, 263.
- relation of, necessary to support distress for rent, 1221.
- when it exists, 1221, note.
- see also "Distress for Rent" and "Tenant."

LANDLORD'S LIEN:

- for rent created by distraint, 1220.
- enforced by distraint, 1220.
- not enforceable by trover, 143.
- extent of, 1221.
- on crops, 1221.
- what will destroy, 1221.
- see "Lien" and "Distress for Rent."

LAW OF MARRIED WOMEN:

- regarding contracts, 73.
- see "Married Women," "Wife," "Parties," "Actions" and "Contracts."

LAW:

- process of, general requirements of, 426.
- of this state, how proven, 855.
- of other states, how proven, 856.
- questions of, to be determined by court, 911.
- "of such importance, etc." Review of, granted in supreme court, when less than one thousand dollars involved, 1019.

LAW COURTS:

- what are, 2.
- see "Courts."

LAWYER:

- definition of, 1231.
- nature of his office, 1232.
- to hold his office during good behavior, 1232.
- of other states, courtesy extended to, 1232, note.
- presumption regarding admission to practice, 1233.
- authority conferred on license to practice, 1233.
- who may be licensed to practice as, 1234.
- who may not practice as a, 1233, note.
- admission to practice, necessity for, 1233.
- how procured, 1235.
- upon examination, 1236.
- upon diploma issued by a law school, 1237.
- on license granted in another state, 1238.
- certificate of moral character, 1239.
- requisite oath (*Form No. 403*), 1240.
- roll of names, 1241.
- license, by whom issued, 1242.
- a judgment of the court, 1243.
- admission to practice in United States Supreme Court, 1244.
- party to suit need not be represented by, 1244.
- summary jurisdiction of court over, 1245.
- liability of, generally, 1245.
- power of court to strike name from roll, 1246.
- mal conduct in office, striking name from roll, 1246.
- striking name from roll, complaint who can make, 1246.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

LAWYER—Continued.

- removal of, who can procure, 1246.
- power of court, to suspend from practice for a time, 1247.
- striking name from roll, must have opportunity to be heard, 1248.
- practice complaint or information, 1249.
- an officer of the court licensing him, 1243.
- effect of removal or suspension from practice, 1250.
- restoration to practice, after suspension or removal, 1251.
- privileges and exemptions of, generally, 1252.
- from arrest, liability to, 1253.
- from serving as juror, 1254.
- regarding examination of records, etc., 1255.
- in argument, 1256.
- privileged communication with client, 1257.
- extends to whom, 1257.
- ends with death of client, 1257.
- disability of, because of his profession, 1258, 1259, 1260, 1261, 1262.
- from buying demands for suit, 1258.
- from becoming bail or surety, 1258.
- from acting on both sides, 1259.
- as a witness in the case, 1261.
- from administering oath in the case, 1262.
- liability of, to third persons, 1263.
- retainer and appearance, rule governing, 1264.
- contract of retainer, 1267.
- what contract with, not champertous, 1265.
- duty to client does not cease with judgment, 1265.
- appearance of, for client generally, 1266.
- withdrawal of appearance, substitution, 1267.
- authority and power, management of case, satisfaction, 1268.
- to make admission for client, 1268.
- to compromise cause, 1268.
- to satisfy judgment, 1268.
- in regard to assignment of judgment, 1268.
- to dispose of perishable property of client, 1268, note.
- to receive service of notice in appeal cases, 1268, note.
- excess of authority relieved by equity, when, 1268, note.
- duties and liabilities of to client, generally, 1269.
- must counsel against wasting estate, 1269, note.
- in management of case, 1270.
- to remain in court until jury discharged, 1270.
- in collection of money, 1271.
- in purchasing of land, 1272.
- in the investigation of title, 1273.
- duty of law firm to client, 1269.
- trustee of client, when, 1269, 1272, 1275, note.
- liability of client to, compensation, 1274.
- lien for services, 1276.
- party not compelled to retain, may manage his own case, 1244, 1268, note.
- how contract of retainer proved, 1275.

LAWYER'S FEES:

- declaration in common counts for (XIX), 510.
- see "Fees" and "Costs."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

LAYING FOUNDATION:

for impeachment of witnesses, 885.
for evidence of contents of books, 850.
see "Witnesses" and "Proof."

LIABILITY OF OFFICER:

in regard to bail bond, 457.
see "Officers."

LEADING QUESTIONS:

not permitted on direct examination, 842.
objection to, when and how to be urged, 842.
permissible on cross-examination, 879.
see "Evidence" and "Proof."

LEASE:

action on, when holding over, 76.
to recover rent on, 80.
action upon, covenant a proper form, 96.
assignment of, averment of in declaration for rent, 575, note.
see "Assumpsit," "Covenant," "Landlord and Tenant" and "Tenant."

LEAVE TO AMEND:

on demurrer, 737, note.
see "Amendment" and "Motions."

LEGAL EFFECT:

averment of, in declaration, on written instrument, 518.

"LEGAL FENCE:"

what is, 43.
see "Fences."

LEGAL FICTION:

employed in ejectment, 238.
see "Ejectment."

LEGAL PROCESS:

trespass for damages inflicted under, 115.
damages under color of, trespass on case for, 232.
see "Writ," "Summons" and "Process."

LEGAL PROCEEDINGS:

trespass for injury under color of, 129.
see "Proceedings."

LEGAL REPRESENTATIVE:

as defendant in action on contract, 36.
see "Executors, etc."

LEGAL TITLE:

necessary to support ejectment, 246, 248.
see "Ejectment" and "Cause of Action."

LEGALITY OF CORPORATION:

only questioned by *quo warranto* and *scire facias*, 1124.
see "Corporations" and "Quo Warranto."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

LEGATEE:

residuary, may maintain action of account, 100.
see "Heirs" and "Executors, etc."

LEGISLATIVE ACT:

constitutionality of, cannot be questioned by *quo warranto*, 1125.

LENDER:

cannot maintain action for hire, 75.
see "Contracts" and "Bailments."

LETTERS:

how shown in evidence, 861, note.
signed as evidence of contract, 74, note.
see "Documents" and "Evidence."

LETTER OF ATTORNEY:

an instrument under seal, 1231.
see "Warrant of Attorney."

LEVY OF ATTACHMENT:

how to be made, 323.
on corporate stock, 324.
on land, certificates of, 328.
where to be made, 325.
not to be made on exempt property, 326.
lien created by, 327.
excessive, effect of, 322.
declaration in case against sheriff for (*Form No. 231*), 612.
see "Attachment," "Garnishment," "Execution" and "Writ."

LEVY OF EXECUTION:

cannot be made on property of municipal corporation, 1103, note.
and sale of real estate after seven years, 1164.
in attachment, 348.
see "Execution" and "Judgment."

LEVY OF TAX:

replevin will not lie for property taken under, 165.
see "Tax," "Mandamus" and "Replevin."

LIABILITY:

of attorney to client, generally, 1269.
to arrest, 1253.
to client, only for gross ignorance, or gross negligence, 1269.
for negligence in managing case, 1268.
to third persons, 1263.
concerning statements made in argument, 1256.
in regard to legal process, 129.
criminal, for false imprisonment, 209, note.
for damages occasioned by tort, 131.
of employer, for negligence of servant, 229.
of executors, etc., for waste, 234.
of garnishee, generally, 365.
on insurance policy, 369, note.
to surrender property on execution, 382.
how compelled to make supplemental answer, 378.
of guarantor of "payment" or "collection," 84.

[The references are to sections: Vol. I., §§ 1-737; Vol. II., §§ 788-1276.]

LIABILITY—Continued.

- of officer, for excessive levy in attachment, 322.
- of owner of domestic animals for trespass by them (*Form No. 201*), 592, note.
- reason for the rule, 128.
- of partners, on written instrument sued on, 711.
- of parties to notes, 83.
- of plaintiff, in regard to legal process, 129.
- of railroads for killing stock, 118.
- of railroads, for injury to stock, 231.
- of sureties on attachment bond, 317.
- of trespassers, joint or several, 131.
- of trustee regarding waste, 234.
- of wrongdoer in action for trespass, 114.
- how determined in negligence cases, 220.
- joint, on written instrument, how denied, 711.

LIBEL:

- definition of, 194.
- and slander distinguished, 194.
- publication in good faith, 195.
- publication in newspaper in good faith is not, 196.
- who to join as plaintiffs in action for, 27.
- corporation may be guilty of, 194.
- cause of action for, abates with death, 29.
- action of abates with death, 46.
- privileged communication not sustain action of, 194.
- defendants joined in action for, 44.
- charging insolvency, declaration in case for (*Form No. 281*), 618.
- declaration in case for (*Forms Nos. 275-281*), 618.
- of corporation, declaration in case for (*Form No. 276*), 618, note.
- defense to action for, plea denying (*Form No. 347*), 710.
- form of denial of in special pleas or notice with general issue (*No. 347*), 710.
- plea that accusation is true (*Form No. 349*), 710.
- when published in newspaper, 196.
- justification of, publication in good faith, 195.
- plea of justification (*Form No. 348*), 710.
- form of averment of, in special plea or notice with general issue (*No. 348*), 710.
- accusation true, form of averment of, in special plea or notice, with general issue (*No. 349*), 710.
- retraction of publication corrects, when, 196.
- notice to make, 196.
- punishable as contempt of court, when, 197.
- see "Slander" and "Trespass."

LIBERUM TENEMENTUM:

- plea of, in trespass, 706.
- see "Trespass" and "Pleas."

LICENSE:

- to be pleaded specially in covenant, 704.
- burden of proof regarding, 820.
- bond, declaration on, for use of person injured, etc. (*Form No. 160*), 570.
- to practice law, 1233.
- by whom issued, 1242.
- see "Admission to Practice of Law" and "Pleas."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

LIEN:

- of attachment created by levy, 327.
- of attachment in aid, 353.
- of attorney, for services, 1276.
- in garnishment, equitable power of court relating to, 384.
- held by garnishee, permits him to take title at sale, 385.
- of landlords for rent, created by distraint, 1220.
- enforces distraint, 1220.
- extent of, 1221.
- on crops, extent of, 1221.
- what will destroy, 1221.
- not enforceable by trover, 143.
- created by judgment, on personal property, 1003.
- on real property, 1003.
- against the body, 1005.
- priority of, 1006.
- property subject to, in garnishment, execution on, 380.
- plaintiff may perform conditions, when, 381.
- see "Landlord's Lien," "Attachment Lien" and "Judgments."

LIFE INSURANCE POLICY:

- declaration on in assumpsit (*Form No. 111*), 544. ✓
- see "Insurance Policy" and "Policy."

LIGHTS:

- law in this State regarding, 616.
- declaration in case for obstructing (*Form No. 273*), 616.
- see "Ancient Lights."

LIMITATION:

- burden of proof regarding, 820.
- in insurance policies, how pleaded (*Form No. 325*), 710, note.

LIMITATIONS OF ACTIONS:

- determined by form, 49.
- in form of account, 103.
- on lease for rent, 81.
- in trespass, 134.
- in replevin, 169.
- for libel and slander, 198.
- for malicious prosecution, 207.
- for false imprisonment, 212.
- for criminal conversation, 217.
- in trespass on the case, for injury to person or property, 236.
- in ejectment, 244, 245.
- for distress for rent, six months, 1222.
- by surety against principal, 85.
- see "Actions" and "Statute of Limitations."

LIMITATION OF APPEARANCE:

- of defendant in suit, how effected, 631.
- see "Appearance."

LIMITATIONS, STATUTE OF:

- determined by form of action, 49.
- as to *certiorari*, 396.
- begins to run against right to procure review, when, 1041.
- does not apply to assignments of error, 1062, note.
- see "Statute of Limitations."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

LIMIT OF RECOVERY:

in actions for breach of contract, 60.

see "Addamnum," "Damages" and "Measure of Damages."

LIONS:

liability for trespass of, 128.

see "Animals."

LIQUOR:

plaintiff in action for damage occasioned by, 30.

infant may sue for injury caused by, 31.

action on the case for injury caused by, 230.

see "Injury," "Damages" and "Actions."

LOAN:

declaration in common courts, to recover (VIII), 510.

LOCOMOTIVE:

fire from, liability of company for, 231.

see "Fire," "Negligence" and "Railroads."

LODGING:

and board, declaration in common counts for (XIII), 510.

LOCAL ACTION:

when trespass is, 133.

attachment is as to land, 294.

actions regarding water course are, 615, note.

forcible entry and detainer is, 1212.

declaration in, statement of *venue* in, 491.

see "Actions."

LOCATION:

must be averred in declaration, when, 485.

averment in declaration, necessity for, 526, note.

averment of, in action of replevin, 593, note.

when required to be proved, 818.

see "Place" and "Venue."

LOST BAGGAGE:

contents of, proved by wife of plaintiff, 828.

LOST INSTRUCTIONS:

no ground for new trial, 974, note.

LOST NOTE:

after suit begun, proof required, 487, note.

LOST PLEAS:

rights of defendant, when, 718.

from files, effect of (*Form No. 348*), 710, note.

LOST RECORD:

how supplied after appeal perfected, 1058, note.

certiorari, will not issue to supply, 1044, note.

LOST SUMMONS:

may be supplied, 434.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

LONDON CUSTOM:

regarding attachment, 291.

see "Attachment" and "Origin."

LUNACY:

see "Insanity," "Conservator" and "Guardian."

LUNATIC:

guardian for defendant in action, on contract, 40.

M.**MACHINERY:**

due care in use of, 225.

contributory negligence of one using, 225.

see "Negligence," "Employer" and "Master and Servant."

MAILING NOTICE:

of attachment writ not personally served, 338.

see "Notice" and "Service."

MAINTENANCE:

what is not, 1260, note.

see "Barratry."

MAKER:

of a note, liability of, 83.

see "Promissory Notes" and "Bills of Exchange."

MALCONDUCT:

in office, what is, by attorney, 1246.

see "Negligence."

MALICE:

when an element of damages, 115.

effect of, in action of trover, 138.

gist of, action for slander, 192.

proof of, in slander, 187, 191.

made by showing want of probable cause, 203.

in action for malicious prosecution, 607, note.

presumption of, in slander, 191.

implied, in spoken slander, 187.

question for jury in slander, 188.

necessary to malicious prosecution, 199.

will be inferred, when, 203.

not attributable to attorney in argument, 1256.

see "Damages," "Attachment" and "Malicious Prosecution."

and want of probable cause.

must concur in malicious prosecution, 201.

see "Malicious Prosecution."

MALICIOUS ARREST:

declaration in case for (*Forms Nos. 248-249*), 607.

MALICIOUS ATTACHMENT:

action on the case for, 206.

see "Attachment."

MALICIOUS INDICTMENTS:

action on the case for, 184.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

MALICIOUS MOTIVES:

essential to malicious prosecution, 201, 202, 203, 204.

MALICIOUS PROSECUTION:

definition of, 199.
 action on the case for, 199.
 four things necessary to support, 199.
 falsity of the charge in, 199.
 want of probable cause, 199.
 malice necessary to, 199.
 damage necessary element, 199.
 falsity of the charge necessary to, 200.
 want of probable cause and malice, must concur in, 201.
 probable cause, what is, 202.
 want of raises, inference of malice, 203.
 defense in, probable cause as, 202.
 good faith as a defense in, 202.
 when malice will be inferred, 203.
 advice of counsel as defense in, 204.
 justification of, by showing advice of counsel, 204.
 damages necessary to recovery, 205.
 of civil action, 206.
 when to be begun, 207.
 declaration in case for (*Forms Nos. 247-250*), 607.
 by causing arrest, declaration in case for (*Forms Nos. 248-249*), 607.
 of civil case, declaration in case for (*Form No. 250*), 607.
 proof in action for, 818, note.
 see "Trespass."

MALICIOUS USE OF PROCESS:

liability for, 129.

MALPRACTICE:

liability of attorney for, 1268.
 see "Negligence."

MANDAMUS:

jurisdiction of supreme court in, 7.
 powers of appellate court in, 8.
 writ of, circuit court may issue, 389.
 definition and nature of, 1097.
 will lie when bill of particulars improperly ordered, 650.
 to compel judge to sign bill of exceptions, when, 1025, note.
 when granted or denied, 1098.
 will not compel a discretionary act, 1098.
 not granted to enforce trifling interests, 1098.
 will lie to inferior tribunal, when, 1099.
 will not lie to compel change of venue, 1099.
 enforced by attachment, 1099.
 will lie to compel administration of an oath, 1099, note.
 will lie to compel judge to sign bill of exceptions, 1099, note.
 will lie to state officer, when, 1100.
 will not lie to governor, 1100.
 will lie to county officer, when, 1101.
 will lie to highway commissioners, when, 1101.
 will lie to township officer, when, 1102.
 will not lie till precedent duty performed, 1102.
 will not lie to compel additional tax levy for roads and bridges,
 1102.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

MANDAMUS—Continued.

- writ of, will not lie to compel auditing of accounts, when, 1102, note.
- names of parties in proceedings by, 1102, note.
- will lie to municipal corporation or officer, when, 1103.
- will lie to private corporation, when, 1104.
- will lie to boards of education and school officers, when, 1105.
- who to apply for, 1106.
- private citizen may procure, 1107.
- will lie to compel admission of pupil to school, 1107.
- answer to, when officer must make "individually," 1107.
- parties, the relator or petitioner, 1106.
- the respondent, 1107.
- the petition, notice required in supreme court, 1108.
- construed like a declaration, 1108.
- must be verified, 1108.
- what it must contain, 1108.
- leave to file in supreme court must be obtained, 1108.
- demurrer to, 1110, note.
- demand for performance must precede, when, 1108.
- objection for want of, when to be made, 1108, note.
- not denied because other remedy exists, 1108.
- "alternative," superseded by petition in present practice, 1108.
- a peremptory writ, 1108.
- issues on, what tried in supreme court, 1108.
- summons to show cause, when returnable, 1109.
- extension of time to plead, etc., in, 1110.
- defense to plea or answer, 1110.
- issues on, how made up, 1110.
- pleas to answer to, 1110.
- trial of issues on, 1110.
- judgment on, default, *nil dicit* and peremptory writ, 1110.
- answer default, peremptory writ, 1110.
- peremptory judgment, costs, 1111.
- peremptory, contents of, 1111.
- service of, 1111.
- judgment on, concludes litigation, 1111.
- objection for variance, 1111, note.
- excuse for not obeying, 1111, note.
- new parties defendant, not interpleaders, 1112.
- abatement of, what not, 1113.
- not abated by death of defendant, 1113.
- review of proceedings on, 1114.
- how enforced, 1115.
- will lie to restore attorney's name to roll, when, 1251.
- or writ of error, which proper remedy, 1099.
- see "Writ."

MANDAMUS AND QUO WARRANTO:
compared, 1098.

MANDAMUS AND PROHIBITION:
compared, 1118, 1097, note.

"MANNER AND FORM."
use of, in plea, generally, 692, note.

MAP:
as evidence, 853.
see "Documents."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1278.]

MARRIAGE:

- pending suit, effect of, as to plaintiff, 22, note.
- effect of, on plaintiff in action for tort, 30.
- effect of, on defendant in action on contract, 38.
- in tort cases, 47.
- breach of promise of, *assumpsit* will lie for, 60.
- action on case for, 218.
- declarations for (*Forms Nos. 85-87*), 533.

MARRIED WOMEN:

- law of, in Bible time, 22.
- property rights of, 22.
- law of, 22.
- real estate of plaintiffs in action for damages to, 27.
- as plaintiff in action for tort, 30.
- when liable for necessities, 38, note.
- when liable for work and labor, 38.
- as defendants in action on contract, 38.
- as defendants in tort cases, 47.
- liable in *assumpsit* on her own contracts, 73.
- trover as to separate property, 145.
- proof of criminal conversation, 216.
- service of summons upon, 436.
- disability as plaintiffs, plea in abatement, 657.
- improper plaintiffs shown on plea of the general issue, 657, note.
- may not testify, when, 828.
- see "Parties," "Wife" and "Husband and Wife."

MASTER:

- see "Employer."

MATERIAL:

- assumpsit* to recover for, 73.
- extra, *assumpsit* to recover for, 73, note.
- and labor, declaration, common counts for (*VII*), 510.
- work, labor and, declaration on contract for (*Forms Nos. 105-106*), 541.
- see "Work, Labor and Material."

MAXIM OF LAW:

- "what not denied by plea" is admitted, 822.
- "no wrong without a remedy," 183.

MEADOW:

- declaration in case for overflowing (*Form No. 269*), 615.
- see "Trespass to Land" and "Negligence."

MEASURE OF DAMAGES:

- in actions of *assumpsit*, 60.
- of covenant, 98.
- of trespass, 114.
- of trespass to land, 121.
- of trover, 152.
- of replevin, 179.
- on replevin bond, 182.
- for personal injuries, 216.
- for breach of promise, 218.
- on the case for nuisance, 235.
- on attachment bond, 317.
- on appeal bond, in forcible entry and detainer, 1219, note..

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

MEASURE OF DAMAGES—Continued.

- in *assumpsit* for extras, 73, note.
- when interest included in trespass or trover, 119.
- in recovery of *mesne* profits in ejectment, 279, 280.
- compensation of attorneys, 1274, 1275.
- see "Damages."

MEMBERS OF ASSOCIATIONS:

- when to be named as defendants, in action on contract, 33.

MEMBERS OF THE BAR:

- what officers of the court are, in England, 1231.
- see "Lawyers."

MEMORANDA:

- use of, in evidence, 848-849.
- adversary's right to see, 849.
- see "Documents" and "Evidence."

MEMORANDUM BOOK:

- as evidence of contract, 74.
- see "Documents."

MERGER:

- by judgment in replevin, 178.
- rule regarding, 987.

MERITS:

- affidavit of, objection to, when to be made, 895, note.
- to be filed with plea, general rules, 712.
- plea to—See "Plea in Bar" and "Affidavit of Merits."

MESNE PROFITS:

- recovery of, in ejectment, 279, 280.
- suggestion of, in ejectment (*Forms Nos. 293-294*), 620.
- see "Ejectment."

MINISTER:

- or priest as a witness, rule regarding, 831.
- see "Witnesses, Privilege."

MINISTERIAL ACT:

- entry of judgment is, 990.
- entry of judgment by clerk on confession is, 996.

MINISTERIAL CAPACITY:

- in commencement of suit—See "Representative Character."

MINISTERIAL DUTY:

- compelled by *mandamus*, 1100.

MINORS:

- liable in trespass, 115.
- see "Infants."

MINUTES OF JUDGE:

- not required by law, 990.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1278.]

MISCONDUCT OF COURT:

grounds for a new trial, 968.
see "Mandamus" and "Prohibition."

MISCONDUCT OF JURY:

ground for *venire facias de novo*, 962.
grounds for a new trial, 968.
see "Jury."

MISCONDUCT OF PREVAILING PARTY:

ground for new trial, 967.
see "New Trial" and "Motions."

MISDEMEANORS:

cases above the grade of, appeal directly to the supreme court, 1017.
cases below the grade of, appeal first to the appellate court, 1018.

MISINTERPRETATION:

see "Interpreter, Contradiction of," "Abatement" and "Parties."

MISJOINDER:

of partners as plaintiffs, 19.
of plaintiffs in action for torts, how taken advantage of, 27.
see "Parties" and "Joinder."

MISJOINDER OF CAUSES OF ACTION:

in declaration, demurrable, 525.
see "Action, Joinder of."

MISJOINDER OF COUNTS:

in declaration, 525.
aided by intendment, when, 525, note.
see "Declaration" and "Counts."

MISJOINDER OF DEFENDANTS:

in action for tort, how availed of, 44.
plea in abatement for (*Form No. 303*), 674.
see "Parties" and "Defendants."

MISJOINDER OF PARTIES:

when objection for, to be raised, 19.
plea in abatement for, 663.
see "Parties."

MISNOMER:

in christian name, 13.
in declaration, how availed of, 18.
see "Names."

MISNOMER OF DEFENDANT:

plea in abatement for (*Form No. 308*), 674.
see "Names."

MISNOMER OF PARTIES:

plea in abatement for, 662.
see "Names" and "Parties."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1278.]

MISNOMER OF PLAINTIFF:

when a corporation, 13.
see "Parties" and "Plaintiffs."

MISREPRESENTATION:

action on the case for, damages occasioned by, 233.
see "Fraud and Deceit."

MISSING PLEA:

from files, effect of (*Form No. 348*), 710, note.
see "Amendments."

MISTAKE:

money paid by, recovered in *assumpsit*, 60.
when not recoverable, 68.
assumpsit for money paid by, 64.
in notice in attachment, how taken advantage of, 338.
in plea, how corrected, 688.
in verdict, ground for a new trial when, 975.
of fact, in entry of judgment, how corrected, 1002.
see "Error" and "Amendments."

MITIGATION OF DAMAGES:

in replevin, 179.
in action on replevin bond, 181.
in slander, 187.
see "Damages."

MIXED ACTIONS:

what are, 50.
see "Actions."

MODEL OF DECLARATION:

illustrating the various parts, 489.

MODIFYING WRITTEN INSTRUMENT:

by oral evidence, what is not, 868, 869.

MONEY:

paying into court, by defendant, 625.
receipt for, how contradicted, 269.
collection of, duty of attorney to client in, 1271.
paid to defendant's use, declaration on common counts for (*I.X.*), 510.

MONEY COUNTS IN DECLARATION:

use of, 503.
see "Declaration."

MONEY DUE:

common counts only lie for, 505.
see "Declaration" and "Forms."

MONEY HAD AND RECEIVED:

declaration on common counts for (*X.*), 510.
recoverable in common counts, 63.
see "Count" "Declaration" and "Forms."

MONEY LOANED:

declaration on common counts, to recover (*VIII.*), 510.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1278.]

MONEY LOST:
at gaming, declaration in trover for (*Form No. 204*), 594, note.

MONEY PAID BY MISTAKE:
assumpsit to recover, 60.
when not recoverable, 68.

MOTIVE:
malicious, necessary to malicious prosecution, 201, 202, 203, 204.
material only for what, 114.

MORAL CHARACTER:
certificate of, for admission to practice law, 1239.
see "Lawyers."

MORTGAGE:
assignment of, need not be acknowledged, 1174, note.
foreclosure of, by *scire facias* (*Form No. 334*), 1171.
by *scire facias*, formal requisites, 1172.
service of the writ, publication, 1173.
defenses to the proceedings, 1174.
judgment, 1175.
see "Scire Facias."

MORTGAGEE:
may maintain ejectment, when, 261.

MORTGAGEE OF CHATTELS:
may maintain trover, when, 148.

MORTGAGEE'S INTEREST:
attachable, when, 295.

"MOTION:"
definition of, 769.
affidavit in support of, when required, 774.
no part of record, unless by bill of exceptions, 1023, note.
in upper court, when required, 1095.
classified, "common" and "special," 771.
contested, hearing of arguments, 776.
defense to, showing cause, 775.
for continuance, that delay is sought, 793.
dilatory, when to be interposed, 769, 772.
not entertained after lapse of term, unless, etc., 779.
evidence in support of, 774.
judge may hear in vacation, 9, note.
notice of, to dismiss appeal, not required, 421.
for judgment in *capias* cases, 472.
affidavit of service of (*Form No. 357*), 773.
rulings on, reviewed only by aid of bill of exceptions, 1023.
support of, affidavit, etc., 774.
waiver of, when not interposed in apt time, 779.
when to be preceded by notice, 772.
see "Special Motions."

MOTIONS:
in arrest of judgment, misnomer of plaintiff's ground for, 19.
on ground of misjoinder, 27.
misjoinder of defendant's ground for, 44.
for insufficiency of declaration, 482, 633, note.

[The references are to sections: Vol. I, §§ 1-787; Vol. II., §§ 788-1276.]

MOTIONS—Continued.

- in arrest of judgment, not entertained after demurrer, 640, note.
- and new trial compared, 979.
- will be granted, when, 979.
- nature of, 979.
- waived by demurrer, 980.
- see "Arrest of Judgment."
- after overruling motion for a new trial, 976.
- when to be made, 980.
- who shall make, 981.
- supported by points in writing, 981.
- exception to rulings, when necessary, 982.
- effect of granting, 983.
- and orders, no part of record unless by bill of exceptions, 1023.
- and rules generally, 769.
- for amendment, necessity of, 744. ✓
- for bill of particulars, 644.
- for continuance, granted because copy of instrument sued on omitted in declaration, 546.
- granted with costs, for default in filing declaration, 549.
- to make amendment, 745.
- affidavit to support, 791, 793.
- when necessary, 791.
- when to be made, 792.
- when second to be made, 792.
- how to be made, 793.
- review of ruling on, 794.
- for change of venue, by whom to be made, etc., 761.
- for judgment, against defendant in *capias* cases, 472.
- non obstante veredicto, general rule, 984.
- when must be made, 985.
- on special findings, 986.
- when contrary to general verdict, 986.
- non-suit, misnomer of plaintiff ground for, 19.
- on ground of misjoinder, 27.
- for variance in declaration, 487.
- for want of evidence, when proper, 919.
- by defendant, how defeated by plaintiff, 923.
- for new trial, when and how made (*Form No. 364*), 964.
- when unnecessary, 964.
- exception entered on overruling, 964.
- in ejectment, exceptions to rulings, 277, note.
- when to be made, 964.
- either party may make, 964.
- "filing points in writing," 964.
- may be withdrawn, 964.
- grounds for enumerated, 965.
- for want of proper jury, 966.
- that juror is a non-resident, is not, 966.
- misbehavior of prevailing party, 966.
- surprise is, when, 967, 970.
- improper remarks of counsel are, when, 967.
- misconduct of the jury, 968.
- absence of party, or counsel, or witness, 969.
- newly discovered evidence, 971.
- that lost instrument sued on, has been found, etc., 971, note.
- excessiveness of damages, 972.
- smallness of damages, 973.
- misconduct of court is, etc., 974.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

MOTIONS—Continued.

- for new trial, grounds that verdict is against the law or evidence, 975.
 - that verdict is against the law or evidence, 975.
 - that witness may be impeached, when, 975, note.
 - duty of court on hearing, 976.
 - hearing of, ruling, exception, 976.
 - costs on, 977.
 - overruling, may be assigned for error, when, 976.
 - presumption as to grounds on which granted, 916, note.
 - amendment after overruling, 976, note.
 - abandonment of, 976, note.
 - number granted, 978.
 - waiver of, by motion in arrest of judgment, 979, note.
 - rulings on, no part of record unless by bill of exceptions, 1023.
 - refusal to grant is a final judgment, when, 1013, note.
 - see "New Trial."
- for rehearing, rule governing, 1086.
- for replender, when a proper proceeding, 963.
 - ground for, what is, 963.
 - new trial obtained by, 963.
- for rule to plead *instante*, 719.
- for *venire facias de novo*, new trial obtained by, 962.
 - when to be granted, 962.
- in upper court, rules governing, generally, 1095.
 - objections to, must be in writing, 1095.
- of course in upper court, when to be entered, 1095.
- of a criminal nature, 770.
- to discharge bail in *capias* case, 458.
- to dismiss, for want of security for costs, 430.
 - by defendant, plaintiff in default, 757.
 - motion for in absence of plaintiff, 798.
 - not entertained where default not set aside, 802, note.
 - because of improper opening statement, 811.
- appeal, effect of, 421.
 - in upper court, must be made, before joinder in error, 1065, note.
 - supreme court, 1083, note.
- to dissolve attachment, 341.
- to file additional plea generally, when granted, 718.
- to quash, forcible entry and detainer, 1214.
 - certiorari*, 397.
 - writ of possession in ejectment, 278.
 - attachment cannot be based on mistake in notice, 338.
 - may be made on "special appearance," 340.
- to set aside, default, entered on mistaken appearance, 629.
 - order of court, 779.
 - continuance, 794.
 - default, affidavit to support, 802.
 - when to be made, 802.
 - verdict, must show cause and be made at same term, 978.
 - judgment, must show cause and be made at same term, 978.
 - by confession, where and by whom made, 999.
 - confessed, affidavit to support, 999.
 - affidavit to support, 1007.
 - entered on verdict, general rule, 1007.
 - award, when to be made, 1195.
- to show cause, defense to, 775.
- to strike bill of exceptions from files, 1026.
- to strike from files, brief in upper court, 1073.
- to strike plea from files, what may be shown on, 712, note.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

MOTIONS—Continued.

- to strike plea from files, when to be made, 899.
- nature of, 900.
- to strike out evidence entire, effect of, 901.
- to strike testimony before referee, 1200, note.
- to vacate appeal, from justice's court, when to be made, 422.

MORTGAGOR:

- may maintain ejectment, when, 261, note.

MUNICIPAL CORPORATIONS:

- how to be sued on contracts, 33.
- negligence of, action on case for, 228.
- may maintain garnishment, 361.
- may not be held as garnishees, 362.
- service of process upon, 443.
- declaration in case for negligence of (*Forms Nos. 225-230*), 600.
- no costs awarded against, 1010.
- mandamus* will lie to, when, 1103.
- officer of, to answer *mandamus* individually, 1107.
- see "Corporation."

N.

NAKED PROMISE:

- promise to pay another's debt, is not, when, 72.
- see "Assumpsit."

NAME:

- purpose of, 13.
- effect of wrong christian name, 13.
- christian, use of alone in summons, 434.
- see "Christian Name, "Misnomer" and "Parties."

NAME OF PLAINTIFF:

- when a corporation or society, 13.
- changed on *scire facias*, by amendment, 1163, note.
- see "Parties" and "Plaintiff."

NAME OF DEFENDANT:

- variance in proof of, what is not, 819, note.
- see "Defendants" and "Parties."

NAMES OF PARTIES:

- to actions, 12.
- must be in commencement of declaration, 495.
- must be stated in body of declaration, 517.
- in declarations, not in issue unless denied, 499.
- public officers, etc., 499.
- variance in, as proved, 819, note.
- in *mandamus* proceedings, 1102, note.
- to proceedings by *quo warranto*, 1128.
- see "Parties."

NAMING:

- of formal parts in declaration, 488.
- see "Parties."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

NARRATIVE TESTIMONY:

permitted to be given, 843.

see "Evidence" and "Proof."

NATIONAL BANK:

how receiver ought to sue, 24, note.

declaration by, form of commencement, 498.

averment of corporate existence of, in commencement of declaration, 498.

see "Parties" and "Plaintiffs."

NATURE:

of action of account, 99.

of assumpsit, 54.

of attachment, 291.

of covenant, 95.

of debt, 88.

of ejectment, 238.

of replevin, 155.

of trespass, 113.

of trespass on the case, 183.

of trover, 136.

of arbitration and award, 1180.

of bill of exceptions, 1021.

of *capias ad respondendum*, 449.

of courts, 1.

of distress for rent, 1220, note.

of forcible entry and detainer, 1205.

of garnishment, 355.

of judgments, classification according to, 989.

of motion in arrest of judgment, 979.

of reference, 1198.

of set-off, 721.

of special verdict, 952.

of writ of *certiorari*, 392.

of *mandamus*, 1097.

of prohibition, 1116.

of *quo warranto*, 1124.

of *habeas corpus*, 1139.

of *scire facias*, 1162.

see "Actions" and "Forms."

NECESSARY AMENDMENTS:

In declaration as to names of parties, when, 483.

see "Amendments."

NECESSARY AVERMENTS:

In declaration, requisites of.

NECESSARY FACTS:

must be averred in declaration, 481.

see "Declaration" and "Requisites."

NECESSARIES:

furnished to infants, who liable for, 39.

when married women liable for, 38, note.

declaration in common counts for (XVII), 510.

[The references are to sections: Vol. I, §§ 1-787; Vol. II, §§ 788-1276.]

NE EXEAT:

writ of, circuit courts may issue, 9, 389.
see "Writs."

NEGATIVE AVERMENTS:

when proper in declaration, 487.
see "Averments" and "Requisites."

NEGLIGENCE:

- definition of, 220.
- of common carriers, what excuses, 61.
- when trespass will lie for, 117.
- action on the case for damages resulting from, 219.
- in what it consists, 220.
- how determined in action for damages, 220.
- when a question of law or fact, 221.
- what is "slight" and what is "gross," 222.
- comparative, doctrine of, abrogated in this state, 223.
- what degree will sustain action, 223.
- contributory, rule regarding, 224.
- of servant, action on case for damage caused by, 229.
 - rule of, will not apply, when, 226.
- causing death, action on case for, 227.
- proof of, in action against municipal corporation, 228.
- of servant, action on case for damage caused by, 229.
- action on the case for, injury by liquor, 230.
- to property, trespass on the case for, 231.
- declaration for, averments necessary, 481. ✓
 - against railroad companies, case (*Forms Nos. 217-224*), 599.
 - against railroad company for injury to passenger (*Form No. 223*), 599.
 - against railway company for injury to person by collision (*Form No. 224*), 599.
 - in case, against municipal corporations (*Forms Nos. 225-300*), 600.
 - regarding sidewalk (*Form No. 225*), 600.
 - in case, in kindling fire, declaration for (*Form No. 232*), 602.
 - in case, regarding partition fence (*No. 233*), 602.
 - in case, regarding animals (*Forms Nos. 234-237*), 603.
 - for keeping ferocious dog (*Form No. 234*), 603.
 - keeping dog accustomed to bite sheep, etc. (*Form No. 235*), 603.
 - for injury to plaintiff by defendant's bull (*Form No. 236*), 603.
 - regarding boats and vessels (*Forms Nos. 262-265*), 613.
 - regarding water course (*Forms Nos. 267-270*), 615.
 - for obstructing highways (*Forms Nos. 271-272*), 616.
 - avermment of, in declarations against railroad companies (*Form No. 224*), 599, note.
 - of municipal corporation, action on the case for, 228.
 - regarding water tower, liability for, 600, note.
 - regarding use of cannon in streets, 600, note.
 - in practice of profession, declaration in case for (*Forms Nos. 253-255*), 610.
 - of physician, declaration in case for (*Form No. 253*), 610.
 - of attorney in examining title, declaration in case for (*Form No. 254*), 610.
 - in defending case, declaration in case for (*Form No. 255*), 610.
 - of officer, declaration in case for (*Forms Nos. 258-261*), 612.
 - of sheriff, for false return, declaration in case for (*Form No. 258*), 612.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276]

NEGLIGENCE—Continued.

- of sheriff, regarding replevin bond, declaration in case for (*Form No. 260*), 612.
- in making excessive levy, etc., declaration in case for (*Form No. 261*), 612.
- for not levying, declaration in case for (*Form No. 259*), 612.
- of warehouseman, declaration in case for (*Form No. 266*), 614.
- in producing papers, declaration in case for (*Form No. 274*), 617.
- liability of attorneys for, 1268.
- defense to, plea of diligence (*Form No. 350*), 710.
- see "Declaration," "Damages" and "Diligence."

NEGLIGENT DRIVING:

- declaration for, in case (*Forms Nos. 211-212*), 597.
- against plaintiff's carriage (*Form No. 211*), 597.
- see "Bailments" and "Trespass."

NEGOTIABLE INSTRUMENTS:

- who may bring suits on, 13.
- who to sue on when assigned, 20.
- who to make defendant, when assigned, 35.
- trover will lie for conversion of, 143.
- payable in other than money, declaration on (*Form No. 122*), 545, note.
- denial of execution of, 711.
- attorney's lien upon, for fees, 1276.
- when court cannot order production of, 1276, note.
- see "Notes" and "Bills of Exchange."

NEW BAIL:

- on surrender in *capias* cases, 468.
- see "Bond," "Bail" and "Surety."

NEW BOND:

- on appeal from justices' court, when may be filed, 414.
- see "Bond" and "Appeal."

NEW PARTIES:

- plaintiff, may be added on appeal from justice, 409.
- added by amendment, 741, note.
- see "Parties," "Plaintiffs" and "Amendments."

NEW PLEADINGS:

- admitted after amendment, 746.
- see "Pleading" and "Amendment."

NEW PROMISE:

- burden of proof regarding, 820.
- see "Evidence" and "Proof."

NEW TRIAL:

- affidavit for, on ground of absence or illness of counsel, 969.
- on ground of surprise, 971.
- of newly-discovered evidence, requisites of, 971.
- and arrest of judgment compared, 979.
- and *venire facias de novo*, compared, 962.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

NEW TRIAL.—*Continued.*

- within discretion of the court, when, 964, note.
- for tort, granted less seldom than for action on contract, 972, 973.
- grounds for, in action of trover, 153.
- where several defendants, 131, note.
- in ejectment, 277, note.
- what may be shown in bar of, 277, note.
- "second," 964, note.
- may be ordered by court of its own motion, when, 974.
- motion for, in ejectment, exceptions to rulings, 277, note.
- "filing points in writing," 964.
- when unnecessary, 964.
- may be withdrawn, 964.
- when and how made (*Form No. 364*), 964.
- exception entered on overruling, 964.
- when to be made, 964.
- either party may make, 964.
- grounds for, enumerated, 965.
 - for want of proper jury, 966.
 - that juror is a non-resident, is not, 966.
 - misbehavior of prevailing party, 967.
 - surprise is, when, 967.
 - improper remarks of counsel are, when, 967.
 - misconduct of the jury, 968.
 - absence of party, or counsel, or witness, 969.
 - surprise, 970.
 - newly-discovered evidence, 971.
 - that lost instrument sued on has been found, etc., 971, note.
 - excessiveness of damages, 972.
 - smallness of damages, 973.
 - misconduct of court in, etc., 974.
 - that verdict is against the law or the evidence, 975.
 - that witness may be impeached, when, 975, note.
 - hearing of, ruling, exception, 976.
- exceptions to ruling on hearing of, 976.
- overruling, may be assigned for error, when, 976.
- abandonment of, 976, note.
- amendment after overruling, 976, note.
- duty of court on hearing, 976.
- presumption as to grounds on which granted, 976, note.
- hearing of, costs on, 977.
- number granted, 978.
- waiver of by motion in arrest of judgment, 979, note.
- refusal to grant is a final judgment, when, 1013, note.
- rulings on, no part of record unless by bill of exceptions, 1023.
- not granted for disqualification of juror, 806, note.
- obtained by motion for *venire facias de novo*, 962.
- for re-pleader, 963.
- variance between pleading and proof, ground for, 819.
- waiver of ground for, 972.
- see "Motions."

NEWLY DISCOVERED EVIDENCE:

- ground for new trial, when, 971.
- see "Evidence" and "New Trial."

NEWSPAPER:

- libel published in, declaration for (*No. 230*), 618.
- see "Libel" and "Publication."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

NEXT FRIEND:

when necessary as plaintiff, 23.
 how appointed, 23.
 in case of insanity or idiocy, 25.
 for infant defendant in tort cases, 48.
 for commencement of suit, powers, etc., 490.
 appearance of, in defense, 628.
 may act as interpreter, 839.
 see "Parties," "Infants" and "Guardians."

"NIL DEBET:"

definition of, 689.
 plea of, general issue in debt, 693.
 see "Pleas."

NIL DICET:

judgment by, where plea states no defense, 716, note.
 see "Judgment."

NISI ORDER:

see "Rule Nisi."

NOLLE PROSEQUI:

as to defendants in actions for tort, 131.

NOMINAL DAMAGES:

in action of trover, 152.
 see "Damages," "Measure of Damages" and "Exemplary Damages."

NOMINAL PLAINTIFF:

in action "for use," 14.
 see "Assumpsit" and "Assignments."

"NON-ASSUMPSIT:"

definition of, 689.
 see "Assumpsit" and "Pleas."

NON CEPIT:

definition of, 689.
 plea of, in replevin, what may be shown under, 697.
 in replevin, 156.
 see "Replevin" and "Pleas."

NON CULPABILIS:

definition of, 689.
 see "Pleas."

NON COMPOS MENTIS:

see "Insanity."

NON DAMNIFICATUS:

plea of (*Form No. 341*), 710.
 form of averment of, in special plea or notice with general issue
 (*No. 341*), 710.
 see "Pleas."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

NON DETINET:

definition of, 689.

plea of in replevin, what may be shown under, 697.

see "Replevin" and "Pleas."

NON EST FACTUM:

definition of, 689.

plea of, not proper in *assumpsit* on interest coupons, 692, note.

what may be shown under, in debt, 693.

in covenant, what may be shown under (*Form No. 311*), 694.

see "Plea of."

NON JOINDER:

of parties, plaintiff in actions for torts, how taken advantage of, 27.

of defendants, in action on contract, how availed of, 34.

of parties, plea in abatement for, 664.

cannot be pleaded in action for tort, 237.

form of plea in abatement (*No. 301*), 674.

see "Joinder" and "Parties."

NON OBSTANTE VEREDICTO:

judgment, motion for, general rule, 984.

motion for, when must be made, 985.

NON-RESIDENCE:

as grounds for attachment, 306.

see "Attachment" and "Grounds."

NON-RESIDENT LAWYERS:

courtesy extended to, 1232, note.

NON-RESIDENT PLAINTIFF:

to give security for costs, when, 430, 431.

bond for costs on writ of error, 1051, note.

must give security for costs in distress for rent, 1220.

see "Plaintiffs" "and "Security for Costs."

NON-RESIDENT DEFENDANTS:

effect on commencement of suit, 429.

see "Service" and "Scire Facias."

NON-RESIDENTS:

notice to, in replevin, 176.

liable in attachment, when, 294.

as garnishees, 362.

in garnishment, exemption rights of, 387.

notice to, in distress for rent, 1225.

see "Parties," "Attachment" and "Residence."

NON-SUIT:

wrong name of plaintiffs, ground for, 19.

of defendants, in actions for tort, 131.

in replevin, 178.

voluntary and involuntary, 798.

when to plaintiff's advantage, to take, 923.

may be submitted to, on motion to set aside judgment entered on confession, 999.

judgment of, when defendant entitled to, 798.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

NON-SUIT—*Continued.*

- motion for, on ground of misjoinder, 27.
- for variance in declaration, 487.
- by defendant, when plaintiff in default, 757.
- how defeated by plaintiff, 923.
- in absence of plaintiff, 798.
- not entertained, where default not set aside, 802, note.
- because of improper opening statement, 811.
- for want of evidence, when proper, 919.
- see "Judgments."

NOTES:

- actions on, who to bring, 20, 83.
- debt may be maintained, 89.
- plea of usury to (*Form No. 337*), 710, note.
- set-off in, 724.
- assignment of, defendants in case of, 35.
- denial of, plea must be verified, 711.
- attorney's lien upon, for fees, 1276.
- consolidation of, for confession of judgment, 996, note.
- copy of, must be attached to declaration, 546.
- judgment on, before maturity, when authorized, 996, note.
- lost, after suit begun, proof required, 487, note.
- payable in other than money, as to declaration on, see (*Form No. 122*), 545.
- promissory, plaintiffs in action on, 13.
- trover will lie for conversion of, 143.
- under seal, assumpsit upon, generally, 60.
- variance in proof of contents of, 819, note.
- when court cannot order production of, 1276, note.
- see "Bills of Exchange," "Negotiable Instruments" and "Promissory Notes."

NOTES AND BILLS:

- assumpsit upon, 83.
- see "Negotiable Instruments."

NOTICE:

- averment of, in declaration, 518, 519.
- to defendant in declaration on bill of exchange (*Form No. 127*), 545, note.
- definition of, as used in ejectment law, 285, note.
- effect of, not to fish, 116.
- form of special defense to accompany plea of general issue (*No. 317*), 710.
- in writing, with plea of general issue required by statute, when, 699.
- with general issue or special plea, in *assumpsit*, when required, 702.
- in debt, when required, 703.
- in account, when required, 705.
- in covenant, when required, 704.
- in "trespass" or "case," when required, 706.
- in trover, when required, 707.
- in replevin, when required, 708.
- in ejectment, when required, 709.
- form of averment of note given in satisfaction (*No. 319*), 710.
- form of averment of arbitration and award (*No. 320*), 710.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

NOTICE—Continued.

- in writing, with general issue or special plea, form of averment of former judgment (No. 321), 710.
- form of averment of payment by services (No. 322), 710.
- form of averment of payment in money (No. 322), 710.
- form of averment of statute of frauds (No. 323), 710.
- form of averment of *ultra vires* corporation (No. 324), 710.
- form of averment of statute of limitations (No. 325), 710.
- form of averment of statute of limitations to book account (No. 326), 710.
- form of averment of tender (No. 327), 710.
- form of averment of denial of part, tender of residue (No. 328), 710.
- form of averment of want of capacity (No. 329), 710.
- form of averment of partnership of plaintiff (No. 330), 710.
- form of averment of want or failure of consideration (No. 331), 710.
- form of averment of gambling debt (No. 332), 710.
- form of averment of infancy of defendant (No. 333), 710.
- form of averment of increased risk (No. 334), 710.
- form of averment of notice of estoppel (No. 335), 710.
- form of averment of fraud (No. 336), 710.
- form of averment of usury (No. 337), 710.
- form of averment of *plene administravit* (No. 338), 710.
- form of averment in debt on indemnity bond (No. 339), 710.
- form of averment of *Nul tiel record* (No. 340), 710.
- form of averment of *non damnificatus* (No. 341), 710.
- form of denial of false warranty (No. 342), 710.
- form of averment of conditions performed (No. 343), 710.
- form of averment of duress (No. 344), 710.
- form of averment of self defense (No. 345), 710.
- form of averment of defending another (No. 346), 710.
- form of denial of libel (No. 347), 710.
- form of averment of justification of libel (No. 348), 710.
- form of averment that accusation is true (No. 349), 710.
- form of averment of diligence by common carrier (No. 350), 710.
- not both to be filed in same case, 710, note.
- to be filed with general issue, may state several defenses, 714.
- judicial, will be taken of what facts, 823.
- things generally known need no proof, 823.
- mailing of, when attachment writ not personally served, 338.
- mistake in, in attachment, how taken advantage of, 338.
- of appearance on writ of error, 1055.
- of default in filing abstract of evidence in upper court, 1070, note.
- of hearing, before auditors in action of account, 106.
- on review by *certiorari*, 1049.
- before referee, 1190.
- of motion, for judgment in *capias* cases, 472.
- to dismiss appeal not required, 421.
- when required, 773.
- affidavit of service of (Form No. 357), 773.
- form of (No. 357), 773.
- no part of record unless by bill of exceptions, 1023, note.
- of petition for *mandamus* required in supreme court, 1108.
- of recoupment, general rules regarding, 729.
- or plea (Form No. 354), 732.
- of rehearing in upper court, filing, 1087.
- retraction of libel, 196.
- of set off, general rules, 721.

[The references are to sections: Vol. I., §§ 1-757; Vol. II., §§ 788-1276.]

NOTICE—Continued.

- of set off, not compulsory, 723.
- rules regarding, 726.
- (*Form No. 353*), 726.
- dismissal of suit after, 727.
- when to be interposed, 724.
- of special defense with general issue, requisites of, 701.
- of special matter of defense with general issue, 700.
- of viciousness, when required, 43.
- of animal, effect of, 127.
- presumed, to defendant in supreme court, 628, note.
- production of documents on, when required, 863.
- publication of, when attachment writ not personally served, 338.
- to non-residents in replevin, 176.
- in distress for rent, 1225.
- to produce papers, declaration in case for neglect of (*Form No. 274*), 617.
- to produce documents (*Form No. 363*), 864.
- for evidence, when not required, 862.
- for evidence, when required, 861.
- to purchaser and terre-tenants on writ of error, 1057.
- to quit, necessary before ejectment, 263.
- distinguished from demand in writing in forcible entry and detainer, 1210.

"NOT GUILTY:"

- plea of, in forcible entry and detainer, raises what issue, 1214.
- see "Pleas."

NOVATION:

- what is, 35.

"NO WRONG WITHOUT A REMEDY:"

- maxim of the law, 183.

NUDUM PACTUM:

- see "Naked Promise."

NUISANCE:

- who liable for, 45.
- action on the case for, 231, 235.
- declaration for in case (*Form No. 231*), 601.

NUL TIEL CORPORATION:

- plea in abatement, 658.
- (*Form No. 307*), 674.
- see "Pleas."

NUL TIEL RECORD:

- definition of, 689.
- plea of, in debt, what may be shown under, 693.
- in *scire facias*, a good defense, 1177.
- not a good plea to action on appeal bond (*Form No. 340*), 710, note.
- form of averment of, in special plea or notice with general issue, (*No. 340*), 710.
- see "Pleas."

NUNC PRO TUNC:

- entry of judgment, 1001.
- see "Judgments."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

NUMBER:

- averment of, in declaration in action for tort, 583.
- variance in proof of, 819, note.
- of jurors, 804.
- see "Declaration," "Averments" and "Requisites."

O.

OATH:

- any form of, may be basis of perjury, 838.
- administering, disability of counsel from, 1262.
- administration of, may be compelled by *mandamus*, 1099, note.
- commitment for refusal to take, in action of account, 107.
- form of, to arbitrators, 1187.
- for admission to practice law (*No. 403*), 1240.
- for admission to practice law in United States Supreme Court (*No. 404*), 1244.
- omission of signature of officer administering, avoids affidavit, 171, note.
- not to be administered by attorneys, when, 673.
- of witnesses, or affirmation (*Forms Nos. 361-362*), 838.

OATH OF WITNESS:

- form of (*No. 361*), 838.
- on arbitration, 1188.
- to auditors, in action of account, 105.
- to be administered by auditors in action of account, 107.
- to Chinaman, how administered, 838.
- to Jew, how administered, 838, note.
- to Turk, how administered, 838.
- who may administer, 550, note.

OBEDIENCE:

- to writ of *habeas corpus* enforced by attachment, penalty, 1150, note.

OBJECT OF PLEADING:

- statement, 475.
- see "Pleading" and "Declaration."

"OBJECTION:"

- definition of, 894.
- and exception to evidence, purpose of, 894.
- the objection, rule governing, 895.
- that suit begun in wrong county, cannot be raised after default, 429.
- to affidavit in replevin, when to be urged, 171.
- to argument of counsel, when to be raised, 1256.
- to evidence, when exception to be taken, 844.
- generally, 894.
- waiver of, 895.
- must be specific, 895.
- rule governing, 895.
- ruling of court on, 896.
- the exception, 897.
- and exception, to correct improper finding of court, 960.
- to instructions, must be preserved by exceptions and bill of exceptions, 941.
- to leading question, when and how to urge, 842.
- to motion in upper court, must be in writing, 1095.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

"OBJECTION"—Continued.

- waiver of, to *mandamus* proceedings, 1114.
- to evidence, 895.
- for lack of notice of petition for *mandamus* in supreme court, 1108, note.
- when to be made for irregularity in filing abstract, 1070.
- see "Exception."

OBSTRUCTING LIGHTS:

- declaration in case for (*Form No. 273*), 616.
- see "Lights" and "Ancient Lights."

OBSTRUCTION TO STREET:

- declaration in case for (*Forms Nos. 228, 229*), 600.
- see "Negligence," "Trespass," and "Highways."

OCCUPATION AND USE:

- declaration in common counts for (*XII*), 510.
- see "Use and Occupation."

OFFER OF PROOF:

- when and how to be made, generally, 814.
- see "Proof" and "Evidence."

OFFICE:

- malconduct in, what is by attorney, 1246.
- of declaration, 478.
- right to hold questioned, by *quo warranto*, 1125.
- see "Officer" and "Trespass."

OFFICERS:

- action against for wrongful act survives, 29.
- deputy, may serve summons, when, 436.
- return of summons by, 445.
- duty of, taking bond in replevin, 173.
- to return replevin bond with writ, 174.
- to make inventory in replevin, 175.
- in service of summons, 436.
- executive, cannot be restrained by writ of prohibition, 1121.
- judicial, liable in trespass, when, 130.
- justification of, under writ of replevin, 163, note.
- liable in trover for goods taken under process, when, 143.
- liability of, for excessive levy in attachment, 322.
- in regard to bail bond, 457.
- may maintain action, of trespass, when, 117.
- of replevin, when, 156.
- may summon aid to execute writ, when, 278.
- public, commencement of declaration in case of, 499.
- negligence of, case (*Forms Nos. 253-261*), 612.
- of common carriers, liability for trespass of, 115.
- of county, *mandamus* will lie to, when, 1101.
- of municipal corporation, *mandamus* will lie to, when, 1103.
- of schools, *mandamus* will lie to, when, 1105.
- of state, *mandamus* will lie to, when, 1100.
- of township, *mandamus* will lie to, when, 1102.
- power of, in serving writs, limited to jurisdiction, 438.
- in serving process, 439.
- public, may not be held as garnishees, 362.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

OFFICERS—Continued.

replevin against, for unlawful seizure under process, 163.
rights of, in *capias* cases, 457, note.
signature of, administering oath necessary to affidavit, 171, note.
suit for use of, on replevin bond, 180.
when may sue in his own name, 16.
when writ protects, 163.
see "Sheriff."

OFFICERS' FEES:

for caring for attached property, 335.
presumed to be paid by party requiring him, 1012.
see "Fees" and "Expenses."

OFFICER'S POSSESSION:

in attachment of joint debtors and partner's interest, 296.
see "Custody" and "Possession."

OFFICIAL BOND:

debt will lie upon, 92.
see "Bonds" and "Debt."

OFFICIAL CAPACITY:

want of, form of plea (*No. 329*), 710.
see "Pleas."

OFFICIAL CHARACTER:

statement of, in commencement of declaration, 498.
how stated in declaration (*Form No. 152*), 567, note.
see "Averments," "Declaration," and "Representative Character."

OFF-SET:

in trial of suggestion of damages in ejectment, 284.
in attachment, 344.
should be claimed by garnishee in answer, 370.
cannot be made of unliquidated damages, 370.
in distress for rent, 1227.
see "Set-off."

OMISSIONS:

in bill of exceptions cannot be supplied by the pleadings, 1027, note.
of signature of officer administering oath, avoids affidavit, 171, note.
of words "before me" avoids affidavit, 171, note.
to join in error, effect, 1066.
see "Amendments."

"OPEN AND CLOSE:"

see "Opening Statement."

OPENING THE CASE:

when in order, 810.

OPENING COURT:

and calling calendar, 788.
see "Courts" and "Calendar."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

OPENING STATEMENT:

who entitled to, 811.
 of plaintiff, 811.
 of defendant, 812.
 waiver of right to, 812.
 how reviewed, 813.
 see also "Argument of Counsel."

OPINION OF JUSTICE BREEZE:
 regarding juries, 976.

OPPRESSIVE GARNISHMENT:
 statute concerning, 387.
 see also "Malicious Attachment."

ORAL ARGUMENT:
 of counsel, not permitted in upper court on motion for rehearing,
 1077.
 in upper court, time allowed for, 1078.
 on rehearing in upper court, 1094.

ORAL CONTRACT:
 how proved, 870.
 see "Proof" and "Evidence."

ORAL EVIDENCE:
 to explain written instrument, 868.
 to contradict written instrument, rule, 869.
 see "Evidence" and "Secondary Evidence."

ORAL SLANDERS:
 number and classification of, 185.

ORCHARD:
 injury to, trespass will lie for, 125.
 see "Trespass" and "Injury."

ORDER:
 for continuance, how reversed, 794.
 not set aside without notice to adversary, 798.
 form of, of reference (*No. 391*), 1199.
 interlocutory, cannot be reviewed, 1013, note.
 reviewed only by aid of bill of exceptions, 1023.
 cannot be assigned for error, 1062.
 not granted in vacation without notice, 9, note.
 of argument of counsel, rule regarding, 909.
 of court, for amendment must be procured, 744.
 on motion, etc., reviewed only by aid of bill of exceptions, 1023.
 of pleading, 652.
 of presenting evidence, generally, 814.
 of proof, general rule regarding, 814, 815.
 on motions, how impeached or reviewed, 779.
 no part of record unless by bill of exceptions, 1023.
 remanding cause for retrial, when to be filed, 1085.
 to show cause in proceedings to disbar attorneys, 1249.
 see "Continuance."

ORDER AND TIME:
 of pleading, 476.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1278.]

·ORDINANCE:

- action on, debt proper from, when, 89.
- declaration upon, averments necessary, 481.
- how proven, 855.
- prescribing a duty, non performance of is negligence, 220.
- violation of, action of debt will lie for, 93.

·ORIGIN:

- of arbitration and award, 1180.
- of action of attachment, 291.
- of bill of exceptions, 1021.
- of writ, of *habeas corpus*, 1139.
 - of *quo warranto*, 1124.
 - of *scire facias*, 1162.
- of special verdict, 952.
 - see "Nature."

·ORIGIN AND NATURE:

- of courts, 1.
 - see "Nature" and "Courts."

·"ORIGINAL ATTACHMENT:"

- what is, 350.
 - see "Attachment."

·ORIGINAL JURISDICTION:

- what is, 5.
- of circuit courts, 9.
- in supreme court, in what cases, 7.
 - see "Jurisdiction."

·ORIGINAL WRITS:

- powers of circuit and other courts to issue, 389.
 - see "Writs."

·OUSTER:

- when a trespass, 123.
- in *quo warranto*, 1136.
- or dispossession in ejectment need not be shown, 260.
 - see "Ejectment" and "Distress for Rent."

·OUTSTANDING TITLE:

- as defense to ejectment, 272.
 - see "Ejectment" and "Title."

·OUTER DOOR:

- officer may break in executing writ, 175.
 - see "Service." "Sheriff," and "Officer."

·OVERFLOW OF MEADOWS:

- declaration in case for (*Form No. 269*), 615.
 - see "Trespass to Land."

·OVERFLOW OF WATER:

- action on the case for damages occasioned by, 231.
 - see "Trespass to Land."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

OVERRULING A DEMURRER:

form of judgment, 993, note.

see "Demurrer."

OWNER:

may be guilty of trespass, when, 123.
of animals, duty to keep inclosed, 127.

see "Trespass."

OWNERSHIP:

as affecting action of trover, 139.
will not sustain replevin, when, 156.

see "Defense" and "Trover."

OYER:

of the writ cannot be craved, 661.

see "Copy of Instrument Sued on."

P.

PANEL:

see "Jury."

PAPERS:

attorney's lien upon for fees, 1276.
notice to produce for evidence, when required, 861.

when not required, 862.

order to produce, when court has no authority to make, 1276, note.
production of, on motion, etc., declaration in case for neglect.

(Form No. 274), 617.

when court cannot order, 1276, note.

trover will lie for conversion of, 143.

see "Documents."

PARENT:

when to sue for child's wages, 23.

when to sue for damages resulting to child, 26.

when may sue to injury to child, 31.

the natural guardian of a child, 39.

when liable for child's tort, 115.

may maintain action for seduction of child, 214.

see "Children," "Next Friend," "Guardian" and "Minors."

PAROL CONTRACT:

may be made by corporation, 86.

see "Contracts" and "Written Contracts."

PART PAYMENT:

should be admitted in declaration, 523.

see "Declaration" and "Set Off."

PART PERFORMANCE:

should be admitted in declaration, 523.

see "Declaration" and "Set Off."

PARTIAL CONTRACT:

pleading and proof in assumpsit, on, 60.

see "Assumpsit" and "Quantum Meruit."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

PARTIAL FAILURE OF CONSIDERATION:

plea of when and how interposed (*Form No. 331*), 710, note.
see "Consideration."

PARTICULARS:

see "Bill of Particulars."

PARTIES TO ACTION:

names of, 12.
in proceedings by *quo warranto*, 1128.
on contracts under seal, 59.
must be stated in body of declaration, 517.
in *mandamus* proceedings, 1102, note.
on notes, 83.
partners as (*Form No. 112*), 545, note.
non-joinder of, cannot be pleaded in action for tort, 237.
plea in abatement for, 664.
misnomer of, plea in abatement for, 662.
misjoinder of, plea in abatement for, 663.
in garnishment generally, 359.
necessary to garnishment, 361.
effect of death of, in *certiorari*, 407.
must be named in commencement of declaration, 495.
character in which sues or is sued, not in issue unless especially denied, 499.
how stated in declaration (*Form No. 152*), 567, note.
added by amendment, 741, note.
in interest, privilege of, may testify when, 825.
may not testify, when, 826.
misconduct of, ground for new trial, 967.
absence of, ground for new trial, when, 969.
judgment, defendant, *scire facias* to make, 1165.
see "Parties Defendant," "Parties Plaintiff," "Defendants" and "Plaintiffs."

PARTIES DEFENDANT:

in action on contract, as between original parties, 33.
in cases of assignment, 33.
who to join and sever, 34.
where interest assigned, 35.
when contractor dies, 36.
where assigned for benefit of creditors, 37.
where female contractor marries, 38.
in case of infancy, 39.
in case of insanity, idiocy, etc., 40.
in action on the case for negligence, causing death, 227.
for injury caused by liquor, 230.
for waste, 234.

DEFENDANT:

in action of ejectment, generally, 264.
when premises unoccupied, 265.
effect of death of, 267.
to action on note, 83.
assigned, 35.
in actions for torts, as between original parties, 41.
in case of death, 42.
by acts of animals, 43.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1278.]

DEFENDANT—Continued.

- in action for torts, who to join or omit, 44.
- where interest assigned, 45.
- when wrongdoer dies, 46.
- where wrongdoer marries, 47.
- in case of infant wrongdoer, 48.
- in trespass, joint or several, 131.
- must be named in declaration, 483.
- how named in action for debt, 552.
- names of in *mandamus* proceedings, 1102, note.
- mandamus*, the respondent, 1107.
- new, in *mandamus* not interpleaders, 1112.
- on review, "defendant in error," 1040.
- on writ of error, 1057.
- to proceedings by *quo warranto*, 1128.
- in forcible entry and detainer, 1209.
- see "Defendants."

PARTIES PLAINTIFF:

- in action of account, 100.
- in action on case for "Crim. Con.," 216.
- for negligence, cause death, 227.
- for injury caused by liquor, 230.
- for waste, 234.
- in actions on contract, as between the original parties, 13.
- the name of one for use, 14.
- cannot be party defendant, 15.
- when agent or officer may sue, 16.
- when a subscription list is circulated, 17.
- when trustees may be, 17.
- effect of wrong name, 18.
- when to be joint or several, 19.
- when co-partners to be, 19.
- when interest assigned, 20.
- when obligee dies, 21.
- effect of death upon, 21.
- when executors, etc., to be, 21.
- when female contractor marries, 22.
- in case of infants, 23.
- in case of insolvency, 24.
- in cases of assignment, 24.
- in case of receivers, 24.
- in case of insanity or idiocy, 25.
- in action of ejectment, 261.
- in garnishment, 361.
- in action for injury by intoxication, 600, note.
- in *mandamus*, the relator or petitioner, 1106.
- in action on note, 83.
- in action for rent, 575, note.
- in actions for torts, generally, 26.
- who to join or sever, 27.
- when interest assigned, 28.
- when a party dies, 29.
- in case of marriage, 30.
- in case of infancy, 31.
- in case of insanity, 32.
- children may be, 115.
- joinder of, 131.
- to wife, 590, note.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

PARTIES PLAINTIFF—Continued.

in action of trespass for injury to personal property, 117.
disability of, plea in abatement for, 657.
must be named in declaration, 483.
names of, in *mandamus* proceedings, 1102, note.
new, may be added on appeal from justice, 409.
on review, "plaintiff in error," 1040.
to forcible entry and detainer, 1208.
to proceeding in *quo warranto*, 1126-1128.
see "Plaintiffs."

PARTITION FENCE:

declaration in case for negligence regarding (*Form No. 233*), 602.
see "Fence."

PARTNER:

cannot sue co-partner, 15.
dormant or secret, need not be named as plaintiffs, 19.
contract between, when may be enforced by suit at law, 19, note.
as defendant in action on contract, 33, 34.
actions between, when "account" will lie, 99, 100.
may have action of account or bill in chancery, 110.
declaration against, in account by partner (*Form No. 182*), 581.
may sue another in trover when, 143.
action of trover by and against, 146, 161.
action of replevin by and against, 161.
interest of attachable, when, 296.
as a garnishee, 362.
how process served upon, 440.
as party to action on note (*Form No. 112*), 545, note.
may not testify, when, 827.
not served with process made parties to judgment by *scire facias*, 1165.
surviving, when may sue in firm name, 19, note.
as defendant in action on contract, 36.
commencement of suit by declaration, 498.
ratification of arbitration by, 1181, note.
see "Partnership" and "Tenants in Common."

PARTNERSHIP:

suits regarding, when to be brought, 15.
in what name to sue dormant or secret, 19.
how to be named as defendant in actions on contract, 33.
how process served upon, 440.
property, attachment of, 296.
garnishment in case of, 362.
questioned by plea in abatement, 663.
admitted by plea of general issue, 692.
form of averment of partnership of plaintiff in special plea, or
notice with general issue (*No. 330*), 710.
liability on written instrument sued on, 711.

PASTOR:

when may recover for services, 77.
see "Minister" or "Priest."

PASTURAGE:

declaration on common counts for (*XV*), 510.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

PASS BOOKS:

as evidence, 853, note.
see "Evidence," "Proof."

PASSENGERS, CARRIERS OF:

liability in trespass, when, 115.
liability for reasonable diligence (*Form No. 223*), 599, note.
declaration in case against railroad company for injury to (*Forms Nos. 223-224*), 599.
see "Common Carriers" and "Railroads."

PAWNEE:

may maintain action of trespass, when, 117.
see also "Bailees."

PAYEE:

see "Bills of Exchange" and "Promissory Note."

PAYING MONEY INTO COURT:

by defendant, 625.
see "Defenses."

PAYMENT:

in part should be admitted in declaration, 523.
may be shown under general issue, 692.
of demand, stay of proceedings by, 627.
plea of may be interposed in *mandamus*, 1110.
in money, form of averment of in special plea, or notice with general issue (*No. 322*), 710.
by services, form of averment of in special plea, or notice with general issue (*No. 322*), 710.
partial, may be shown under plea of payment (*Form No. 322*), 710, note.
plea of, in distress for rent, 1277.
in *scire facias*, a good defense, 1177.
burden of proof regarding, 820.
of taxes and color of title will support ejectment, 257.
effect of guaranty, 89.
see "Plea" and "Set-off."

PECUNIARY CIRCUMSTANCES:

proof of in trespass, 115.
proof of, in action for breach of promise, 218.
see "Proof" and "Evidence."

PENAL BONDS:

debt will lie upon, 93.
see "Bond for Penalty."

PENALTY:

action for, form of, to recover, 85.
assumpsit will lie to collect, when, 87.
when case, the proper form, 183.
"debt," the proper form, 89, 93.
or forfeiture, declaration on, statutory (*Form No. 161*), 571.
for cutting trees, 124.
for injury to orchard, 125.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

PENALTY—Continued.

- for injury to garden, yard, or field, 126.
- for false imprisonment, 209, note.
- for enticing away servant, 215.
- for transferring claim of wages for garnishment, 388.
- for removing prisoner to avoid *habeas corpus*, 1141, note.
- for refusing copy of *mittimus* on *habeas corpus*, 1143, note.
- for judge in refusing a writ of *habeas corpus*, 1145.
- for omission of witness to give recognizance in *habeas corpus*, 1154.
- for re-arresting a person discharged on *habeas corpus*, 1159.
- for avoiding *habeas corpus*, 1160.
- on writ of *habeas corpus*, how recovered, 1161.
- see "Forfeiture," "Actions," "Debt" and "Forms."

PENDENTE LITE:

- effect of marriage, 22, note.
- see "Suit Pending."

PENDENCY OF WRIT OF ERROR:

- pleaded in abatement, when operates as a *supersedeas*, 665.

PENDING SUIT:

- plea in abatement for (*Form No. 304*), 674.
- ground for continuance, 791.
- see "Suit Pending."

PEREMPTORY CHALLENGE:

- rule relating to, 806.
- see "Challenge" and "Jury."

PEREMPTORY WRIT:

- of *mandamus*, former practice, 1110.
- judgment, costs, 1111.

PERFORMANCE:

- averment of, in declaration, 518.
- in part, should be admitted in declaration, 523.
- or readiness to perform averment of, in declaration, in debt, 559.
- pleaded specially in covenant, 704.
- plea of (*Form No. 343*), 710.
- of covenants, plea of, when to be interposed, what it admits (*Form No. 341*), 710, note.
- of conditions, when, on property subject to lien in garnishment, 381.

PERISHABLE PROPERTY:

- in attachment, disposition of, 336.
- deposit of proceeds, 336.
- disposition of, in distress for rent, 1230.
- power of counsel to dispose of, 1268, note.

PERJURY:

- accusation of, is slander, 191.
- accusation of, slander, declaration in case for (*Form No. 284*), 619.
- may be made on any form of oath, 838.

PERMISSION:

- to amend, on judgment on demurrer, 640.
- to plead over, after judgment on demurrer, 640.
- in written instrument, how rebutted, 868.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

PERSONAL ACTIONS:

what are, 50.
attachment is, to certain extent, 293.
see "Actions."

PERSONAL APPEARANCE:

equivalent to personal service, in attachment, 292.

PERSONAL PROPERTY:

injuries to, who to join as plaintiffs in action for, 27.
declaration for injury to, trespass (*Forms Nos. 192-198*), 591.
declaration in case for injury to (*Forms Nos. 232-233*), 602.
see "Chattels."

PERSONAL REPRESENTATIVE:

when to sue for damages resulting from death, 26.
as defendants in action, on contracts, 33.
when liable for torts, 46.
may maintain action of account, 100.
cannot distrain for rent, when, 1220.
see "Executors," etc.

PERSONAL SERVICE:

of writ of attachment on defendant, return, 329, 337.
of process, its effect upon judgment in attachment, 346, 347.

PERSON:

inspection of, in court, 892.
see "View" and "Proof."

PETITION:

form of, for *certiorari*, to justice (*No. 10*), 397.
for *mandamus*, what it must contain, 1108.
must be verified, 1108.
notice of, required in supreme court, 1108.
construed like a declaration, 1108.
amendment of, 1110.
for *habeas corpus*, generally, 1142.
form of, for writ of *habeas corpus* (*No. 374*), 1143.
for writ of *habeas corpus ad testificandum* (*No. 375*), 1143.
for *certiorari*, form of (*No. 371*), 1047.
for re-hearing in upper court, 1086.
who may make, 1086.
reply to, 1092.

PETITIONER:

plaintiff in *mandamus*, 1106.
see "Plaintiff."

PHOTOGRAPHS:

as evidence, 853.
see "Proof" and "Evidence."

PHYSICIAN:

negligence of, declaration in case for (*Form No. 253*), 610.
services of, declaration in common counts for (*XVIII*), 510.
as a witness, rule regarding, 830.
see "Doctors," "Agent" and "Servant."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

PLACE:

- as affecting recovery on contract, 60.
- or location, must be averred in declaration, 125, 485.
- and time, averment of in declaration, when sufficient, 485, note.
- averment of in declaration, 518.
- necessity for, 526, note.
- see "Location."

PLACING CAUSE ON CALENDAR:

- out of its order, 797.
- see "Calendar."

PLACING CASE ON DOCKET:

- in upper court for review, 1061.
- see "Review" and "Docket."

PLACITA:

- cannot be added to record by bill of exceptions, 1023.
- necessary to transcript of record, 1058, note.

PLAINTIFF:

- which party is, 12.
- who to be, generally, 12.
- when trustees may be, 17.
- when guardians to be, 23.
- a partner cannot be, generally, 15.
- effect of wrong name, 18.
- when to be joint or several, 18.
- when co-partners to be, 19.
- when stockholders of corporation to be, 19.
- when to be joint, 19.
- when interest assigned, 20.
- when obligee dies, 21.
 - when executors, etc., to be, 21.
 - when female contractor marries, 22.
 - in case of infants, 23.
 - in case of insolvency, 24.
 - in cases of assignment, 24.
 - in case of receivers, 24.
 - in case of insanity or idiocy, 25.
- in action of account, 100.
- in action on case for negligence, causing death, 227.
 - for injury by intoxication, 230, 600, note.
 - for waste, 234.
- in action on contract, as between the original parties, 13.
 - in name of one for use, 14.
 - cannot be party defendant, 15.
 - when agent or officer may sue, 16.
 - when a subscription list, 17.
- action on bonds, 13.
- in action of ejectment, 261.
- in action on land, 13.
- to action on note, 83.
- in action for rent, 575, note.
- in action of replevin, when chattels assigned, 28.
- in action for seduction, 214, 214, note.
- in action on specialties, 13.
- in actions for torts, generally, 26.
 - who to join or sever, 27.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

PLAINTIFF—Continued.

- in action for torts, when interest assigned, 28.
 - when a party dies, 29.
 - in case of marriage, 30.
 - in case of infancy, 31.
 - in case of insanity, 32.
 - children may be, 115.
 - joinder of, 131.
 - to wife, 590, note.
- in action for trespass for injury to personal property, 117.
- becomes trespasser, when, 129.
- character of, admitted by plea of general issue, 692.
- claim of, may be filed after plea, when, 712, note.
- death of, effect of, 21.
 - in ejectment, effect of, 261.
 - effect of, in suit, 266.
- plea in abatement for, 657.
- demurrer by, to plea in abatement, 677.
- disability of, plea in abatement for, 657.
- in ejectment, must recover on strength of his own title, 247.
- in error, which party is, 12.
 - name of party to proceedings of review, 1040.
- executors, etc., as, 21.
- firm, member of, cannot be defendant, 15.
- for injury to property, 26.
- "for use" on contract under seal, 59.
- to forcible entry and detainer, 1208.
- in garnishment, 361.
 - who to be, 359.
- infancy of, plea in abatement for (*Form No. 305*), 674.
- joinder of, in action for torts, 27.
- joint liability of, questioned by plea in abatement, 663.
- judgment for, in replevin, 178.
- judgment against, in replevin, 178.
- liability of, in regard to legal process, 129.
- in *mandamus*, the relator or petitioner, 1106.
- misjoinder of, when objection to be raised, 19.
- must be named in declaration, 483.
- name of, when a corporation or society, 13.
 - when corporations "*de facto*s" sues, 13.
- in *mandamus* proceeding, 1102, note.
- nominal, in actions for use, 14.
- non-resident to give security for costs, when, 430, 431.
 - must give security for costs on distress for rent, 1220.
- on insurance policies, 13.
- right or interest, averment of in declaration in action for tort, 584.
- to recover costs, when, 1009.
- to proceedings in *quo warranto*, 1126, 1128.

PLANS:

- as evidence, 853.
- see "Documents" and "Proof."

PLEAS, ELEMENTS AND RULES:

- see "Pleas, Kinds of," "Pleas, Forms of" and "Pleas in Actions," following respectively.
- object of, 690, note.
- classification and definition, 651, 653, 665, 682, 683.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

PLEAS, ELEMENTS AND RULES—Continued.

- dilatory, definition of, 651.
 - general rules relating to, 653 to 664.
- to the action, definition and classification of, 651.
 - see "Pleas in Bar."
- to the declaration, general issue, 685.
- to the merits, "general issue" defined, 683.
 - "Special Plea" defined, 683.
 - general rules governing, 682, 685.
 - when to be interposed, 682.
 - course to be pursued, 683.
 - see "Pleas, Kinds of," below.
- character of, determined by commencement and conclusion, 667.
- conclusion of, importance of, rule, 701.
- verification of, necessary to denial of execution of instrument sued on, 711.
- verification of, by the record, when required, 701.
- how entitled, 687.
 - need not be entitled of a term, 710, note.
- order in which to be interposed, 652.
- rule to instanter, meaning of, 719.
- several may be filed in same cause, 714.
- new, after amendment of declaration, 746.
- default for want of, in abatement, 676.
- default for, when to be entered, 801, note.
- right to file without affidavit of merits, 712, note.
- affidavit of truth of, required when dilatory, 673.
- affidavit of merits to be filed with, 712.
- use of words "manner and form," 693.
- amendment of, when uncertain, 715.
- uncertainty in, cured by amendment, 715.
- bill of particulars, so considered, 641.
- demurrer to, general rules, 636, 737.
 - of contravention (*Form No. 340*), 710, note.
 - for inconsistency in, two or more, 714.
 - judgment on, 737, note.
- replication to, 733.
- lost from files, effect of (*Form No. 348*), 710, note.
 - rights of defendant, when, 718.
- burden of proof on, when affirmative, 820.
- striking from files, general rules, 716.
 - when proper, 692.
 - what not ground for, 633.
 - for inconsistency in two or more, 714.
- withdrawal of, rules relating to, 717.

PLEAS, KINDS OF:

- see "Pleas, Elements and Rules" above and "Pleas, Forms of" and "Pleas in Actions" following respectively.
- in abatement, how classified, 651.
 - formal parts of, generally, 667.
 - how entitled, 668.
 - commencement of, form, 669.
 - the body of, 670.
 - conclusion of, 671.
 - must be verified, 671.
 - verification of, 18.
 - required by statute, 673.
 - in case of misnomer, 18.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

PLEAS, KINDS OF—*Continued.*

- in abatement, when partners sue in wrong name, 19.
- when husband and wife improperly joined as plaintiffs, 22.
- as to misjoinder of plaintiffs in action for torts, 27.
- for non-joinder of tenants in common, 27.
- for non-joinder of defendants in action on contract, 34.
- for non-joinder, not available in tort, 237.
- for misjoinder of defendants in actions for torts, 44.
- who cannot interpose in attachment, 306.
- in attachment on ground that debtor is about to remove, etc., 310.
- on ground that debtor is about to fraudulently conceal, 313.
- for mistake in notice of attachment, 338.
- to dissolve attachment, 341.
- defendant sued in wrong county, 429.
- to contradict return, 446.
- for variance in declaration, 487.
- a plea to the jurisdiction is, to what extent, 653.
- demurrer to, 635.
 - always, general, 637.
 - for misnomer of parties, 662.
- order in which to be interposed, 656.
- and bar distinguished, 656.
- to the disability of the plaintiff, 657.
- to disability of the defendant, 659.
- nul tiel*, corporation, 658.
- to form of the process, 661.
- to the form of process, for misnomer of parties, 662.
 - for misjoinder of parties, 663.
 - for nonjoinder of parties, 664.
- to question partnership of party to suit, 663.
- to action of process, suit pending, variance, etc., 665.
- special motion substituted for, when, 665.
- suit prematurely brought, 665, note.
- to question sheriff's return, 665, note.
- must show "better writ," 666.
- requirements of, summarized, 672.
- form of, for non-joinder (*No. 301*), 674.
 - for misjoinder of defendants (*No. 303*), 674.
 - for suit pending (*No. 304*), 674.
 - of infancy of plaintiff (*No. 305*), 674.
 - for infancy of defendant (*No. 306*), 674.
 - nul tiel* corporation (*No. 307*), 674.
 - for misnomer of defendants (*No. 308*), 674.
- amendments of, not generally allowed, 671.
- signature to, by attorneys, 674, note.
- for suit pending in another state, cannot be interposed except to attachment, 674, note.
- averaging death, requirements of, 674, note.
- when to be filed, 675.
- default for want of, 676.
- estoppel may be alleged to, 677.
- traverse of, 677.
- may be demurred to, 677.
- replication to, conclusion of, 677.
 - by plaintiff, 677.
- issue on, 679, 680.
- in replevin, what is, 680, note.
- judgment on, 681.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

PLEAS, KINDS OF—Continued.

- in abatement, to part, in bar to part, and demurrer to part, of same declaration, 714.
- in forcible entry and detainer, 1214.
- of arbitrament, form of (*No. 320*), 710.
- in bar, general rules governing, 682, 685.
 - when to be interposed, 682.
 - "special plea," defined, 683.
 - course to be pursued, 683.
 - general issue, defined, 683.
 - formal parts of, 686.
 - commencement of, 688.
 - demurrer to, 688.
 - requisites of, 637.
 - significance of "comes and defends, etc.," 688.
 - body of, 689.
 - general issue, rules relating to, 690.
 - conclusion of, 690.
- of confession and avoidance, in forcible entry and detainer, 1214.
- of covenants performed, when to be interposed, what it admits—(*Form No. 341*), 710, note.
- denying libel (*Form No. 347*), 710.
- of diligence, by common carrier (*Form No. 350*), 710.
- of duress (*Form No. 344*), 710.
- of estoppel (*Form No. 335*), 710.
- of failure of consideration (*Form No. 331*), 710.
- of former recovery, form of (*No. 321*), 710.
- of fraud (*Form No. 336*), 710.
- of general issue, what may be shown under, in action on contract, 19.
 - generally, 685.
 - formal parts of, 686.
 - commencement of, form, 688.
 - body of pleas in bar, 689.
 - raises question of fact, 690.
 - waiver by, 691.
 - admissions by, 691.
 - effect of, by one of several defendants, 691.
 - what it admits and denies, 691.
 - what may be shown under, 691.
 - in *assumpsit*, what may be shown under, 692.
 - admits partnership, 692.
 - with special pleas amounting to same, obnoxious on demurrer, 692.
 - verification by one of several defendants, effect, 692.
 - in debt, 693.
 - when demurrable, 693.
 - in covenant, what may be shown under, 694.
 - in trespass, what may be shown under, 695.
 - in action for negligence, under statute, 695, note.
 - in trover, what may be shown under, 696.
 - in replevin, what may be shown under, 697.
 - in case, what may be shown under, 698.
 - notice with, equivalent to special plea, 699.
 - when alone, not sufficient, 699.
 - notice with, of special matter of defense, 700.
 - notice of special defense, requisites of, 701.
 - in ejectment, form of, 709, note.
 - form entire (*No. 316*), 710.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

PLEAS, KINDS OF—*Continued.*

- of general issue, form of notice of special defense, to accompany (No. 317), 710.
- with notice, or special plea, form of averment of note given in satisfaction (No. 319), 710.
 - form of averment of arbitration and award (No. 320), 710.
 - form of averment of former judgment (No. 321), 710.
 - form of averment of payment for services (No. 322), 710.
 - form of averment of payment in money (No. 322), 710.
 - form of averment of statute of frauds (No. 323), 710.
 - form of averment of *ultra vires* corporation (No. 324), 710.
 - form of averment of statute of limitation (No. 325), 710.
 - form of averment of statute of limitation, to book account (No. 326), 710.
 - form of averment of tender (No. 327), 710.
 - form of averment of denial of part, tender of residue (No. 328), 710.
 - form of averment of want of capacity (No. 329), 710.
 - form of averment of partnership of plaintiff (No. 330), 710.
 - form of averment of want or failure of consideration (No. 331), 710.
 - form of averment of gambling debt (No. 332), 710.
 - form of averment of infancy of defendant (No. 333), 710.
 - form of averment of increased risk in policy of insurance (No. 334), 710.
 - form of averment of notice of estoppel (No. 335), 710.
 - form of averment of fraud (No. 336), 710.
 - form of averment of usury (No. 337), 710.
 - form of averment of *plene administravit* (No. 338), 710.
 - form of averment in debt on indemnity bond (No. 339), 710.
 - form of averment of *nul tiel* record (No. 340), 710.
 - form of averment of *non damnificatus* (No. 341), 710.
 - form of denial of false warranty (No. 342), 710.
 - form of averment of conditions performed (No. 343), 710.
 - form of averment of self defense (No. 345), 710.
 - form of averment of defending another (No. 346), 710.
 - form of denial of libel (No. 347), 710.
 - form of averment of justification of libel (No. 348), 710.
 - form of averment of that accusation is true (No. 349), 710.
 - form of averment of diligence by common carrier (No. 350), 710.
 - form of averment of duress (No. 344), 710.
- notice to be filed with, may state several defenses, 714.
- of infancy of defendant (Form No. 333), 710.
- judgment on, of payment by default for defendant (Form No. 322), 710, note.
- to the jurisdiction, general rules relating to, 653.
 - need not be verified, 653.
 - need not show "better writ," 653.
 - form of (No. 300), 654.
 - when to be filed, 654.
 - judgment on, 655.
 - must show proper *forum*, 666.
- of justification, in action for slander, 191.
 - when, is an aggravation (Form No. 348), 710, note.
 - of libel (Form No. 348), 710.
 - in *quo warranto*, 1132.
 - in forcible entry and detainer, 1214.
- of *nil debet*, general issue in debt, what may be shown under, 693.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

PLEAS, KINDS OF—Continued.

- of *non cepit*, in replevin, 156.
 - in replevin, what may be shown under, 697.
- of *non detinet*, in replevin, what may be shown under, 697.
- of *non damnificatus* (not damaged) (*Form No. 341*), 710.
- non est factum*, when proper in action on specialty, 19.
 - not proper in *assumpsit* on interest coupons; 692, note.
 - what may be shown under, in debt, 693.
 - in covenant, what may be shown under (*Form No. 311*), 694.
- of not guilty, in forcible entry and detainer, raises what issue, 1214.
- of *nul tiel* record, in debt, what may be shown under, 693.
 - not good, to action on bond of appeal, 710.
 - (*Form No. 340*), 710.
 - in *scire facias*, a good defense, 1177.
- of partnership, form of (*No. 330*), 710.
- of payment, form of (*No. 322*), 710.
 - judgment by default upon (*Form No. 322*), 710.
 - burden of proof on (*Form No. 322*), 710, note.
 - proof of partial payment may be shown under (*Form No. 322*), 710, note.
 - may be interposed, in *mandamus*, 1110.
 - in *scire facias*, a good defense, 1177.
 - in distress for rent, 1227.
- of performance (*Form No. 343*), 710.
- puis darrein* continuance, general rules relating to, 752.
 - form of (*No. 356*), 753.
 - practice relating to, 753.
 - effect of, as to defendant, 755.
 - as to plaintiff, 756.
 - judgment and costs on, 758.
- of recoupment, in distress for rent, 1227.
- or notice of recoupment, generally, 730.
 - (*Form No. 354*), 732.
- of release, in action for damages (*Form No. 341*), 710, note.
- of satisfaction, form of (*No. 319*), 710. —
- of self defense, in trespass (*Form No. 345*), 710.
- of set-off, general rules, 721.
 - when to be interposed, 724.
 - in distress for rent, 1227.
- several, of special matter of defense, may be interposed, 700.
- special, notice with general issue equivalent to, 699.
 - when to be interposed, 699.
 - notice of special matter of defense, with general issue, 700.
 - formal parts of, enumerated, 701.
 - general requisites of, 701.
- of statute of frauds, form of (*No. 323*), 710.
 - who only may interpose (*Form No. 323*), 710, note.
- of statute of limitations (*Forms Nos. 325-326*), 710.
- of statute of other states, special, 720.
- of tender, form of (*No. 327*), 710.
 - of part, denial of part, tender of residue (*Form No. 328*), 710.
 - judgment on (*Form No. 328*), 710, note.
 - in distress for rent, 1227.
- of *ultra vires* corporation (*Form No. 324*), 710.
- of usury (*Form No. 337*), 710.
- of want of capacity (*Form No. 329*), 710.
- of want of consideration (*Form No. 331*), 710.
- see "Pleas," etc., other headings.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

PLEAS, FORMS OF:

- see "Pleas, Elements and Rules" and "Pleas, Kinds of" above; also "Pleas in Actions," below.
- of general issue, entire (No. 316), 710.
- note given in satisfaction (No. 319), 710.
- arbitration and award (No. 320), 710.
- former judgment (No. 321), 710.
- for payment, by services (No. 322), 710.
- in money (No. 322), 710.
- statute of frauds (No. 323), 710.
- ultra vires* corporation (No. 324), 710.
- statute of limitations (No. 325), 710.
- to book account (No. 326), 710.
- tender (No. 327), 710.
- denial of part, tender of residue (No. 328), 710.
- want of capacity (No. 329), 710.
- partnership of plaintiff (No. 330), 710.
- for want or failure of consideration (No. 331), 710.
- for gambling debt (No. 332), 710.
- infancy of defendant (No. 333), 710.
- increased risk (No. 334), 710.
- notice of estoppel (No. 335), 710.
- for fraud (No. 336), 710.
- for usury (No. 337), 710.
- for *plene administravit* (No. 338), 710.
- on debt for indemnity bond (No. 339), 710.
- nul tiel* record (No. 340), 710.
- non damnificatus* (No. 341), 710.
- denying false warranty (No. 342), 710.
- conditions performed (No. 343), 710.
- duress (No. 344), 710.
- self defense in action of trespass (No. 345), 710.
- for defending another (No. 346), 710.
- for denial of libel (No. 347), 710.
- for justification of libel (No. 348), 710.
- that accusation is true (No. 349), 710.
- diligence by common carrier (No. 350), 710.
- of *nul tiel* record in *scire facias* (No. 385), 1177.
- of death in *scire facias* (No. 387), 1177.
- of payment in *scire facias*, 1177.
- see "Forms."

PLEAS IN ACTIONS:

- see "Pleas, Elements and Rules," "Pleas, Kinds of" and "Pleas, Forms of," above.
- in assumpsit, general issue, what may be shown under, 692.
- when special, or notice with general issue required, 702.
- in attachment, 344.
- in aid, 350, note.
- in "account," when special plea or general issue required, 705.
- to action on bond, of replevin, 703, note.
- of appeal, 703, note.
- nul tiel* record is bad (Form No. 340), 710, note.
- of guardian, 703, note.
- in case, general issue, what may be shown under, 698.
- when special or notice with general issue required, 706.
- in covenant, general issue, what may be shown under, 694.
- when special or notice with general issue required, 704.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

PLEAS IN ACTIONS—Continued.

- in debt, general issue, what may be shown under, 693.
 - when special or notice with general issue required, 704.
- in ejectment, general issue, form of, 709, note.
 - when special, or notice in, with general issue required, 709.
- to suggestion of damages, 282.
- in *quo warranto*, 1132.
- in replevin, abatement, no property, 680, note.
 - generally, 177.
 - when, to jurisdiction, 653, note.
- general issue, what may be shown under, 697.
 - when special or notice with general issue required, 708.
- to action on bond, must be responsive, etc., 703, note.
- in trespass, general issue, what may be shown under, 695.
 - when special or notice with general issue required, 706.
- in trover, general issue, what may be shown under, 696.
 - when special or notice with general issue required, 707.
- see "Pleas, Kinds of," *supra*.

PLEADING:

- definition of, 475.
- object of, 475, 699, note.
- end of, the issue, 684, 736.
- principles of, generally, 475.
- order and time of, 476.
- time for, in abatement, 675.
- order of, 652.
- in writing, may be dispensed with at any stage of the case, 475.
- to state facts only, 475.
- must sustain the proof, 525.
- How written instrument set forth, 558.
- contingency, must be set forth, 559.
- duplicity in, effect of, 525.
- erroneous, 701.
- double, rules regarding, 715.
- surplussage in, detrimental, when, 701.
- uncertainty in, cured by amendment, 715.
- In forcible entry and detainer, 1214.
- Declaration, upon sealed instrument, generally, 95.
 - in action for cutting trees, 124.
 - in attachment, 343.
 - in trespass, *quare clausum fregit*, possession necessary to support, 114, note.
 - in trespass for injury to animals, 116.
 - in trover, averment of "finding," 136.
 - in action against railroad killing animals, 231, note.
 - in action to recover mesne profits, 280, 281.
 - how to be signed, 547.
- common counts in *assumpsit*, 62.
- in action of account, not required to be formal, 106.
- in attachment, 344.
- in attachment, declaration in, 343.
- in attachment in aid, 350, note.
- in ejectment, plea to suggestion of damages, 282.
- in replevin, 177.
- in action on note, necessary averments, 83.
- in action for false imprisonment, 211.
- a statute in declaration in debt, 561.
- statutes of other states, 720.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

PLEADING—Continued.

- imperfections in, availed of by demurrer, 635.
- choice of, plea in abatement or special motion, 665.
- amendments, generally, 740.
- amendment of, when sworn, 746.
- lost, supplied by amendment, 747.
- new after amendment, when, 746.
- in distress for rent, 1226.
- filing, either in term time or vacation, 548.
- filing declaration, 548.
- on default of defendant, general rules, 623, 624.
- in upper court, writ of error equivalent to declaration of plaintiff in trial court, 1062.
- assignment of cross-errors equivalent to plea of defendant in trial court, 1065.
- see "Declaration," "Pleas," "Averments" and "Requisites."

PLEADING OVER:

- permission for, after judgment on demurrer, 640.
- waiver of right, 640.
- leave to, on demurrer, 737, note.
- waiver by, 737, note.
- see "Amendments."

PLEADING AND PRACTICE:

- in attachment, generally, 342.
- same in appellate and supreme court, 1022.
- see "Practice" and "Pleading."

PLEADING AND PROOF:

- variance between fatal, 819.
- variance in, on "promissory note" not payable in money (*Form No. 122*), 545, note.
- as to time when payable (*Form No. 123*), 545, note.
- must agree in ejectment, 250.
- variance between, in action for tort, 588.
- of statutes of other states, 720.
- agency is the latter, not the former, 596, note.
- see "Evidence" and "Proof."

PLEDGE:

- rights of, in action of trover, 152.
- see "Bailments" and "Trover."

PLENE ADMINISTRAVIT:

- plea of (he has fully administered) (*Form No. 338*), 710.
- form of averment of in special plea or notice with general issue (*No. 338*), 710.
- see "Account."

PLENE COMPUTAVIT:

- plea of, in action of account, 705.

PLURIES WRIT:

- in replevin, 172.
- when may be issued in commencement of suits, 435.
- of *scire facias* on writ of error, issuance of, 1054.
- see "Writs" and "Alias Writs."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

"POINTS IN WRITING:"

to support motion in arrest of judgment, 981.

see "Motions."

POLICY, OF INSURANCE:

who may bring suits on, 13.

action on, how brought, 20, note.

assumpsit upon, generally, 60.

trover will lie for conversion of, 143.

liability of garnishee on, 369, note.

limitations in (*Form No. 325*), 710, note.

see also "Insurance," "Fire Insurance Policy" and "Life Insurance."

POLLING THE JURY:

rule governing, 947.

see "Jury."

POOR PERSON:

commencement of suit by, 431.

see "Plaintiff" and "Commencement of Actions."

POSSESSION:

abandonment of, in action of ejectment, 254.

adverse, as defense to ejectment, 270.

as defense to ejectment by tenant in common, 271.

alone sufficient in action of ejectment, 254.

by agent, sufficient to sustain trespass, 117.

constructive, sufficient to sustain trespass, when, 592, note.

coupled with an interest sufficient to sustain trespass, 117.

demand for, necessary before replevin, when, 166.

in replevin, when unnecessary, 168.

who must make, 167.

must be shown in ejectment, when, 259.

to precede action of forcible entry and detainer, 1210.

for seven years, with payment of taxes, effect on ejectment, 244.

fraud in, effect on action of replevin, 168.

gained through fraud is trespass, 123.

joint, of plaintiffs in action for trespass to land, effect of, 592, note.

length of, will defeat legal title in ejectment, 256.

necessary to support trespass, *quare clausum fregit*, 114, note.

action of trespass, to land, 123.

obtained through fraud, replevin for, 160.

of attached property, release of on forthcoming bond, 331.

expense of caring for, 335.

disposition of, when perishable, 336.

of defendant, must be shown in ejectment, 259.

of officer, in attachment of joint debtor's and partner's interest, 296.

of property, pending suit in replevin, 175.

right of, necessary to sustain trespass, 117.

required to sustain trover, 139.

necessary to maintain replevin, 156.

must be "present," to sustain replevin, 157.

determined in replevin, 178.

replevin cannot be maintained without, 164.

required to support ejectment, 246.

will alone support ejectment, 258.

time of, must be averred in declaration in ejectment, 484.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

POSSESSION—Continued.

- what necessary to sustain action of forcible entry and detainer, 1215, note.
- writ of, in action of ejectment, 278.
- in ejectment, what court may grant, 278.
- officer may summon aid to execute, 278.
- how to be executed, 278.
- see "Custody," "Ejectment" and "Writ."

POSTPONEMENT:

- see "Continuance."

POWER:

- of attorney, in attachment, to dispose of perishable property, 336.
- on instrument under seal, 1231.
- at law, generally, 1252.
- in management of case, 1268.
- of circuit courts, to issue writ of *quo warranto*, *habeas corpus*, and other writs, in vacation, 389.
- of courts, over judgment record, 743.
- of judge in vacation, 9.
- of officer, in serving writs, limited to his jurisdiction, 438.
- in serving process, 439.
- of superior courts, 389.
- see "Courts" and "Jurisdiction."

PRACTICE AND PLEADING:

- in attachment, generally, 342.
- same in appellate and supreme courts, 1022.
- of defendant—See "Proceedings by Defendant" and "Pleading."

PRACTICE IN COURTS OF REVIEW:

- service, in return of process, appearance and notice thereof, 1051.
- when writ of error to operate as *supersedeas*, 1051.
- indorsement of writ of error, filing writ and transcript, return, certificate, 1052.
- to whom writ of error directed, when service unnecessary, return, 1053.
- process on writ of error, *scire facias*, 1054.
- plaintiff's duty to order *scire facias*, notice, continuance, 1056.
- pending writ of error, notice to purchasers and terre-tenants, 1057.
- of what "authenticated copy of record of judgment appealed from" to consist, 1058.
- when cause removed from appellate to supreme court, 1059.
- transcript, clerk may be directed what to include in, 1060.
- when to be filed, placing case on docket, 1061.
- assignment of error, 1062.
- form of (No. 373), 1064.
- assignment of cross-errors, 1065.
- in supreme court, when reversing appellate court decision, 1063.
- joinder in error, effect of omission, 1066.
- time to plead when defendants prefer not to join in error, 1067.
- abstract, preparing and filing, 1068.
- what it shall contain, 1069.
- when to be filed, default, 1070.
- further abstract, 1071.
- brief, preparing and filing, 1072.
- when to be filed, 1073.
- number of copies to be filed, 1074.
- docketing and hearing the case, 1075.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

PRACTICE IN COURTS OF REVIEW—Continued.

- argument of counsel, 1076.
 - none oral, on motion for rehearing, 1077.
 - oral, time allowed for, 1078.
- judgment, general rule, 1079.
 - of affirmance, execution, 1080.
 - of reversal in whole, execution, 1081.
 - of reversal in part, remittitur, execution, 1082.
 - of dismissal, execution, 1083.
- remanding cause, retrial, when unnecessary, 1084.
- when case remanded for retrial, practice, 1085.
- rehearing, petition for, 1086.
 - notice, filing, 1087.
 - no argument permitted in support of petition, 1088.
 - supersedeas* to stay proceedings, 1089.
 - redocketing case, when granted, 1090.
 - record, abstract, brief, and argument, 1091.
 - reply to petition, 1092.
 - closing argument of petitioner, 1093.
 - oral arguments, conclusion, 1094.
- motions, generally, 1095.
- change of venue, 1096.

PRACTICE OF LAW:

- admission to, rule governing, 1233.
 - who entitled to, 1234.
 - how procured, 1235.
 - upon examination, 1236.
 - upon diploma issued by a law school, 1237.
 - oath required (*Form No. 403*), 1240.
 - roll of names, 1241.
 - license, by whom issued, 1242.
 - a judgment of the court, 1243.
 - in United States supreme court, form of oath (*No. 404*), 1244.
 - after suspension or removal, 1251.
 - see "Attorney at Law."

PRÆCIPUE:

- necessary to the commencement of suit, 428.
- form of (*No. 18*), 428.
- for *scire facias* (*Form No. 378*), 1162.

PRAYING APPEAL:

- see "Appeal."

PREACHER:

- when may recover for services, 77.
- see "Pastor" and "Minister."

PREJUDICE:

- as ground for change of venue, 762.
- see "Change of Venue."

PRELIMINARY EXAMINATION:

- of witness, 837.
- see "Proof" and "Witnesses."

PREMATURE ACTION:

- plea in abatement for, 665, note.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

PREPONDERANCE:

definition of, as used in law of evidence, 821.
of evidence only, required in civil cases, 821.

PREMISES:

description of, in declaration in ejectment, 620.
view of, by jury for proof, 893.
see "Abuttals," "Ejectment" and "Proof."

PREROGATIVE WRIT:

mandamus is, 1097.
see "Writ."

PRESENTING EVIDENCE:

general rule regarding, 814.

PRESENTMENT:

avertment of, in declaration on bill of exchange (*Forms Nos. 124, 128*),
545, note.

PRESUMPTION:

as to grounds on which new trial granted, 976, note.
aiding amended bill, 1028, note.
favoring, judgment confessed, 1000, note.
bill of exceptions, 1027.
none regarding instructions not in bill of exceptions, 1027, note.
none when bill of exceptions not signed, 1025, note.
not indulged in favor of statutory cause of action, 85.
of jurisdiction, when, 6.
when not shown in bill of exceptions, 1027, note.
of notice to defendant in supreme court, 628, note.
of partnership of plaintiffs, 19.
of title in action of ejectment from possession of deed, 252.
raised by law requires no proof, 820.
regarding affidavits not in bill of exceptions, 1027, note.
regarding correctness of verdict, 949.
regarding gratuitous services, 75.
regarding judgment by confession, 997, note.
regarding jurisdiction, 653.
regarding time of signing, sealing and filing bill of exceptions.
1027, note.
regarding withdrawal of appearance, 1267.

PREVIOUS DEMAND:

to suit unnecessary when judgment confessed, 624.
see "Demand."

PRICE OF GOODS:

assumpsit to recover, 71.

PRIEST OR MINISTER:

as a witness, rule regarding, 831.
see "Proof" and "Witnesses."

PRIMA FACIE CASE:

how made out, 821.
what proof required to make, 818.
see "Proof."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

"PRIMARY EVIDENCE:"

- definition of, 858.
- proof of contents of documents by, 858.
- see "Evidence" and "Proof."

PRINCIPLES OF PLEADING:

- generally, 475.
- see "Pleading."

PRINTED ABSTRACT:

- of evidence.
- see "Abstract of Evidence."

PRINTED BRIEF:

- see "Brief."

PRIORITY OR LIENS:

- created by judgment, 1006.
- see "Judgments" and "Liens."

PRIORITY OF SERVICE:

- of writ in attachment, 322.
- see "Attachment" and "Liens."

PRISONER:

- discharge of, held on *capias*, by *habeas corpus*, 455.
- on *habeas corpus*, when ordered, 1152.
- when not ordered, 1153.
- remanding, on *habeas corpus*, order, 1155.

PRIVATE CORPORATIONS:

- service of process upon, 441.
- mandamus* will lie to, when, 1104.
- see "Corporations."

PRIVATE WAY:

- declaration in case for obstructing (*Form No. 272*), 616.

PRIVILEGE:

- of attorneys, regarding testimony, 832.
- generally, 1252.
- from arrest, 1253.
- from serving as jurors, 1254.
- examination of records, etc., 1255.
- of parties in interest, may testify, when, 825.
- may not testify, when, 826.
- of witness, general rule regarding, 825.
- as to crimination, may be waived, 834.
- not compelled to criminate himself, 834.
- waiver of, by party interested, 833.
- of witness, 834.
- by client of communication with attorney, 1257.

PRIVILEGED COMMUNICATIONS:

- definition of, 189.
- in slander, 189, note.
- what, in slanderous words, 189, note.
- will not sustain libel, 194.
- of physician or surgeon, 830.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

PRIVILEGED COMMUNICATIONS—Continued.

- of minister or priest, 831.
- of attorney and client, 832.
- may be waived by party, 833.
- between attorney and client, rule governing, 1257.
- extends to documents, 1257.
- ends with death of client, 1257.
- to whom it extends, 1257.
- see "Evidence" and "Proof."

PRIVITY OF CONTRACT:

- necessary to *assumpsit*, 67.
- necessary to sustain "debt," 90.
- see "Contracts" and "Cause of Action."

"PROBABLE CAUSE:"

- want of, in malicious prosecution, 199.
- and malice, must concur in malicious prosecution, 201.
- proof of, in malicious prosecution, 202.
- what is, in malicious prosecution, 202.
- malice inferred from want of, 203.
- must be shown to procure writ of *habeas corpus*, 1144.
- see "Malicious Prosecution" and "Malice."

PROCEDENDO:

- powers of supreme court to issue in vacation, 7, note.
- see "Writ."

PROCEDURE:

- by plaintiff when unsuccessful at trial, general rule, 961.
- by defendant when unsuccessful at trial, general rule, 961.
- see "Practice."

PROCEEDINGS:

- of defendant, desiring not to appear and defend, 622.
- where plaintiff's cause of action admitted, default, 623.
- desiring not to appear and defend, paying money into court, 625.
- cognovit, 624.
- tender, 626.
- when plaintiff replies to plea in abatement, 678.
- after replication, etc., 735.
- where plaintiff in default, 757.
- when plaintiff absent, default, 798.
- to have case stricken from short cause calendar, 784.
- of plaintiff, when plea in abatement filed, replication, 677.
- after plea filed, replication, similiter, 733, 734.
- after sur-rejoinder, etc., of defendant, 735.
- in absence of defendant, default, 801.
- amendment of, on an appeal from justices' court, 419.
- stay of, by *certiorari* to justice, 401.
- to obtain review, general rules, 1013.
- see "Practice."

PROCEEDS:

- application of, on sale in garnishment, 383.
- distribution of, after judgment in attachment, 349.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

PROCESS:

- of law, general requirements of, 426.
- issuance of, is the commencement of suit, 432.
- purchase of, necessary to commencement of suit, 433.
- protects officer serving it, when, 436, note.
- legal, trespass for damages received under color of, 115
- trespass for injury under color of, 129.
- unlawful seizure under, replevin for, 163.
- service of, who may make and when, 436.
- where to be made, 438.
- how made, 439.
- when cannot be made, 437.
- by officer, must be within his jurisdiction, 438.
- upon partnership, how made, 440.
- upon private corporation, publication, 441.
- upon receiver, 442.
- in attachment, on joint debtors, 296.
- in garnishment, 357.
- exemption from, what persons have, 437.
- insufficient, how corrected, 448.
- return of, when served on corporation, 441.
- declaration must correspond with, 480.
- on writ of error, *scire facias*, 1054.
- see "Summons," "Writ" and "Service."

PROCHIEM AMI:

- how appointed, 23.
- when necessary as plaintiff, 23.
- in case of insanity or idiocy, 25.
- for commencement of suit, powers, etc., 498.
- appearance of, in defense, 628.
- see "Next Friend."

PROCTOR:

- definition of, 1231.
- see "Attorney at Law."

PRODUCTION:

- of books and papers before auditors in action of account, 106.
- of documents, on notice, when required, 863.
- of subpoena *duces tecum*, 865.
- exception to disobedience to order, 865.
- when excused, 866.
- how offered in evidence, 867.
- when court cannot order, 1276, note.
- of papers on notice, etc., declaration in case for neglect (*Form No.* 274), 617.
- see "Documents" and "Proof."

PROFERT:

- in declaration abolished (*Form No.* 138), 545, note.
- of specialty need not be made, 557.
- see "Oyer."

PROFESSION:

- negligence in practice of, declaration in case for (*Forms Nos.* 253-255), 610.
- slander regarding, declaration in case for (*Form No.* 287), 619.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1278.]

PROFESSIONAL SERVICES:

assumpsit to recover for, 77.

PROFESSIONAL SKILL:

amount necessary to sustain recovery, 77.

see "Assumpsit."

PROFITS:

mesne, recovery of in ejectment, 279, 280.

suggestion of in ejectment (*Forms Nos. 293-294*), 620.

recoverable in action of account, 101.

rents and, recovery of, in ejectment, 279, 280.

see "Rents and Profits," "Suggestion of Damages" and "Ejectment."

PROHIBITION:

writ of, definition and nature of, 1116.

demand must precede, 1116.

when a proper proceeding, 1116.

how obtained, practice, 1119.

circuit court may issue, when, 389.

petition for, must be verified, 1119.

contents of, 1119.

at what stage of proceedings, to issue, 1119.

rules of practice at common law govern when, 1119.

may be obtained when, examples, 1120.

will not lie to restrain executive, 1121.

service and return of, 1122.

judgment on, 1123.

costs on, 1009, note; 1010, note.

and injunction compared, 1117.

and mandamus compared, 1118.

see "Writs."

PROMISE:

collateral, what action will lie upon, 90.

implied, for beneficial services, when, 75.

corporation may make, 86.

in declaration, illustrated, 489.

when necessary to aver, 517.

subsequent averment of, in declaration (*Form No. 112*), 545, note.

time of, must be stated in declaration, 517.

what necessary to, 54.

see "Agreement" and "Contract."

"PROMISED:":

necessary averment in declaration in debt, 503, 526, note.

see "Declaration" and "Debt."

"PROMISED" OR "AGREED:":

use of, in declaration of assumpsit or debt, 553.

see "Declaration," "Assumpsit" and "Debt."

PROMISSORY NOTE:

plaintiff in action on, 13.

who to sue on when assigned, 20.

who to make defendant when assigned, 35.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

PROMISSORY NOTE—Continued.

- declaration on, in assumpsit, payee against maker (*Form No. 112*), 545.
- indorsee against maker (*Form No. 113*), 545.
- second (or subsequent) indorsee against maker (*Form No. 114*), 545.
- indorsee against payee or other indorser (*Form No. 115*), 545.
- holder against maker and indorsers (*Form No. 116*), 545.
- payable at particular place, payee against maker (*Form No. 117*), 545.
- payable in installments, all due (*Form No. 118*), 545.
- not all due (*Form No. 119*), 545.
- payable to bearer (*Form No. 120*), 545.
- surviving payee against maker (*Form No. 121*), 545.
- see "Notes," "Bills of Exchange" and "Negotiable Instruments."

PROOF:

- elements of, —.
 - when to be offered, general rule, 814.
 - order in which to be made, 815.
 - exhausting witnesses and subject, 815.
 - order of offering where there are several defendants, 817.
 - what required to be made generally, 818.
 - must follow pleading, 818.
 - need not be made of surplusage, 818.
 - required where there are several counts, 818.
 - must not be variant from pleading, 819.
 - strict, required, when contract set out in *haec verba*, 819.
 - need not be made of what law presumes, 820.
 - preponderance of, only required in civil cases, 821.
 - beyond a "reasonable doubt" not required in civil case, even on proof that defendant is guilty of a crime, 821.
 - degree and quality required generally, 821.
 - "tending to establish" must be received, 821.
 - "best" must be offered, 821.
 - when court may refuse to receive further, 821.
 - need not be made if facts not disputed, 822.
 - need not be made of things generally known, judicial notice, 823.
 - when parties in interest may make, 825.
 - when party in interest may not make, 826.
 - when partners, joint contractors, etc., may not testify, 827.
 - may not be made by agent, when, 826, 827.
 - when husband and wife may not make, 828.
 - may be made by children, when, 829.
 - may be made by physician or surgeon, 830.
 - how made, redirect examination, 881.
 - may be made by minister or priest, when, 831.
 - examination in chief, 840 to 873.
 - "admissions" as, generally, 847.
 - may be made by attorney, when, 832.
 - witness not compelled to criminate himself, 834.
 - where refusal to answer is evidence against witness, 835.
 - whether compulsory answer in evidence against witness, 836.
 - best must be produced, 846.
 - how memoranda used, 848-849.
 - two witnesses sufficient to prove a fact, 845.
 - number of witnesses required to make, 845.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

PROOF—Continued.

- elements of, showing entries in book, 850.
- how made, by maps, charts, plans, photographs, etc., 853.
- all made by one witness, on both direct and cross-examination taken together, 880.
- how made, evidence in rebuttal, 883.
- impeaching witnesses, 885.
- form of question on impeachment of witness, 885.
- impeaching testimony not primary evidence, 886.
- cross-examination of impeaching witness, 887.
- supporting witnesses, generally, 888.
- cross-examination of sustaining witness, 889.
- number of witnesses necessary, 890.
- objections to, and exceptions to rulings thereon, 894.
- foreign statute as, objection to, when to be made, 895, note.
- objection to, ruling of court on, 896.
- objection to, the exception, 897.
- striking out and withdrawing, power to, 898.
- how introduced after case closed, 904.
- election of counts on which to make, 905.
- contradicting assignment of note, 13.
- what, necessary in action on contract by several plaintiffs, 19.
- what, joint plaintiffs may make, 19, note.
- to support action for goods sold, 71.
- memorandum book as, of labor contract, 74.
- must follow pleading in ejectment, 250.
- pleading must be sustained by, 525.
- under plea of payment, partial payments may be shown (*Form No. 322*), 710, note.
- under general issue, 691.
- requisite in crim. con. cases, 606, note.
- error in admission of, ground for new trial, when, 974.
- what, attorney may make for client, 1257, 1261.
- burden of, rules regarding, 820.
- in action for destroyed chattel balled, 75, note.
- in trespass for injury to animal, 118.
- in suit on replevin bond, 181.
- of diligence, in negligence cases, 220.
- on plaintiff in ejectment, 247.
- on trial of interplea, 364.
- on garnishee to establish exemption, when only, 368.
- in garnishment, upon plaintiff, 371.
- on issue on garnishee's answer, 372.
- regarding sufficiency of bail, 457.
- in action on bond, in *capias* cases, 471, note.
- on plea, of payment (*Form No. 322*), 710, note.
- of want of consideration (*Form No. 331*), 710, note.
- of set-off, 820, 722, 726, note.
- of reconpment, 731, note.
- of justification, 820.
- when plea verified, 711.
- on replication, 820.
- when new promise pleaded, 820.
- when payment pleaded, 820.
- when satisfaction pleaded, 820.
- when release pleaded, 820.
- when license pleaded, 820.
- when fraud pleaded, 820.
- when estoppel pleaded, 820.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

PROOF—Continued.

- burden of, when statute of limitations pleaded, 820.
 - when exemption pleaded, 820.
 - when duress pleaded, 820.
 - when infancy pleaded, 820.
 - on an affirmative plea, 820.
 - on intervention in attachment, 820, note.
 - on *quo warranto* proceedings, 1132, 1135, 820, note.
 - of fraud in award on arbitration, 1193.
 - of fairness between attorney and client, 1269, 1275.
 - of attorney's undertaking, 1274.
- by books, must be book of original entry, 852.
 - scientific, 854.
 - statutes of this state, 855.
 - statutes of other states, 856.
- by documents, how made, 858, 859, 860, 867.
- by inspection or view, 891.
 - in court, 892.
 - out of court, 893.
- by receipts for money, are *prima facie* only, 869.
- in action, of account, 104.
 - for breach of promise, 218.
- in ejectment, of demand, when to be shown, 259.
 - of defendant's possession, when to be shown, 259.
 - of lease, entry, and ouster, need not be made, 260.
 - by landlord against tenant, 263.
- for false imprisonment, 211.
- for fire escaping from an engine, 818, note.
- of forcible entry and detainer, 1215.
- of libel, of retraction, 196.
- for malicious prosecution, 818, note.
- of slander, 818, note.
- of trespass, of provocation, 115.
- in crim. con. case, of intercourse, 606, note.
- in civil cases, preponderance only required, 821.
- in defense, of action of account, 705.
 - when to be offered, 815.
- in justification of slander (*Form No. 340*), 710, note.
- of bodily injury, by inspection in court, 892.
- of color of title, in action of ejectment, 253.
- of contents of documents, how made, generally, 857.
 - how made by primary evidence, 858.
 - how made by attested copies, 859.
 - how made by secondary evidence, 860.
- of corporate existence, 658.
- of crime in civil case, made by preponderance, 821.
- of damages, in action of replevin, 179.
 - in malicious prosecution, 203.
- of description, when required, 818.
- of diligence in negligence cases, 220.
- of due care of plaintiff in negligence cases, 223.
 - when required to be made, 818.
- of duty performed, in negligence cases, 220.
- of emancipation of child, 23, note, 39.
- of "existence" of written instrument, how made, 846.
- of fraud, alleged as ground for attachment, 311.
 - absence of proof of fairness of attorney to client construed as, 1275.
- of gratuitous services, when required, 75.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

PROOF—Continued.

- of handwriting, how made, 859, note.
- of inducement, when required, 818.
- of location, when required to be made, 818.
- of malice in slander, 187, 191.
 - may be made by showing want probable cause, 203.
 - in action for malicious prosecution, 607, note.
- of negligence in action against municipal corporations, 228.
- of number, variance in, 819, note.
- of oral agreement, how made, 870.
- of ordinances, how made, 855.
- of pecuniary circumstances, proof of in trespass, 115.
- of possession alone sufficient in action of ejectment, 254-255.
- of probable cause in malicious prosecution, 202.
- of property in plaintiff in replevin, 208.
- of publication of notice in attachment, 338.
- of rules of court must be made, 797, note.
- of sales without books, 851.
- of signature, how made, 859, note.
- of title, when necessary, in action of trespass to land, 123.
- of time, variance in, 819, note.
 - when required to be made, 818.
- of value of service on labor contract in writing, 74.
 - of extra services, 73, note.
- of professional services, 77.
- of written instrument, how made, 846.
- of words spoken in action for slander, 192.
- variance in, question of law for the court, 819.
 - cured by amendment, 819.
 - as to name of party, 819, note.
 - regarding amount of money, 819, note.
 - of contents of note, 819, note.
 - of time, 819, note.
 - of description, 819, note.
 - of number of animals, 819, note.
 - of defendant's name, what is not, 819, note.
 - objection to be made, 895.

PROOF AND PLEADING:

- in actions for torts, 588.
- of statutes of other states, 720.
- variance between, fatal, 819.
 - see "Pleading."

PROPER JURY:

- want of, ground for new trial, 966.
 - see "Jury."

PROPERTY:

- description of, necessary in affidavit for replevin, 171.
- disposition of, by sale in garnishment, 383.
- exempt, replevin for, demand unnecessary, 166.
 - cannot be attached, 326.
- held in trust, not susceptible of garnishment, 360.
- identification of, not required in trover, 142.
- in custody of law not susceptible of garnishment, 360.
- inventory of, in levy of replevin, 175.
- jurisdiction of, necessary in garnishment, 362.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

PROPERTY—Continued.

- negligence to, trespass on case for, 231.
- of married women, law regarding, 22.
- passes on conditional sale, when, 144.
- perishable, disposition of, in distress for rent, 1230.
- power of counsel to dispose of, 1268, note.
- possession of, pending suit in replevin, 175.
- redemption of, condemned in garnishment, 383.
- return of, judgment for in replevin, 178.
- special, force of in action of trover, 152.
- subject to lien in garnishment, execution on, 380.
- execution on, in garnishment, plaintiff may perform conditions.
when, 381.
- see "Chattels" and "Land."

PROPOSITIONS OF LAW:

- findings on trial by the court, 958.
- exceptions to, 959.
- two ways of correcting, 960.
- how review of, obtained, 960.
- submitted to court, review of findings on, 960.
- to be submitted to court, 958.
- see "Instructions."

PROSECUTION:

- see "Malicious Prosecution."

PROTECTION:

- of witness from insolent examination of counsel, 841.
- see "Proof" and "Witnesses."

PROVINCE:

- of court, to apply the law, 911-912.
- what are questions of law, 912.
- regarding questions of libel, 915.
- cannot weigh evidence, 916.
- of court and jury, general rule, 910.
- on mixed questions of law and fact, 915.
- of jury, to determine weight of evidence, 821.
- to determine credibility of witnesses, 914, 821.
- to determine questions of fact, 913.
- to determine the case when any evidence tends to support it, 922.
- to determine what facts proven, 930.
- to weigh evidence, 916.
- sufficiency of evidence, 901.
- regarding questions of libel, 915.
- limited to fact proved, 917.
- must not be instructed as to matters within, 930.

PROVOCATION:

- proof of, in action for trespass, 115.
- as a defense in action of trespass, 115.

PROXIMATE CAUSE OF INJURY:

- act of plaintiff must not be, 223.
- see "Negligence" and "Damages."

PROXIMATE CONSEQUENCE:

- damages must be, 524.
- see "Negligence."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

PUBLIC ENEMY:

act of, excuses breach of contract, 61.
see "Assumpsit" and "Action."

PUBLIC HIGHWAY:

liability of public for use of (*Form No. 270*), 615, note.
land in, recoverable in ejectment, 242.
ferocious dog may be killed on, 118.
turning animals in, 127.
see "Highway" and "Street."

PUBLIC OFFICER:

may not be held as garnishees, 362.
commencement of declaration in case of, 499.
see "Officers."

PUBLIC POLICY:

bets are against, *assumpsit* will recover, 65.
see "Assumpsit," etc.

PUBLIC WAY:

see "Highway."

PUBLICATION:

service of process on corporation by, 441.
in good faith, no libel, 195.
in newspaper, in good faith, is not libel, 196.
declaration in case for (*Form No. 280*), 618.
of award on arbitration, 1189.
of libel, averment of, necessary in declaration (*Form No. 277*), 618,
note.
of notice, when attachment writ not personally served, 338.
proof of, in attachment, 338.
retraction of, corrects libel when, 196.
service by, in forcible entry and detainer, 1213.
service of writ of *scire facias* by, 1163, 1173.
see "Service" and "Notice."

PUIS DARREIN CONTINUANCE:

plea of, general rules relating to, 752.
practice relating to, 754.
effect of, as to defendant, 755.
effect of, as to plaintiff, 756.
judgment and costs on, 758.
see "Pleas."

PUNITIVE DAMAGES:

recoverable in trespass, when, 114.
in action on replevin bond, 182.
recoverable in action for malicious prosecution, 205.
see "Exemplary Damages" and "Damages."

PURCHASE OF PROCESS:

necessary to commencement of suit, 433.

PURPOSE:

of bill of exceptions, 1021.
of bond in replevin, two-fold, 173.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

PURPOSE—Continued.

of the writ of *certiorari*, 392.
of *scire facias*, 1162.

See "Process" and "Commencement of Actions."

PURCHASER:

innocent, trover will not lie in case of, 144.
notice to, on writ of error, 1057.

Q.

QUALIFICATION OF JURORS:

general rule, 804.
relationship disqualifies, 806, note,
interest in subject matter disqualifies, 806, note.
see "Jury."

QUALITY:

averment of, in action for injury to land, 583.
see "Averment" and "Requisites."

QUALITIES OF PLEAS:

in abatement, 672.
see "Plea" and "Abatement."

QUANTITY:

averment of, in declaration in action for tort, 583.
see "Averment" and "Declaration."

QUANTUM MERUIT:

in actions of *assumpsit*, 60.
count, in *assumpsit*, 62.
form of (No. 42), 507.
see "Assumpsit" and "Declaration."

QUANTUM VALEBANT:

count, in *assumpsit*, 62.
form of (No. 43), 508.
see "Declaration" and "Assumpsit."

QUARE CLAUSUM FREGIT:

declaration in trespass, stating many injuries (Form No. 201), 592.
see "Trespass."

QUASH:

motion to, writ of possession in ejectment, 278.
forcible entry and detainer, 1214.
see "Dissolution" and "Motions."

QUESTIONS OF FACT:

when negligence is, 221.
to be determined by jury, 913.
what are, 914.
finding on, final in appellate court when, 1019.
findings on, "differently," etc., entitles party to review in supreme court, 1020.

QUESTION OF LAW:

when negligence is, 221.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

QUESTIONS OF LAW—Continued.

- for court to determine, 911.
- what is, 912.
- findings on trial by the court, 958.
 - exceptions to, 959.
 - how reviewed, 960.
 - two ways of correcting, 960.
- "of such importance, etc.," review of granted in supreme court:
 - when less than a thousand dollars involved, 1019.

QUESTION OF LAW AND FACT:

- mixed, to be determined by court or jury, 915.

QUESTION FOR JURY:

- see "Province of Jury."

QUESTIONS TO JURY:

- see "Special Verdict."

QUO WARRANTO:

- writ of, circuit court may issue, 9, 389.
- burden of proof in, 820, note.
- origin, definition and nature, 1124.
- information in the nature of, competent for what, 1124.
 - when it may be filed, 1125.
 - who may file, 1126.
 - leave to file, how asked, counter-showing, 1127.
 - requisites of, 1129.
 - construed as a declaration, 1129.
 - what not sufficient, 1129, note.
 - defendant must plead or demur, 1132.
 - replication and rejoinder, demurrer, 1133.
 - extension of time to plead in, 1134.
 - issues and trial of, 1135.
 - judgment, ouster, fine, costs, 1136.
 - review of, 1137.
- when it may issue, 1125.
- at whose instance it may issue, 1126.
- names of parties to proceedings, 1128.
- style of, 1129.
- amendment in proceedings by, 1129.
- summons on, when returnable, 1130.
 - how served, 1131.
- defendant must plead or demur, 1132.
- judgment in, by default, how entered, 1132.
- judgment on ouster, fine, costs, 1136.
- review of judgment on, 1137.
- and *mandamus* compared, 1098.

R.

RABBITS:

- liability for trespass of, 128.
- see "Animals."

RAILROAD COMPANY:

- declaration in case against, for negligence in running train across:
 - highway (*Form No. 217*), 599.
 - for not ringing bell, etc. (*Form No. 219*), 599.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

RAILROAD COMPANY—Continued.

- declaration in case against, for negligence regarding escape of fire
(*Form No. 220*), 599.
- for not fencing road (*Form No. 221*), 599.
- for not maintaining cattle guards (*Form No. 222*), 599.
- for negligence to passenger (*Form No. 223*), 599.
- for injury to person by collision (*Form No. 224*), 599.
- by an administrator for negligence causing death (*Form No. 218*), 599.
- duty of, to give warning of approaching train, 220.
- to fence road, 231.
- in regard to fire from engine, 231.
- liable for assault and battery by employee, 213.
- liability of, for killing stock, 118.
- for injury to stock, 231.
- to sound whistle or ring bell, 118.
- trespass to, form of declaration (*No. 202*), 592.
- see "Negligence" and "Trespass on the Case."

RAILROAD CROSSING:

- is itself warning of danger, 223.

RATIFICATION:

- of trespass of officer by plaintiff, 129.
- of submission to arbitration by partner, 1181, note.

READINESS TO PERFORM:

- avermment of, in declaration illustrated, 489.
- in declaration, 518.
- see "Averments" and "Declaration."

READING BOOKS:

- in argument of counsel, 854.
- see "Argument of Counsel" and "Opening Statement."

READING DOCUMENTS TO JURY:

- rule regarding, 811.
- see "Argument of Counsel."

READING LAW TO JURY:

- counsel not permitted, 907.
- see "Argument of Counsel."

REAL ACTIONS:

- what are, 50.
- who to be defendants in, 41.
- attachment is to certain extent, 293.
- see "Actions" and "Land."

REAL ESTATE:

- definition of, 122, 1003, note.
- plaintiffs in action concerning, 13.
- who to sue for damages to, 26.
- of married women, plaintiffs in action for damages to, 27.
- defendants in actions concerning, 41.
- assignee of, when liable for nuisance, 45.
- trespass to, waiving and suing in assumpsit, 58.
- what is, 121.
- for injury to, 121.
- title to, tried by ejectment, 238.
- see "Land" and "Ejectment."

[The references are to sections: Vol. I., §§ 1-737; Vol. II., §§ 738-1276.]

REBELLION:

see "War."

REBUTTAL EVIDENCE:

in what it consists, 883.

REBUTTER:

rules relating to, 735.

RECALLING WITNESSES:

to correct testimony, 884.

see "Witnesses" and "Proof."

RECEIPTS:

for money, how contradicted, 869.

see "Evidence" and "Proof."

RECEIVER:

when to be plaintiff, 24.

of national bank, how to sue, 24, note.

in garnishment, power of court to appoint, 384.

of corporation, service of process upon, 442.

what plea not proper in suit begun by, 658, note.

see "Assignees."

RECITALS:

in bond of replevin, 173.

see "Bond" and "Replevin."

RECOGNIZANCE:

forfeited, recoverable in "debt," 89.

debt will lie upon, 92.

of witnesses, in *habeas corpus*, penalty for omission, 1154.

see "Bail" and "Bond."

RECOLLECTION:

refreshing, of witness rule regarding, 848, 849.

see "Witnesses" and "Proof."

RECORD:

abstract of, privilege of attorney to make, 1255.

amendment of, power of court in term time, 6.

after term, 9, note.

after judgment, 743, 1058.

after term, how made, 743.

procured by writ of *certiorari*, 1044.

continuance for procuring, 1058.

costs, terms, 1058, note.

by trial court, 1058, note.

supersedeas no obstacle to, 1058, note.

bill of exceptions becomes part of, when, 1026.

certiorari will issue to compel clerk to send up true one, 1044, note.

correcting, bill of exceptions cannot be used for, 1023.

diminution of, suggestion, practice, 1058, note.

suggestion of, and issuance of *certiorari* to amend, 1044.

examination of, privilege of attorney in, 1255.

filing, in appellate or supreme court on appeal, 1035.

how exception preserved upon, 897.

lost, *certiorari* will not issue to supply, 1044, note.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

RECORD—Continued.

- lost, how supplied after appeal perfected, 1058, note.
- objection that papers are improperly incorporated, 1058, note.
- of court, entire, only brought up by *certiorari*, 393.
 - of what it consists, 1023.
 - privilege of attorney in examining, 1255.
- of judgment appealed from, authenticated copy, of what it must consist, 1058.
- on rehearing in upper court, 1091.
- original papers in, rule governing, 1058, note.
- placita* cannot be added to, by bill of exceptions, 1023.
- rulings of court, no part, 772.
- transcript of, of what to consist, 1058.
 - certificate of authentication, 1058.
 - bond must be copied in, 1058, note.
 - costs of sending to upper court, 1058, note.
 - all files and orders must be copied, 1058, note.
 - original bill of exceptions may be incorporated into, 1026, note, 1058, note.
 - of what to consist when cause removed from appellate to supreme court, 1059.
 - voluminous, costs, 1060.
 - clerk may be directed what to include in, 1060.
 - when to be filed, 1061.
- warrant of attorney to confess judgment, becomes part of, 998.
- when amended bill of exceptions becomes part of, 1028.

RECORDING TITLE:

- will not interrupt possession, ejectment plaintiff, 257, note.
- see "Ejectment" and "Outstanding Title."

RECORDING VERDICT:

- rule regarding, 948.
- see "Verdict."

RECOURSE:

- definition of, 730.
- in action for breach of contract, 60.
- and set-off, distinguished, 721.
- compared, 730.
- how made available, 731.
- plea or notice of generally, 729.
- burden of proof on, 731, note.
- surety may avail himself of, 731, note.
- plea or notice of (*Form No. 354*), 732.
- in distress for rent, 1227.
- compare "Set Off."

RECOVERY:

- how extent of, determined, 721.
- in an action of debt, 94.
- in action of trover, amount of, 152.
- in action of breach of promise, 218.
- in action for negligence, what will sustain, 223.
- amount of in covenant, 98.
- when interest included in action of trespass or trover, 119.
- extent of, in action of trespass to land, 121.
- of damages in replevin, 178.
- of penalty on *habeas corpus*, 1161, note.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276]

RECOVERY—Continued.
 of attorney's fees, in suit on replevin bond, 182.
 in suit on replevin bond, 182.
 for improvements by defendant in ejectment, 286.
 right of, waived by withdrawal of counts, 525.
 see "Judgment."

RE-CROSS EXAMINATION:
 of witness a consequent right, 882.
 see "Witnesses" and "Proof."

RECRIMINATION:
 no defense in action of "crim. con.," 216.
 see "Criminal Conversation."

REDELIVERY BOND:
 action on, 334, note.
 see "Attachment" and "Bond."

REDEMPTION:
 equity of, attachable, when, 295.
 of property condemned in garnishment, 383.
 see "Attachment" and "Garnishment."

RE-DIRECT EXAMINATION:
 of witness, for what purpose allowable, 881.
 see "Witnesses" and "Proof."

REDOCKETING CASE:
 when rehearing granted, 1090.
 see "Practice."

REFEREE:
 definition of, 1198.
 appointment of, his power, etc., 1199.
 notice of hearing before, 1199.
 must reduce testimony to writing, 1200.
 continuance of hearing before, 1200.
 powers of, 1200.
 trial by, compelling attendance, oaths, 1200.
 need not be sworn, 1200.
 record when case referred to, 1204.
 report of, exceptions to, hearing, etc., 1199.
 rule governing, 1201.
 form of, dismissing the action (*No. 392*), 1201.
 generally (*No. 393*), 1201.
 in action for negligence (*No. 394*), 1201.
 exceptions to (*No. 395*), 1202.
 exceptions to, rules governing, 1202.

REFERENCE:
 definition of, 1198.
 of matter in suit to arbitrators, 1183.
 similar in law and in chancery, 1199.
 what is not, 1199, note.
 form of stipulation to make (*No. 390*), 1199.
 form of order of (*No. 391*), 1199.
 judgment on, of issue to referee, 1203.
 the record, when made to referee, 1204.

[The references are to sections: Vol. I., §§ 1-737; Vol. II., §§ 738-1276.]

REFORMING VERDICT:

power of jury in, 943.

see "Verdict."

REFRESHING RECOLLECTION:

of witness, rule regarding, 848-849.

see "Witness" and "Proof."

REFRESHMENTS:

jury allowed, when, 943.

see "Jury."

REHEARING:

in upper court, petition for, 1086.

petition for, who may make, 1086.

notice of filing, 1087.

no argument permitted to support a petition for, 1088.

record on, 1091.

brief upon, 1091.

argument upon, 1091.

abstract of evidence, 1091.

reply to petition, 1092.

closing argument of petitioner, 1093.

oral arguments, conclusion, 1094.

at subsequent term, 1095, note.

costs on, 1095, note.

redocketing case when granted, 1090.

see "Practice in Appellate and Supreme Court."

REINSTATEMENT OF CAUSE:

stricken from docket, 800.

see "Practice."

"REJOIN DOUBLE:"

obtaining leave to, 733, note.

REJOINDER:

rules relating to, 735.

may be to several matters, 735.

in *quo warranto*, 1133.

may be double, by permission, 733, note.

of defendant, conclusion of, in plea in abatement, 678.

to replication to plea in abatement, 678.

see "Pleading."

RELATION OF ATTORNEY AND CLIENT:

must exist, that communication be privileged, 1257.

ends with completion of act to be performed, 1268.

rules of principal and agent apply, 1268.

liabilities and duties of former to latter, generally, 1269.

in collection of money, 1271.

in the purchase of land, 1272.

liability of former to latter in management of case, 1270.

compensation, 1274.

former trustee of latter, when, 1269.

implied agreement of latter to compensate former, 1274.

proving retainer, 1275.

see "Attorney at Law."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

RELATION OF LANDLORD AND TENANT:

necessary to support distress for rent, 1221.

when it exists, 1221, note.

see "Tenant" and "Landlord," etc.

RELATOR:

plaintiff in *mandamus*, 1106.

plaintiff in *quo warranto*, 1128.

RELEASE:

burden of proof regarding, 820.

may be shown under general issue, 692.

of attached property, on forthcoming bond, 331.

on bond to pay judgment, 332.

form of forthcoming bond, 333.

proceedings when bond not returned or not sufficient, 334.

of defendant from arrest on *capias*, 456.

of errors, by warrant of attorney and confession of judgment, 624.

of property, bond for, on distress for rent, 1229.

plea of, in action for damages (*Form No. 341*), 710, note.

RELIGIOUS ASSOCIATIONS:

limitation of power, 2, note.

RELIGIOUS CORPORATIONS:

under what name to sue, 13, note.

RELIGIOUS SOCIETIES:

not interfered with by *mandamus*, generally, 1098, note.

REMANDING CAUSE:

to trial court, retrial, when unnecessary, 1084.

by appellate court, practice, appeal, 1084, note.

for retrial, practice, 1085.

REMANDING ORDER:

transcript of, when to be filed, 1085.

REMANDING PRISONER:

on *habeas corpus*, order, 1155.

see "Practice," etc.

REMARKS OF COUNSEL:

reviewed only by aid of bill of exceptions, 1023.

see "Argument of Counsel."

REMARKS OF JUDGE:

during trial not "instructions," 924.

see "Instructions."

REMEDIES:

choice of, for goods sold and delivered, 71.

to collect fine, penalty, or forfeiture, 87.

when debt preferable, 88, 89, 90.

when "covenant" especially proper, 97.

for tenants in common to land, 101, 102.

action of account or bill in chancery, 110.

trespass or case, 114, 135, 183.

for injury to property, 117.

trespass or trover, 119.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

REMEDIES—Continued

- trespass or trover, at suit of tenants in common, 117.
- trespass and replevin, 120.
- waiver of tort and suing in *assumpsit*, 132.
- trover or trespass, 137.
- trespass, not trover, for injury to crops by animals, 148.
- replevin or trespass, 155.
- trover preferable to replevin, for grain in warehouse, 164.
- replevin or trover, 593.
- for property taken on tax levy, 165.
- for injury to property, 231.
- for goods sold on misrepresentation, 233.
- "case," preferable when and why, 237.
- ejectment or case, 260.
- for injury to highway, 242.
- ejectment or forcible entry and detainer, 240, 263.
- attachment or garnishment, 355.
- of stockholder's interest, 297.
- certiorari*, or appeal, or writ of error, 393, 1038.
- assumpsit* or case, 595.
- appeal or writ of error, 1031, 1038.
- mandamus* or injunction, 1097, note.
- mandamus* or writ of error, 1090.
- mandamus* or *quo warranto*, 1098.
- mandamus* or indictment to remove obstruction to highway, 1102.
- prohibition or injunction, 1117.
- prohibition or *mandamus*, 1118.
- scire facias* or *quo warranto*, to try legality of corporation, 1167.
- concurrent, trespass and case, 135.
- mandamus* and another, 1108.
- forcible entry and detainer, or writ of possession under decree, 1207, note.
- on right of action given by statute, 85. *1*
- selection of, on contracts, 55, 56.
- see "Actions."

REMITTITUR:

- in attachment, 347.
- in upper court, on judgment of reversal in part, 1082.
- surplusage of judgment over *addamnum* clause, cured by, 524.
- where verdict too great, 992.
- see "Judgment."

REMOVABLE FIXTURES:

- may be subject of replevin, 156.

REMOVAL:

- as grounds for attachment, 309, 310.
- by *certiorari*, who may procure, 395.
- when it may be obtained, 396.
- how obtained, petition, 397.
- from premises, ground for distress for rent, 1222.
- of attorney from practice, effect of, 1250.
- of causes, from justice's court by *certiorari*, 391.
- of causes, by appeal from justice, 409.
- of crops, distraint though rent not due, 1220.
- see "Attachment."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

RENDERING JUDGMENT:

is a judicial act, 900.

see "Judgment."

RENT:

definition of, 510.

action for, *assumpsit* proper, when, 48.

assumpsit to recover, 80.

when to be brought on lease, 81.

terminated by forcible entry and detainer, 1216, note.

assignment of, who to sue for, 24, note.

declaration in common counts will not lie to recover, 510.

declaration for in covenant, by lessor against lessee (*Form No. 164*), 575.

by lessor against assignee of lessee (*Form No. 166*), 575.

by heir of lessor against lessee, for rent, etc. (*Form No. 167*), 575.

by devisee of lessor against lessee (*Form No. 168*), 575.

distress for, classification of action, 50.

definition, nature and history, 1220.

right of, when not waived, 1220.

maintainable only when rent due, when, 1220.

security for costs to be given by non-resident plaintiff, 1220.

what property may be distrained, 1221.

may be made against sub-lessee or assignee, 1221.

when a trespass, 1221, note.

when landlord may make, 1222.

when must be begun, 1222.

abandonment or removal, ground for, 1222.

before rent due, ground for, 1222.

release of right, limited to rent then due, 1221, note.

how proceedings begun, warrant, inventory, 1223.

tender of amount due destroys right to, 1222, note.

form of warrant (*No. 400*), 1223.

who may levy, 1223.

form of inventory (*No. 401*), 1223.

summons, issuance and return (*Form No. 402*), 1224.

notice to non-residents, 1225.

pleading, practice, 1226.

set-off in, 1227.

recoupment in, 1227.

plea of payment in, 1227.

judgment for plaintiff in, 1228.

effect of, when defendant served, 1228.

effect of, when defendant not served, 1228.

on defendant's set-off, 1228.

release of property by giving bond, 1229.

perishable property, disposition of, 1230.

parties plaintiff in action for, 575, note.

RENTS AND PROFITS:

recovery of, in ejectment, 279, 280.

see "Suggestion of Damages."

REOPENING:

case after evidence all in, 904.

see "Proof."

REPAIRS:

landlord may make forcible entry to make.

declaration in covenant, for failure to make (*Form No. 165*), 575.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

REPLEADER:

- motion for, ground for, what is, 963.
- when the proper proceeding, 963.
- new trial obtained by, 963.

REPLEVIN:

- action of, how classified, 50, 112.
- nature of, 155.
- who to bring when chattels assigned, 28.
- does survive, 29.
- no bar to trespass, when, 120.
- when to be begun, 169.
- where to be brought, 170.
- when concurrent with trespass, 120.
- how begun, 155.
- when it will lie, generally, 156.
- officer may maintain, when, 156.
- title necessary to support, 157.
- by vendee, when title has passed, 158.
- for injury to goods sold on condition, title to remain in vendor, 159.
- for distress of cattle, damage feasant, 162.
- for goods sold, title not to pass, etc., 159.
- for goods, possession obtained through fraud, etc., 160.
- on rescission of sale of goods, tender necessary, 160.
- for goods delivered by mistake, 160.
- by and against co-tenant, partner, 161.
- for distress of cattle, damage feasant, 162.
- against officer, for unlawful seizure under process, 163.
- when it will not lie, generally, 164.
- wrongful detention necessary to sustain, 164.
- identification of property necessary to, 164.
- when demand necessary before suit, 166.
- when demand unnecessary, 168.
- demand in, who must make, 167.
- affidavit in, 171.
- form of, 171.
- must contain description of property, 171.
- must be sworn to, 171, note.
- made on information and belief, 171, note.
- the writ, 172.
- bond in, 173.
- return of bond with writ, 174.
- bond of indemnity in, 175.
- execution of writ in, 175.
- pleading in, 177.
- amendments in, 177.
- judgment in, fixes right of parties, 178.
- verdict, 178.
- suit on bond, 180.
- will lie for goods sold on misrepresentation, 233.
- will not lie for attached property by claimant, 345.
- declaration for, general rules, 582.
- form of (*No. 203*), 593.
- plea in, when to jurisdiction, 653, note.
- general issue, what may be shown under, 697.
- to action on bond, must be responsive, etc., 703, note.
- avowry in, rules regarding, 708.
- justification in, 708.
- special plea in, or notice with general issue, when required, 708.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1270.]

REPLEVIN—Continued.

- costs in, 1010, note.
- review of, in appellate and supreme courts, 1019, note.
- review of findings of appellate court conclusive in supreme court, 1020, note.
- of fee bill, taxation of costs on, 1038, note.
- when costs improperly taxed, 1012.
- and trover, counts in, may be joined, 707, 708.
- choice of remedies, 593.
- bond of, debt will lie upon, 92.
- action on, 180.
- value of property as stated in, 171.
- plea to, must be responsive, etc., 703, note.
- judgment in, 182.
- purpose of, 173.
- form of (No. 3), 173.
- return of, with writ, 174.
- declaration against sheriff in case, for taking insufficient (*Form No. 260*), 612.
- writ of, duty of warehouseman upon service of, 138.
- will protect officer, when, 163, note.
- execution of, 175.
- construction service upon non-residents, et al., 176.
- see "Writ."

REPLICATION:

- burden of proof on 820.
- demurrer to, "general" (*Form No. 297*), 637. -
- "special" (*Form No. 298*), 637.
- general rules, 738.
- judgment on, 738, note.
- form of (*No. 355*), 733.
- in *quo warranto*, 1133.
- may be several matters, 735.
- may be double by permission, 733, note.
- of plaintiff to plea in abatement, 677.
- to defendant's plea, 733.
- rejoinder to, when to plea in abatement, 678.
- striking from files, 733, note.
- to plea in abatement by plaintiff, 677.
- when to be verified, 677.
- how should conclude, 677.
- walver of, 733, note, 737, note.
- see "Pleading."

REPLY BRIEF:

- in upper court rule governing, 1072, note.
- see "Practice."

"REPLY DOUBLE:"

- obtaining leave to, 733, note.
- see "Replication."

REPORT:

- of auditors in action of account, 109.
- of commissioners on assessment of value of improvements in effectment, 287, 288.
- of referee, rules governing, 1201.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

REPORT—Continued.

- of referee, form of, dismissing the action (No. 392), 1201.
 - generally (No. 393), 1201.
 - in action for negligence (No. 394), 1201.
- exceptions to, rules governing, 1202.
 - hearing, etc., 1199.
- form of exceptions to (No. 395), 1202.

REPRESENTATIVE CHARACTER:

- averment of, in commencement of declaration, rule regarding, 498.
 - see "Declaration."

REPUTATION:

- damages to, action on the case for, 184.
- of witness, impeachment, 885.

REQUEST:

- what is equivalent to, 73, note.
- necessary averment of, in declaration for money paid to defendant's:
 - use (*IX*). 510.
- averment of, in declaration, 520.
 - see "Demand."

REQUISITES:

- of award on arbitration, 1189.
- of bill of exceptions, 1023.
- of cause of action, what are, 52.
- of declaration, must contain all necessary facts, 481.
 - must aver facts with certainty, 482.
 - the names of parties, 483.
 - averment of time, etc., 484.
 - must aver place or location, 485.
 - must aver cause of action, 486.
 - necessary averments, variance, amendments, 487.
 - in case, 595.
- of information in *quo warranto*, 1129.
- of judgments generally, 897.
- to support motion for continuance, 793.

RES:

- jurisdiction of, 4.

RES ADJUDICATA:

- matters decided in supreme court, 7.
- when cases decided in appellate court are, 8.
- when trespass bars replevin, 120.
- non-suit is not in replevin, 181.
- how far judgment in ejectment is, 277.
- what is not when several counts joined in declaration, 525, note.
- as a defense (*Form No. 321*), 710, note.
 - see "Conclusiveness of Judgment."

RESCISION OF CONTRACT:

- when allowable for fraud, 69.
 - see "Contracts" and "Assumpsit."

RESIDUARY LEGATEE:

- may maintain action of account, 100.

[The references are to sections: Vol. I., §§ 1-737; Vol. II., §§ 738-1276.]

RESPONDEAT OUSTER:

- judgment of, on demurrer, 640.
- on plea to jurisdiction, 655.
- on plea in abatement, 681.

RESPONDENT:

- which party is, 12.
- party defendant in *mandamus*, 1107.
- defendant in *quo warranto*, 1128.
- see "Parties" and "Defendants."

RESTITUTION:

- writ of, in action of ejectment, 278.
- form of, in forcible entry and detainer (No. 398), 1218.

RESTRAINT:

- unlawful, is false imprisonment, 209.
- see "Arrest" and "False Imprisonment."

RESTRICTION:

- of appearance of defendant in suit, 631.
- see "Appearance, Special."

RETAINER AND APPEARANCE:

- of attorney not necessary, party may manage his own case, 1244, 1268, note.
- client's right to counsel, 1264.
- contract of retainer, 1265.
- death ends contract of, 1265.
- appearance, generally, 1266.
- withdrawal of appearance, substitution of attorney, 1267.
- proving retainer, 1275.
- see "Attorney at Law."

"RETAINING LIEN:"

- possessed by attorney for services, 1276.
- see "Attorney at Law."

RETRACTION:

- of libel, notice to make, 196.
- of publication, corrects libel when, 196.
- see "Libel."

RETRIAL:

- of case remanded, practice, 1085.
- when unnecessary, 1084.
- see "Practice."

RETURN:

- by special deputy, verified by affidavit, 445.
- of bond for release of attached property, 334.
- enforcement of, 447.
- how contradicted, 446.
- impeachment of, 446.
- of justice on appeal, 416.
- of process, in attachment in aid, proceedings on, 353.
- when served on corporation, 441.
- on writ of error, 1055.
- of property, judgment for in replevin, 178.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

RETURN—Continued.

- of replevin bond with writ, 174.
- of sheriff questioned by plea in abatement, 665, note.
- of summons, what constitutes, 436.
 - aided by intendment, 444.
 - form of, "not found" (No. 21), 444.
 - generally (Nos. 21-22), 444.
 - form of, "found" (No. 22), 444.
 - should be signed, 444.
 - what sufficient, 444, note.
 - served on corporation, 444, note.
 - by deputy or special deputy, 445.
 - how impeached, 446.
 - how enforced, 447.
 - how amended, 448.
 - to show cause in *mandamus*, rule, 1109.
 - in *quo warranto*, 1130.
 - in distress for rent, 1224.
- time of summons in commencement of suit, 434.
- erroneous, gives no jurisdiction, 435.
- traverse of, how issue raised, 446.
- of writ, when erroneous, no ground for setting aside default, 802, note.
 - of attachment, personally served, 329.
 - of error, 1053.
 - when to operate as *supersedeas*, 1052.
 - of garnishment, 358.
 - of *habeas corpus*—producing the body, 1150.
 - form, 1150.
 - proceedings on, generally, 1151.
 - of prohibition, enforceable by attachment, 1122.
 - of *scire facias*, to foreclose a mortgage, what necessary to support default, 1173.
- insufficient, how corrected, 448.
- amendment of, 448, 748.
- summons, when may be made without leave of court, 436.
 - see "Service" and "Writ."

REVENUE:

- jurisdiction of supreme court in, 7.
- cases relating to, appeal taken direct to supreme court, 1017.
- what are, 1017, note.

REVERSAL:

- wrong name of plaintiff ground for, 19.
- of judgment, for using individual names of incorporators, 13, note.
 - effect of, in action of trover, 154.
 - in supreme court, not for mere error in form, 743, note.
 - for want of cross-examination, when, 874.
 - for remarks of judge, when, 924.
 - plaintiff may procure, 1014, note.

REVERSIONER:

- who may sustain action of trespass to land, 123.

REVIEW:

- by appeal, who may take to appellate or supreme court, 1030.
 - when there are several parties, 1030.
 - when may be taken to appellate or supreme court, 1031.
 - cannot be of *habeas corpus* proceedings, 1039.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

REVIEW—*Continued.*

- by *certiorari*, to justice's court, 393.
- from appellate of supreme court, general rule, 1043.
- from appellate or supreme court, when it may be obtained, 1044.
- from what court it may issue, 1045.
- the procedure, 1046.
- form of petition (*No. 371*), 1047.
- assignment of errors not necessary, 1048.
- hearing and placing same on calendar, 1049.
- judgment, 1050.
- by writ of error, when procured, generally, 1036.
- in what cases may be procured, 1038.
- when it cannot be procured, 1039.
- cannot be of *habeas corpus* proceedings, 1039.
- within what time it may be procured, 1041.
- in appellate and supreme court, can be had of final judgments only, 1013.
- cannot be had of interlocutory orders, 1013, note.
- who may obtain, 1014.
- two methods of obtaining, 1015.
- in what tribunal may be had, 1016.
- when cause taken from trial court to supreme court, cases enumerated, 1017.
- when cases taken from trial court to appellate court, 1017.
- in supreme court, how procured from appellate court when ordinary rules not applicable, 1019.
- when by supreme court after appellate court, 1019.
- when by *certiorari*, when cases reviewed by appellate and supreme court, 1019, note.
- when not by supreme court after appellate court, 1020.
- how procured after time for appeal expired, 1031.
- cannot be had on *habeas corpus* proceedings, 1039.
- only procured on final judgments, 1039.
- of arbitration and award, 1197.
- of attachment proceedings, 354.
- of evidence, procured only by bill of exceptions, 844, 1021.
- how alone obtained, 894.
- of findings of the court, how obtained, 960.
- of forcible entry and detainer cases, 1019, note.
- of *habeas corpus* not granted, 1158.
- of interlocutory judgments and orders, procured only by aid of bill of exceptions, 1023.
- of judgment, extent, general rule, 1000.
- of opening statement of counsel, 813.
- of proceedings, on *mandamus*, 1114.
- to disbar attorneys, 1251.
- of *quo warranto*, appeal or writ of error, 1137.
- of *replevin*, in appellate and supreme court, 1019, note.
- finding of appellate court conclusive on supreme court, 1020, note.
- of rules and orders, 779.
- of ruling, on motion for continuance, 794.
- of rulings on motions, procured only by aid of bill of exceptions, 1023.
- of selection of jury, 809.
- of what may be procured, 1013.
- practice in courts of, when writ of error to operate as *supersedeas*, 1051.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

REVIEW—Continued.

- practice in courts of, indorsement of writ of error, filing writ and transcript, return, certificate, 1052.
- to whom writ of error directed, when service unnecessary, return, 1053.
- process on writ of error, *scire facias*, 1054.
- service and return of process, appearance and notice thereof, 1055.
- plaintiff's duty to order *scire facias*, notice, continuance, 1056.
- pending writ of error, notice to purchaser and terre-tenants, 1057.
- of what "authenticated copy of record of judgment appealed from" to consist, 1058.
- when cause removed from appellate to supreme court, 1059.
- transcript, clerk may be directed what to include in, 1060.
- when to be filed, placing case on docket, 1061.
- assignment of error, 1062.
- form of (*No. 373*), 1064.
- assignment of cross-errors, 1065.
- in supreme court, when reviewing appellate court decision, 1063.
- joinder in error, effect of omission, 1066.
- time to plead when defendant prefers not to join in error, 1067.
- abstract, preparing and filing, 1068.
- what it shall contain, 1069.
- when to be filed, default, 1070.
- further abstract, 1071.
- brief, preparing and filing, 1072.
- when to be filed, 1073.
- number of copies to be filed, 1074.
- docketing and hearing the case, 1075.
- argument of counsel, 1076.
- none oral on motion for rehearing, 1077.
- oral, time allowed for, 1078.
- judgment, general rule, 1079.
- of affirmance, execution, 1080.
- of reversal in whole, execution, 1081.
- of reversal in part, remittitur, execution, 1082.
- of dismissal, execution, 1083.
- remanding cause, retrial, when unnecessary, 1084.
- when case remanded for retrial, practice, 1085.
- rehearing, petition for, 1086.
- notice, filing, 1087.
- no argument permitted in support of petition, 1088.
- supersedeas* to stay proceedings, 1089.
- redocketing case when granted, 1090.
- record, abstract, brief and argument, 1091.
- reply to petition, 1092.
- closing argument of petitioner, 1093.
- oral arguments, conclusion, 1094.
- motions, generally, 1095.
- change of venue, 1096.
- powers of appellate court, 8.
- proceedings to obtain, general rule, 1013.
- see "Practice in Appellate and Supreme Court."

REVIVAL OF EXECUTION:

- by *scire facias*, after seven years, 1164.
- see "Scire Facias" and "Judgment."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

REVIVAL OF JUDGMENT:

- by *scire facias*, 1163.
- form of writ (*No. 379*), 1163.
- unnecessary in behalf of the people, 1163.

REWARD:

- recovery of, declaration in *assumpsit* for, offered by advertisement for discovery of offender (*Form No. 89*), 535.

RIDING:

- and driving against plaintiff, declaration in trespass for (*Form No. 186*), 590.

RIGHT:

- equitable, not reached by garnishment, 359.
- legal, reached by garnishment, 359.
- of appeal, joint defendant not entitled to on his default, 995.
- did not exist at common law, 1013.
- of custody of children, determined by writ of *habeas corpus*, 1141.
- of counsel, possessed by client, 1264.
- of officer, in *capias* cases, 457, note.
- of parties on trial of suggestion of damages, 284.
- of possession, necessary to sustain trespass, 117.
- necessary to sustain ejectment, 246.
- will alone support ejectment, 258.
- must be "present" to sustain replevin, 157.
- replevin cannot be maintained without, 164.
- necessary to maintain replevin, 156.
- determined in replevin, 178.
- of recovery, waived by withdrawal of counts, 525.
- of trial by jury, 803.
- or interest of plaintiff, averment of, in declaration for tort, 584.
- under constitution guaranteed, applicable in attachment, 294.
- what cannot be reached by garnishment, 360.
- writ of, when *habeas corpus* is, 1145.

RIPARIAN OWNER:

- rights of, in replevin, 156.

RISK:

- of employment assumed by employé, 225.
- see also "Insurance."

ROADWAY:

- see "Private Way" and "Highway."

ROLL OF ATTORNEYS:

- where and how kept, 1241.
- power of court to strike name from, 1246.
- striking name from, opportunity to be heard must be given, 1248.
- complaint or information, 1249.
- effect of, 1250.
- restoration after, 1251.
- see "Attorney at Law."

RULES:

- classification of "common" and "specials," 771.
- absolute, when granted, 771.
- how rule *nisi* made, 777.
- when granted in first instance, 778.

[The references are to sections: Vol. I, §§ 1-787; Vol. II, §§ 788-1276.]

RULES—Continued.

- are not "records," 772.
- and orders, how impeached in review, 779.
- nisi*, when granted, 771.
 - when granted, generally, 769.
 - how made absolute, 777.
 - when not needed, rule absolute in first instance, 778.
- of construction regarding attachment, 292.
- "of course," what understood by and when granted, 769.
- of court, authority to make, 6.
 - when should not be changed, 6, note.
 - powers of supreme court to make over, 7.
 - power of appellate court to make, 8.
 - county court may make, 10.
 - must be proved, 797, note.
- to plead instant, meaning of, 719.
- to show cause in proceedings to disbar attorneys, 1249.
- see also "Motions."

RULINGS:

- exceptions to, on motion for new trial in ejectment, 277, note
- see "Orders" and "Judgments, Interlocutory."

RULINGS OF COURT:

- on evidence, objection and exception to, 894.
- on objection to evidence, 896.
 - silence construed as against objection, 896.
- on evidence, review of, how procured, 1021.
- on motion for new trial, no part of record unless by bill of exceptions, 1023.
- see "Judgments, Interlocutory," and "Orders."

RULINGS ON MOTIONS:

- reviewed only by aid of bill of exceptions, 1023.
- see "Motions" and "Judgments."

"RUNNING WITH THE LAND:"

- who may sue on such covenant, 35.

S.

SABBATH:

- what constitutes, 437.
- see "Sunday."

SALE:

- conditional, when *assumpsit* will lie upon, 71, note.
- replevin for goods sold on, 159.
- condition of, of goods, trover to recover for breach of, 144.
- and delivery of goods, statement of cause of action for (I), 510.
- declaration in case for fraud in (*Forms Nos. 230-242*), 605.
- in garnishment, application of proceeds of, 383.
- equitable power of court relating to, 384.
- of crops to defendant, declaration in *assumpsit* for (III), 510.
- of fixtures, form of declaration for (IV), 510.
- of goods, rescission of contract for, 71.
- assumpsit* to recover price of, 71.
- for cash payment, a precedent to title, 158.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

SALE.—*Continued.*

- of goods, action on the case for false statements made on, 233.
- declaration for in *assumpsit* (*Forms Nos. 90-97*), 536.
- of perishable property, on distress for rent, 1230.
- on execution, in garnishment, garnishee with lien may take title, 385.
- not vitiated by *certiorari*, 402.
- proof of, by books, 850.
- without books, 851.

SALARY:

- and wages, declaration in common counts for (*XX*), 510.
- see "Wages."

SERGEANT:

- office of, practically abolished, 1231.
- see "Attorney at Law."

SATISFACTION:

- burden of proof regarding, 820.
- form of averment of, in special plea, or notice with general issue (*No. 319*), 710.
- of judgment, authority of counsel to make, 1268.
- see "Accord and Satisfaction."

SAVING EXCEPTIONS:

- to evidence, 844.
- see "Exception."

SCIENTIFIC BOOKS:

- as evidence, 854.
- see "Documents."

SCHOOL BOARD:

- see "Trustees of Schools."

SCHOOL DISTRICT:

- how to be sued on contract, 33.
- treasurer, *mandamus* will lie to, when, 1102.
- see "Municipal Corporation."

SCHOOL LAND:

- who may recover for damages to, 26, note.

SCHOOL MISTRESS:

- slander of, declaration in case for (*No. 285*), 619.

SCHOOL OFFICERS:

- mandamus* will lie to, when, 1105.
- see "Officers."

SCIRE FACIAS:

- writ of, to collect forfeiture, 87.
- and debt, concurrent remedies, when, 89.
- attachment in aid of, 352.
- to make default judgment final in garnishment, 376.
- circuit court may issue, 389.
- to bring in co-partner, 440, note.
- cannot be procured against bail in civil cases, 474.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

SCIRE FACIAS—Continued.

- writ of, barred by keeping tender good (*Form No. 328*), 710, note.
- costs on, 1009, note, 1010, note.
- on writ of error, 1054.
- plaintiff's duty to order, notice, continuance, 1056.
- præcipe* for, form of (*No. 378*), 1162.
- origin, nature and purpose of, 1162.
- to revive a judgment, 1163.
- service of, by publication, 1163.
- to revive a judgment (*Form No. 379*), 1163.
- changing name of plaintiff by amendment, 1163, note.
- to revive execution after seven years, 1164.
- considered as a summons and nothing more, 1165.
- to make defendants not served with process parties to a judgment, 1165.
- to make party to judgment, attachment may be sued out in aid of, 1165.
- in justice's court, form, 1165, note.
- defense, 1165, note.
- (*Form No. 380*), 1165.
- trial on, before justice of the peace, 1165, note.
- to collect special assessments, 1166.
- to try legal existence of corporation, 1167.
- against sureties, defense to, 1168.
- on bond of appeal (*Form No. 382*), 1169.
- against bail, 1168.
- (*Form No. 381*), 1168.
- against a garnishee (*Form No. 383*), 1170.
- to foreclose a mortgage, general rule, 1171.
- (*Form No. 384*), 1171.
- no declaration required, 1172.
- formal requisites, 1172.
- service of, publication, 1173.
- defenses to, 1174.
- judgment, 1175.
- is a proceeding *in rem*, 1175.
- special execution, lien, 1176.
- pleadings on, generally, 1177.
- plea of "*nul tiel record*" to (*Form No. 385*), 1177.
- of payment to (*Form No. 386*), 1177.
- of death to (*Form No. 387*), 1177.
- judgment on, damages, costs, 1178.
- execution on judgment, 1179.
- see "Writ."

SEAL:

- county courts have, 10.
- of court, what it designates, 2.

SEALED CONTRACT:

- assumpsit* on, 59.
- debt a proper form of action, 92.
- see "Actions."

SEALED INSTRUMENT:

- action of covenant upon, 95.
- see "Actions."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

SEALED NOTE:

assumpsit, generally, 60.

SEALED VERDICT:

rule governing, 945.

see "Verdict."

SEALING BILL OF EXCEPTIONS:

rule regarding, 1025.

see "Bill of Exceptions."

SECOND APPEAL:

to appellate court, practice, 1084, note.

see "Appeal" and "Practice."

SECOND SUIT:

prevented by *supersedeas* on writ of error, 1051, note.

"SECONDARY EVIDENCE:"

definition of, 860.

proof of contents of documents by, 860.

see "Evidence."

SECURITY FOR COSTS:

when required before commencing suit, 430.

form of (*No. 19*), 430.

when need not be given, 431.

dismissal of writ of error for want of, 1055, note.

to be given in distress for rent by non-residential plaintiff, 1220.

see "Costs" and "Commencement of Actions."

SEDUCTION:

plaintiffs in action for, when interest assigned, 28.

who may sue for injury occasioned by, 31.

action on the case for, 214.

declaration for in case (*Form No. 251*), 608.

see "Trespass."

SEIZIN:

see "Covenant Of."

"SEIZIN IN HIS DEMESNE AS OF FEE:"

effect of averment, 577, note.

SEIZURE:

of property in time of war, 4, note.

under process, unlawful replevin for, 163.

see "Levy" and "Service."

SELECTION:

of remedies on contracts, 55, 56.

of jury, challenges, 806.

SELF DEFENSE:

justification of trespass, when, 115.

when assaulted by animal, 118.

when trespassing animal may be killed, 127, note.

form of averment of, in special plea or notice with general issue,

(*No. 345*), 710.

plea of, in trespass (*Form No. 345*), 710.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

SENDING JURY BACK:

- to find special verdict, 955.
- motion for, when error in special verdict, 957.
- see "Jury."

SERGEANT AT LAW:

- definition of, 1231.
- see "Attorney at Law."

SERVANT:

- master liable for tort of, when, 41.
- enticing away, action on case for, 215.
- becomes trespasser, when, 229.
- negligence of, action on case for damages caused by, 229.
- declaration in case against, for careless driving (*Form No. 212*), 597.

SERVICES:

- and labor, declaration common counts for (*VI*), 510.
- of horses, carriages, etc., declaration in common counts for (*VIa*), 510.
- professional, *assumpsit* to recover for, 75.
- professional, *assumpsit* to recover for, 77.
- value of, proof of, in *assumpsit*, 77.
- proof of, in action on contract, 74.
- see "Averments" and "Declaration."

SERVICE:

- by publication of *scire facias*, 1173.
- in forcible entry and detainer, 1213.
- of notice of motion, affidavit of (*Form No. 357*), 773.
- of process, in attachment on joint debtors, 296.
- in attachment, insufficiency of, grounds for dissolution, 341.
- personally, its effect upon judgment in attachment, 346-347.
- who may make, and when, 436.
- when cannot be made, 437.
- by officer, must be within his jurisdiction, 438.
- where to be made, 438.
- how made, 439.
- upon partnership, how made, 440.
- upon private corporations, publications, 441.
- upon receiver, 442.
- upon municipal corporations, 443.
- insufficient, how corrected, 448.
- on writ of error, 1055.
- of summons, necessary to jurisdiction, 436.
- cannot be made by party to suit, 436.
- by deputy officer, 436.
- upon married woman, 436.
- who may make, and when, 436.
- calculation of time, 436, note.
- on foreign corporation, 436, note.
- cannot be made on Sunday, 437.
- who exempt from, 437.
- when to be made, 438.
- how made, 439.
- upon partnership, how made, 440.
- in *quo warranto*, how made, 1131.
- in forcible entry and detainer, publication, 1213.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

SERVICE—Continued.

- of summons, in distress for rent, 1224.
 - see "Service of Process."
- of warrant, in distress for rent, who may make, 1223.
- of writ of attachment, when to be made, 320.
 - priority of, in attachment, 322.
 - on defendant personally, return, 329.
 - effect of death of defendant after, 330.
 - of garnishment, 357, 358.
 - of *capias*, 455.
 - of error, when unnecessary, 1053.
 - of *mandamus*, 1111.
 - of prohibition, 1122.
 - of *habeas corpus*, who to make, 1148.
 - how made, 1149.
 - of *scire facias*, by publication, 1163.
 - to foreclose a mortgage, publication, 1173.
 - liability of attorney relating to, 1263.
- personal, of writ of attachment on defendant, return, 329.
 - of writ of attachment, 337.
 - upon a city, how made, 443.
 - upon a county, how made, 443.
 - upon a town, how made, 443.
 - upon a village, how made, 443.
 - see "Writ, Execution of."

SET-OFF:

- general rules, 721.
- nature of, 721.
- not allowed in "case," 287.
- in trial of suggestion of damages in ejectment, 284.
- bill of particulars of, 726.
 - may be demanded, 646.
- in attachment, 344, 724.
- should be claimed by garnishee in answer, 370.
- cannot be made of unliquidated damages, 370.
- pleaded specially in *assumpsit*, 702.
 - in debt, 703.
- and recoupment, distinguished, 721.
 - compared, 730.
- burden of proof on, 722, 726, note.
 - regarding, 820.
- not compulsory 723.
- estoppel, when not interposed, 723.
- what susceptible of, 724.
- when to be made, 724.
- in ejectment, 724.
- statute of limitations does not bar, when, 724, note.
- waiver of right to, 724, note, 726, note.
- copy of instrument or account to accompany, 725.
- notice of (*Form No. 353*), 726.
 - rules regarding, 726.
- dismissal of suit after notice of, 727.
- trial of, 728.
 - by defendant where plaintiff in default, 798.
- judgment on trial of, 728.
 - in distress for rent, 1228.
- demurrer to replication to, effect of overruling, 738, note.
- in distress for rent, 1227.
 - see "Plea."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

SETTING ASIDE:

- rules and orders, 779.
- motion for, continuance, 794.
- appearance entered by mistake, 629.
- award, time to make motion for, 1195.
- effect of, 1196.
- default, affidavit to support motion for, 802.
- not for erroneous return, 802, note.
- judgment, must show cause and be made at same term, 978.
- by confession, what court has the power, 999.
- practice, 999.
- affidavit in support of motion for, 999.
- entered on verdict, practice, 1007.
- against several, 1007, note.
- order for is not itself a judgment, 1007, note.
- does not set aside verdict, 1007, note.
- verdict, in action of trover, 153.
- cause must be shown for, at the same term, 978.
- not for defective count, 948, note.
- not effected by setting aside judgment, 1007, note.
- see "Motions."

SETTLING BILL OF EXCEPTIONS:

- rule regarding, 1025.
- see "Exceptions" and "Bills of Exceptions."

SEVEN YEARS' POSSESSION:

- with payment of taxes, effect on ejectment, 244.
- see "Adverse Possession."

SEWER:

- construction of, compelled by *mandamus*, when, 1104.

SHAFTING:

- liability for, when not boxed, 41.

SEVERAL PLEAS:

- of special matter of defense may be interposed, 700.
- in same cause may be filed, 714.
- see "Pleas."

SHEEP:

- killed by a dog, who liable for, 43.
- no joint action for injury to, 44.
- trespass for chasing, declaration (*Form No. 194*), 591.
- see "Animals."

SHERIFF:

- suit for use of, on replevin bond, 180.
- may summon help to execute writ, when, 278.
- may serve summons, when, 436.
- declaration in case against, for false return (*Form No. 258*), 612.
- for not levying (*Form No. 259*), 612.
- for taking insufficient bond in replevin (*Form No. 260*), 612.
- see "Officers."

SHERIFF'S BOND:

- debt will lie upon, 92.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

SHERIFF'S FEES:

presumed to be paid by party requiring him, 1012.

SHERIFF'S RETURN:

questioned by plea in abatement, 665, note.

see "Return."

SHIPS:

dockage of, declaration in common counts for (XXII), 510.

SHOOTING DOG:

declaration for, in trespass (*Form No. 195*), 591.

declaration in case (*Form No. 237*), 603.

SHORT CAUSE CALENDAR:

duty of clerk to prepare, 782.

how case placed upon, 783.

affidavit for placing case on (*Form No. 358*), 783.

proceeding to have case stricken from, 784.

day to be set aside for trial of, 785.

trial to occupy one hour only, 786.

continuances of, 787.

SHOW CAUSE ORDER:

defense to, 775.

SHOW CAUSE SUMMONS:

in *mandamus*, when returnable, 1109.

to issue on writ of prohibition, when, 1119.

to issue against garnishees, when, 1170.

in proceedings to disbar attorneys, 1249.

SICKNESS:

see "Illness."

SIDE WALKS:

action on the case for injuries caused by, 228.

SIGNATURE:

how made, 859, note.

added to affidavit for attachment by amendment, 315.

of affiant, should be affixed to affidavit, 171, note.

of officer, administering oath necessary to affidavit, 171, note.

to declaration, who may affix, 547.

to plea in abatement by attorneys, 674, note.

SIGNING BILL OF EXCEPTIONS:

rule regarding, 1024.

compelled by *mandamus*, 1099, note.

see "Bill of Exceptions."

SIMILITER:

to plea in trespass, 695.

form of, 734.

rules relating to, 734.

admission by, 734, note.

SETTING ASIDE DISMISSAL:

of appeals from justice's court, 422.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

SKILL:

professional, amount necessary to sustain recovery, 77.
see "Services" and "Assumpsit."

SLANDER:

who to join as plaintiffs in action for, 27.
plaintiffs in action for, when interest assigned, 28.
action abates at death of plaintiff, 29.
abates with death of wrong doer, 46.
defendants joined in action for, 44.
oral, number and classification of, 185.
for words actionable in themselves, 186.
justification of, 187.
may be shown under plea of general issue, 698.
words not actionable in themselves may become so, 187.
words actionable in themselves, when not, 188.
words charging adultery, 190.
of title to land, 189.
privileged communications in, 189, note.
accusing one of false swearing is, 190, 191.
accusing female of want of chastity is, declaration in case for (*Form No. 286*), 619.
presumption of malice in, 191.
accusation of perjury is, 191.
and libel distinguished, 194.
declaration in case for (*Forms Nos. 282-291*), 619.
regarding profession, declaration in case for (*No. 287*), 619.
imputing dishonesty, declaration in case for (*Forms Nos. 283-289*), 619.
imputing insolvency, declaration in case for (*No. 290*), 619.
in foreign language, declaration in case for (*Form No. 291*), 619.
truth of words must be specially pleaded, 698.
proof in action for, 818, note.
husband may testify for wife in, 828.
see also "Libel."

SLAUGHTER HOUSE:

declaration in case for nuisance in keeping (*No. 231*), 601.
see "Nuisance."

SLIGHT NEGLIGENCE:

what is, 222.
see "Negligence."

SMALLNESS OF DAMAGES:

ground for new trial when, 973.
see "New Trial."

SOCIETIES:

under what name may sue, 13.
religious, not interfered with by *mandamus* generally, 1098, note.
see "Corporations."

SOLICITOR:

definition of, 1231.
see "Attorney at Law."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

SOURCE OF TITLE:

in action of ejectment, 251.
for what may be shown in forcible entry and detainer, 1215.
see "Ejectment" and "Forcible Entry and Detainer."

SOUNDING WHISTLE:

willfully, is negligence when, 220.
see "Railroads" and "Negligence."

SPARKS FROM ENGINE:

liability of railroad for, 231.
see "Negligence" and "Railroads."

SPECIAL APPEARANCE:

to move to quash an attachment allowed, 292.
in attachment, effect of, 340.
after appeal from justice's court, 417.
of defendant, not sufficient to give jurisdiction, 439.
how made, 631.
of counsel, rules governing, 1266.
see "Appearance."

SPECIAL ASSESSMENTS:

collected by *scire facias*, 1166.

SPECIAL ASSUMPSIT:

what is, 54.
see "Assumpsit."

SPECIAL BAIL:

in *capias* cases, 456.
proceedings concerning, 461-462-463.
surrender of defendant by, 462-463-464.
see "Bail" and "Bond."

SPECIAL BREACH:

form of, 526, note.
see "Declaration" and "Breach."

SPECIAL CONTRACT:

no recovery on common counts, 505.
plaintiffs in actions on, 13.
declaration on, must contain special count, 514.
require special count in declaration to sustain recovery, 514.

SPECIAL COUNTS:

use of, in declaration, 503.
in *assumpsit*, when required, 514.
in declaration, necessary to recover rent, 510.
six points to be observed, 514.
the "inducement," 515.
the "consideration," 516.
the "promise," 517.
avowment of notice, 519.
avowment of request, 520.
avowment of breach, 521.
avowment of two breaches, 522.
avowment of damages, 524.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

SPECIAL COUNTS—Continued.

- in declaration, form assigning the breach, 523.
- joinder of counts, 525.
- in *assumpsit*, necessary averments, 518.
 - against agents (*Forms Nos. 61-68*), 526.
 - on awards (*Forms Nos. 69-70*), 527.
 - against bailee (*Form No. 71*), 528.
 - against common carriers (*Forms Nos. 72-75*), 529.
 - against guarantor or surety (*Forms Nos. 76-79*), 530.
 - against hirer of chattels (*Form No. 80*), 531.
 - against tenant (*Forms Nos. 81-84*), 532.
 - for breach of promise of marriage (*Forms Nos. 85-87*), 533.
 - for discharge from service (*Form No. 88*), 534.
 - to recover reward (*Form No. 89*), 535.
 - for goods sold (*Forms Nos. 90-97*), 536.
 - for stock subscriptions (*Form No. 98*), 537.
 - for hire of storage room (*Form No. 99*), 538.
 - on warranty of chattels (*Forms Nos. 100-103*), 539.
 - for money in exchange of chattels (*Form No. 104*), 540.
 - on building or labor contract (*Forms Nos. 105-106*), 541.
 - on corporation by-laws (*Form No. 107*), 542.
 - for professional services (*Form No. 108*), 543.
 - on insurance policy (*Forms Nos. 109-111*), 544.
 - on negotiable instrument "payable in money," (*Forms Nos. 112-139*), 545.
- in debt, on common bond (*Forms Nos. 146-151*), 566.
 - on indemnity bonds, penal bonds (*Forms Nos. 152-156*), 567.
 - on judgments (*Forms Nos. 157-158*), 568.
 - on a recognizance (*Form No. 159*), 569.
 - on licensed bond for use, etc. (*Form No. 160*), 570.
 - on a statute for penalty or forfeiture (*Form No. 161*), 571.
- in covenant, on leases (*Forms Nos. 164-168*), 575.
 - on contract to purchase land (*Forms Nos. 169-170*), 576.
 - for breach of warranty (*Forms Nos. 171-176*), 577.
 - on breach of warranty against incumbrances (*Form No. 177*), 578.
 - for breach of warranty for quiet enjoyment (*Form No. 178*), 579.
 - on breach of warranty of seizin and power to convey (*Form No. 179*), 580.
- in "account," tenant in common against co-tenant (*Forms Nos. 180-182*), 581.
- see "Declaration."

SPECIAL DAMAGES:

- when to be averred in declaration, 524.
- see "Exemplary Damages."

SPECIAL DEFENSE:

- notice with general issue, 700.
- form of notice of, to accompany general issue, 710.
- see "Defense" and "Pleas."

SPECIAL DEMAND:

- when necessary to aver in declaration, 520.
- see "Averments" and "Declaration."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

SPECIAL DEPUTY:

return by, verified by affidavit, 445.
service and return of *scire facias* by, 1173, note.
see "Deputy" and "Officers."

SPECIAL EXECUTION:

on judgment of foreclosure by *scire facias*, 1176.
see "Execution."

SPECIAL FINDING:

of court, no part of record unless by bill of exceptions, 1023.

SPECIAL JURY:

in replevin, 179.
see "Jury."

SPECIAL MOTIONS:

generally, 769.
of a criminal nature, 770.
what are, 771.
substituted for plea in abatement, when, 665.
in upper court, rules governing, 1095.
see "Motions."

"SPECIAL PLEA:"

defined, 683.
when to be interposed, 699.
formal parts of, enumerated, 701.
general requisites of, 701.
form of title, commencement and conclusion (No. 318), 710.
verification of (No. 318), 710.
notice with general issue, equivalent to, 699.
several may be filed in same cause, 714.
or notice of special matter of defense with general issue, 700.
or "notice in writing" with general issue, in *assumpsit*, when
required, 702.
in debt, when required, 703.
in covenant, when required, 704.
in account, when required, 705.
"trespass" or "case," when required, 706.
in trover, when required, 707.
in replevin, when required, 708.
in ejectment, when required, 709.
equivalent to (Form No. 317), 710.
form of averment, of note given in satisfaction (No. 319), 710
of arbitration and award (No. 320), 710.
of former judgment (No. 321), 710.
of payment in money (No. 322), 710.
of payment by services (No. 322), 710.
of statute of frauds (No. 323), 710.
ultra vires corporation (Form No. 324), 710.
statute of limitation (No. 325), 710.
of statute of limitations to book account (No. 326), 710.
of tender (No. 327), 710.
of denial of part tender of residue (No. 328), 710.
of want of capacity (No. 329), 710.
of partnership of plaintiff (No. 330), 710.
of want or failure of consideration (No. 331), 710.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

"SPECIAL PLEA"—Continued.

- or "notice in writing," form of averment, of gambling debt (*No. 332*), 710.
- of infancy of defendant (*No. 333*), 710.
- of increased risk in policy of insurance (*No. 334*), 710.
- of notice of estoppel (*No. 335*), 710.
- of fraud (*No. 336*), 710.
- of usury (*No. 337*), 710.
- of *plene administravit* (*No. 338*), 710.
- in debt on indemnity bond (*No. 339*), 710.
- of *nul tiel* record (*No. 440*), 710.
- of *non damnificatus* (*No. 341*), 710.
- of denial of false warranty (*No. 342*), 710.
- of conditions performed (*No. 343*), 710.
- of duress (*No. 344*), 710.
- of self defense (*No. 345*), 710.
- of defending another (*No. 346*), 710.
- of denial of libel (*No. 347*), 710.
- of justification of libel (*No. 348*), 710.
- of that accusation is true (*No. 349*), 710.
- of diligence by common carrier (*No. 350*), 710.
- see "Pleas" and "Demurrers."

SPECIAL PROPERTY:

- force of in action of trover, 152.
- will support replevin, 157.
- see "Title."

SPECIAL QUESTIONS TO JURY:

- see "Special Verdict."

SPECIAL RULES:

- what are, 771.
- see "Motions."

SPECIAL TERM:

- when judge may appoint, 9.
- see "Courts."

SPECIAL TRAVERSE:

- see "Special Pleas."

SPECIAL VERDICT:

- prevails over general verdict, 949.
- purpose of, 952.
- motion for judgment on, exception to ruling of court, 986.
- when contrary to general verdict, 986.
- distinction between general verdict, 951.
- origin and nature of, 952.
- jury may find, on its own motion, 953.
- either party may require, 953.
- questions limited in number, 953.
- exceptions to special questions, 954.
- taking advantage of failure to return, 955.
- inconsistent with general verdict, effect, 956.
- error in, how availed of, 957.
- imperfection or ambiguity in, ground for *venire facias de novo*, 962.
- see, also, "Finding by the Court" and "Verdict."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

SPECIALTIES:

plaintiffs in actions on, 13.

SPECIALTY:

averment of, in declaration in debt, 558.
proof of, need not be made, 557.
see "Contract Under Seal."

SPECIALTY CONTRACT:

debt maintainable upon, 92.
see "Debt" and "Contract Under Seal."

SPENDTHRIFT:

guardian for, defendant in action on contract, 40.
see "Parties" and "Guardian."

SPLITTING CAUSE OF ACTION:

not allowed, 53.
see "Actions."

"SS.:"

significance of, 171, note.
see "Vide Licet."

STABLING AND BOARDING:

horses, cattle, etc., declaration, common counts for (XVI), 510.
see "Common Counts."

STAKEHOLDER:

assumpsit will lie against, 60, 65.
see "Assumpsit for Money Paid Without Consideration."

STATE COURTS:

concurrent jurisdiction of federal courts, 4.
general powers of, 6.
see "Courts" and "Jurisdiction."

"STATE INTERESTED:"

cases in which, appeal taken direct to supreme court, 1017.

STATE OFFICER:

mandamus will lie to, when, 1100.
see "Officers."

STATEMENT:

of cause of action, recoverable under common counts, 510.
of venue, declaration in trespass, necessity for, 490.
of counsel—See "Opening Statement," also "Argument of Counsel."
see "Averments."

STATUTE:

declaration upon, what facts to aver, 481.
what need not be averred in, 571, note.
for penalty or forfeiture (*Form No. 161*), 571.
how set forth, 561.
exemplification of, rule regarding, 856, note.
how pleaded in declaration, 561.
of amendments and jeofails, 740.
cures irregularities after judgment, 1000.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1278.]

STATUTE—*Continued.*

- of frauds, pleaded especially in debt, 703.
 - form of averment of in special plea, or notice with general issue (No. 323), 710.
 - plea of, who only may interpose (*Form No. 323*), 710, note.
 - as a defense (*Form No. 323*), 710, note.
- of limitations, determined by form of action, 49.
 - as to *certiorari*, 396.
 - must be specially pleaded, 698.
 - pleaded specially, in *assumpsit*, 702.
 - in debt, 703.
 - in covenant, 704.
 - in trover, 707.
 - to book account, form of averment of in special plea, or notice with general issue (No. 326), 710.
 - form of averment of in special plea, or notice with general issue (No. 325), 710.
 - defense of, how and by whom interposed (*Form No. 325*), 710, note.
 - does not bar set-off, when, 724, note.
 - burden of proof, when pleaded, 820.
 - begins to run against right to procure review, when, 1041.
 - does not apply to assignments of error, 1062, note.
 - of other states, how pleaded, 720.
 - prescribing a duty, non-performance of is negligence, 220.
 - validity of, when involved, 1017, note.
 - see "Declaration on Statute."

STATUTE LAWS:

- of this state, how proven, 855.
- of other states, how proven, 856.
 - see "Proof."

STATUTORY CAUSE OF ACTION:

- assumpsit* will lie for, when, 85.
 - see "Action" and "Assumpsit."

STAY OF JUDGMENT:

- motion for new trial affects, 964.
 - see "Judgment" and "Arrest of Judgment."

STAY OF PROCEEDINGS:

- by *certiorari* to justice, 401.
- by defendant, by paying demand, 627.
- supersedeas*, rehearing in upper court, 1089.
 - compare "Continuances."

STAY OF WASTE:

- power of court to order, 290.
 - see "Waste" and "Trespass."

STEAMBOAT OWNER:

- declaration in case against, for causing dangerous swell in river, etc. (*Form No. 264*), 613.
 - see "Ships," "Common Carriers," "Negligence" and "Ballments."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

STIPULATION:

to dismiss suit, 665, note.
 for continuance, 795.
 of counsel, no part of record unless by bill of exceptions, 1023.
 of attorney, how far binding, 1268.
 time for preparing bill of exceptions cannot be extended by, 1025.
 judicial act cannot be performed by, 1028.
 bill of exceptions cannot be incorporated into record by, 1028.
 irregularities in appeal bond may be waived by, 1034, note.
 form of, to refer the issues (*No. 390*), 1199.
 see "Agreement" and "Attorneys at Law."

STOCK:

certificates, trover will lie for conversion of, 143.
 killing of, trespass to recover for, 118.
 liability of railroad for killing, 231.
 of corporation, levy of attachment on, 324.
 subscribers to, may plead release from liability (*Form No. 341*),
 710, note.
 subscriptions, declaration for in *assumpsit* (*Form No. 98*), 537.
 see "Animals."

STOCKHOLDERS:

of corporations, when to be parties plaintiffs, 19.
 interest attachable, when, 297.
 see "Corporations."

STOLEN GOODS:

trover will lie for, 143.

STOPPING TRAINS:

compelled by *mandamus*, when, 1104.

STORAGE:

declaration in common counts for (*XXI*), 510.
 declaration for price of, in *assumpsit* (*Form No. 99*), 538.

STRICT PROOF:

required when contract set out in *hæc verba*, 819.
 see "Proof."

STREET:

action on the case for injury caused by defect in, 228.
 land in, recoverable in ejectment, when, 243.
 see "Highway."

STRIKING BILL OF EXCEPTIONS FROM FILES:

when proper, 1026, 1028.

STRIKING BRIEF FROM FILES:

motion for, 1073.

STRIKING CASE FROM CALENDAR:

short cause, 784.
 see "Calendar."

STRIKING CASE FROM DOCKET:

effect of, 799.
 how reinstated, 800.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276]

STRIKING NAME OF ATTORNEY FROM ROLL:

- power of court, 1246.
- opportunity to be heard must be given, 1248.
- complaint or information, 1249.
- effect of, 1250.
- restoration after, 1251.
- see "Attorney at Law."

STRIKING PLEA FROM FILES:

- what not ground for, 633.
- when proper, 692.
- general rules, 716.
- for want of affidavit of merits, 712.
- what may be shown on motion for, 712, note.
- for inconsistency in two or more, 714.
- see "Pleas" and "Motions."

STRIKING PLEADINGS FROM FILES:

- because disfigured, 746.

STRIKING REPLICATION FROM FILES:

- rule regarding, 733, note.

STRIKING OUT EVIDENCE:

- power to, 898.
- motion for, when to be made, 899.
- "entire" nature of, 900.
- entire effect of, 901.
- rule governing, 899.
- to what extent cures error in admission, 902.

STRIKING OUT TESTIMONY:

- before referee, 1200, note.
- readmission after, effect, 902.
- see "Proof" and "Evidence."

STYLE OF WRIT:

- of *quo warranto*, 1129.
- see "Caption" and "Writ."

SUBMISSION TO ARBITRATION:

- who may make, 1181.
- ratification of, by partner, 1181, note.
- at common law, who may make, 1182.
- matters not in suit, 1182.
- under the statute in suits pending, 1183.
- effect of, award, 1184.
- see "Arbitration."

SUBPŒNA DUCES TECUM:

- failure to produce papers on, declaration in case for (*Form No. 27f*), 617.
- production of documents on, 865.
- see "Documents" and "Notice to Produce."

SUBPŒNAES:

- for witnesses, in action of account, 106.
- to be issued in *habeas corpus*, when, 1147.
- on arbitration, 1188.
- see "Witnesses" and "Attendance."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

SUBSCRIBERS:

to stocks of corporations may plead release from liability (*Form No. 341*), 710, note.

see "Corporations."

SUBSCRIPTION LIST:

who may sue on, 17.

SUBSEQUENT PROMISE:

avertment of, in declaration (*Form No. 112*), 545, note.

see "New Promise."

SUBSTITUTION:

of *assumpsit* for other actions, 56.

of attorney, 1267.

SUFFICIENCY:

of answer to be determined by court, 912.

of evidence, the jury to determine, 901.

SUGGESTION OF DAMAGES:

form of, in ejectment, 280.

to recover mesne profits in ejectment, 280.

in ejectment, defenses to, 282.

rights of parties on trial, 284.

defendant's exemption, 285.

in ejectment (*Form No. 293*), 620.

form of (*Nos. 293-294*), 620.

see "Ejectment" and "Damages."

SUGGESTION OF DEATH:

of plaintiff, 21.

of defendant, in action on contract, 36.

in attachment, 330.

in action of ejectment, 266-267.

in *certiorari*, 407.

general rules and form, 759.

see "Parties."

SUGGESTION OF DIMINUTION OF RECORD:

practice, 1058, note.

see "Practice, Etc."

SUIT:

and action synonymous terms, 12.

begun in wrong county, objection to, cannot be raised after default
429.

commencement of, for forcible entry and detainer complaint, 1211.

dismissal because of irregular service of *capias*, 455.

on bond, in replevin, 180.

in *capias* cases, 470-471.

pending, effect of marriage, 22, note.

in ejectment, not abated by transfer, 249.

plea in abatement for, 665.

in another state, plea in abatement not proper for, except in
attachment, 665, note, 674, note.

plea in abatement for (*Form No. 304*), 674.

good ground for continuance, 791.

see "Action" and "Commencement of Actions."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

SUMMARY JURISDICTION OF COURTS:

over attorneys, generally, 1245.

see "Attorneys at Law."

SUMMONING DEFENDANT:

in suggestion of damages in ejectment, 280.

see "Ejectment" and "Suggestion of Damages," also "Summons."

SUMMONING THE JURY:

rule governing, 805.

see "Jury."

SUMMONS:

alias, when may be issued in commencement of suit, 435.

amendment of, 434.

capias to stand as, when, 459.

form of, to commence action (*No. 20*), 434.

in forcible entry and detainer (*No. 397*), 1212.

in distress for rent (*No. 402*), 1224.

in attachment, on joint debtors and partners, 296.

in forcible entry and detainer, when returnable, 1212.

in garnishment, form of (*No. 9*), 357.

issuance and service of, 357.

issuance of not complete till delivered to officer, 432.

lost may be supplied, 434.

on *quo warranto*, return of, 1130.

protects the officer serving it when, 436, note.

return of, what constitutes, 436.

generally, form of (*Nos. 21-22*), 444.

should be signed, 444, note.

served on corporation, 444, note.

what sufficient, 444, note.

aided by intendment, 444.

by deputy or special deputy, 445.

how impeached, 446.

how enforced, 447.

how amended, 448.

in distress for rent, 1224.

returnable at wrong time gives no jurisdiction, 435.

service of, necessary to jurisdiction, 436.

cannot be made by party to suit, 436.

by deputy officer, 436.

who may make and when, 436.

upon married woman, 436.

calculation of time, 436, note.

upon foreign corporations, 436, note.

cannot be made on Sunday, 437.

who exempt from, 437.

where to be made, 438.

how made, 439.

upon partnership, how made, 440.

on *quo warranto*, how made, 1131.

in forcible entry and detainer, publication, 1213.

in distress for rent, 1224.

to show cause, in *mandamus*, when returnable, 1109.

to issue on prohibition, when, 1119.

to issue against garnishee, when, 1170.

in proceedings to disbar attorneys, 1249.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

SUMMONS—Continued.

when returnable in commencement of suit, 434. .
see "Writ" and "Service."

SUNDAY:

what constitutes, 437.
writs may not issue on, 9.
service of civil writ on, may be false imprisonment, 210.
see also "Sabbath."

SUPERIOR COURTS:

number of, 2.
of Cook county, jurisdiction of, 9.
jurisdiction of, to hear appeal from justice, 411.
powers of, regarding original writs, 389.
jurisdiction of—See "Circuit Court, Jurisdiction of."

SUPERSEDEAS, WRIT OF:

powers of appellate court in, 8.
return of, from justice, 413.
appeal from justices' court made so when, 413.
form of (*No. 15*), 414.
from appellate or supreme court, when procured without bond,
1032, note.
only procured on filing certified transcript, 1040.
when writ of error to operate as, practice, 1051.
indorsement, filing, return, certificate, 1052.
to whom directed, when service unnecessary, return, 1053.
process, *scire facias*, 1054.
process, service and return, appearance and notice thereof, 1055.
process, plaintiff's duty to order *scire facias*, notice, continuance,
1056.
effect of, to prevent second suit, 1051, note.
effect of limited, 1051, note.
application for, or writ of error, practice, 1051.
certificate that writ of error to operate as (*Form No. 372*), 1052.
no obstacle to amend of record, 1058, note.
stay of proceedings, rehearing in upper court, 1089.
bond for, on writ of error, 1051, note.
form of (*No. 14*), 414.
see "Appeal" and "Writ of Error."

SUPPLEMENTAL BRIEF:

in upper court, 1073, note.
see "Brief" and "Practice."

SUPPORT OF MOTION:

affidavit, etc., 774.
see "Motions."

SUPPORTING WITNESSES:

see "Sustaining Witness."

SUPREME COURT:

jurisdiction of, 5.
generally, 7.
powers of, in vacation, 7, note.
appeal to, goes to grand division in which case is pending, 1017.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

SUPREME COURT—Continued.

- what cases appeal directly to, 1017.
- when appeal will lie to, from appellate court, 1019.
- review in, how procured from appellate court when ordinary rules not applicable, 1019.
- will not review cases from appellate court, when, 1020.
- who may appeal to, 1030.
- when appeal may be taken to, 1031.
- appeal bond to, 1032.
 - security, when approval of unnecessary, 1033.
 - security may be approved by clerk, 1033.
 - effect when insufficient, amendment, 1034.
- appeal to, filing the record, 1035.
- time for filing transcript, etc., 1061.
- writ of error from, generally, 1036.
 - definition and nature of, 1037.
 - what the record must show, 1038.
 - time for, begins to run at entry of final judgment, 1038.
 - when it will lie, 1038.
 - when it will not lie, 1039.
 - by and against whom to be sued out, 1040.
 - within what time may be sued out, 1041.
 - dismissal of, 1042.
- assignment of error in, when decision of appellate court reviewed, 1063.
- of the United States, admission to practice law in, 1244.
 - see "Courts."

SURETY:

- action against principal accrues when, 84, note.
- approval of, on bond in replevin, 173.
- incompetent witness, 173, note.
- liability of, on attachment bond, 317.
- may recoup in damages, 731, note.
- scire facias* against, 1168.
 - defense to, 1168.
- judgment against, *scire facias* necessary to entry of, when, 1168.
- attorney cannot become, for client, 1258.
- on bond, action against, 180.
 - for release of defendant held on *capias*, 456.
 - of appeal to appellate or supreme court, approved by clerk, 1033.
 - scire facias* against, 1169.
 - see "Bail in Capias Cases."

SURGEON:

- or physician as a witness, rule regarding, 830.
- see "Doctors."

SURPLUSAGE:

- need not be proved, 818.
- in declaration, effect of, 482.
- in pleading, detrimental, when, 701.
- in return of summons, 444.
- of judgment over *ad damnum* clause cured by remittitur, judgment, 524.
 - see "Pleading" and "Declaration."

SURPRISE:

- ground for new trial, when, rule, 970.
- see "New Trial."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

SURREBUTTAL:

evidence, when to be offered, 883.
see "Proof."

SURREBUTTER:

rules relating to, 735.
see "Proof."

SURREJOINDER:

rules relating to, 735.
see "Rejoinder."

SURRENDER OF DEFENDANT:

in *capias* cases, 461, 462, 463.
in term time, 462.
in vacation, 463.
power of sureties to apprehend defendant, 460.
suit on bail bond, 470.
judgment on motion, 472.
pending suit commenced by *capias*, 464.
see "Capias ad Respondendum."

SURRENDER OF PROPERTY:

on execution in garnishment, 379.
refusal of, by garnishee, proceedings on, 382.
see "Possession" and "Levy."

SURVIVAL:

of action, on contracts, 36.
of trover, 147.
of causes of action, 21.
when assignable, 28.
under statute and at common law, 29.
in tort cases, 46.
see "Parties" and "Executors, etc."

SURVIVING OBLIGEE:

declaration on bond in favor of (*Form No. 150*), 506.

SURVIVING OBLIGOR:

declaration on bond against (*Form No. 150*), 506.

SURVIVING PARTY:

to contract, as defendant, 36.

SURVIVING PARTNER:

as defendant in action on contract, 36.
when may sue in firm name, 19, note.
commencement of suit by declaration, 498.
see "Partners" and "Declarations."

SURVIVING PLAINTIFF:

in ejectment suit, 21.
see "Parties."

SUSPENSION OF ATTORNEY:

from practice, effect of, 1250.
practice, complaint, show-cause summons. 1249.
see "Attorneys at Law."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

SUSTAINING VERDICT:

by affidavit of jurors, 968.

see "Verdict, Impeachment of."

SUSTAINING WITNESSES:

manner of, 888.

cross-examination of, 889.

number of, 890.

see "Proof" and "Witnesses."

SWEARING FALSELY:

accusation of, slander, declaration in case for (*Form No. 284*), 619.

see "Slander" and "Declaration."

SWORN INTERPRETER:

rule regarding, 839.

see "Interpreter" and "Proof."

T.**"TAKING EXCEPTIONS:"**

see "Exceptions."

TAKING CASE FROM JURY:

general rule regarding, 919.

manner of, 920.

effect of, 921.

why it may be done, 922.

see "Directing Verdict."

TAKING CASE UNDER ADVISEMENT:

rule regarding, 991.

in upper court, record of, 1096.

TAKING UNLAWFULLY:

not necessary to replevin, 156.

TAME ANIMALS:

trespass for taking, when, 116.

see "Animals" and "Domestic Animals."

TAMPERING WITH THE JURY:

ground for new trial, 967.

see "New Trial" and "Jury."

TAX:

illegal, assumpsit to recover money paid as, 65.

when money paid for, recoverable, 60.

TAXATION OF COSTS:

when improper, fee bill may be replevied, 1012.

general rule, 1012.

cannot be appealed from by witness entitled to costs, 1014, note.

on replevin of fee bill, 1038, note.

see "Costs" and "Judgment."

TAXES:

payment of, and color of title will support ejectment, 257.

special assessments collected by *seire facias*, 1166.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

TAX LEVY:

replevin for property under, will not lie, 165.

by highway commissioners not compelled by *mandamus*, when, 1102.

TEACHER OF SCHOOL:

slander of, declaration in case for (No. 285), 619.

TENANT:

cannot dispute landlord's title, application of rule in forcible entry and detainer, 1215, note.

cannot be put out by force of landlord, 115.

coming in must maintain action for possession, 1208.

declaration against, in *assumpsit* for non-payment of rent, lease under seal (*Form No. 81*), 532.

for not keeping premises in repair (No. 82), 532.

for not using premises in tenant-like manner (*Form No. 83*), 532.

dispossessed by ejectment, when, 263.

of farm, declaration against in *assumpsit* for not cultivating according to custom (*Form No. 84*), 532.

waste by cutting trees, etc., declaration in case for (*Form No. 256*), 611.

waste by injuring premises, etc., declaration in case for (*Form No. 257*), 611.

when may maintain action of trespass to land, 123.

see "Landlord and Tenant" and "Leases," also "Distress for Rent."

TENANTS IN COMMON:

as plaintiffs, 27.

when liable for use and occupation, 79.

may maintain action of account, 100.

"account" will lie suit of, 101.

may have action of account or bill in chancery, 110.

when may sue for trespass, 117.

may sue another in trover, when, 143.

trover by and against, 146.

in ejectment must prove ouster, when, 260, note.

may maintain ejectment, when, 262.

adverse possession as defense in ejectment, by, 271.

declaration by, against co-tenant account (*Form No. 180*), 581.

may maintain action of forcible entry and detainer, 1209.

see "Co-tenant" and "Partners."

"TENDER:"

by defendant at commencement of suit, 626.

form of averment of in special plea, or notice with general issue (*No. 327*), 710.

how made, effect of, 706, note.

judgment on plea of (*Form No. 325*), 710.

keeping good, proceedings by defendant, 626.

necessary in replevin for cattle distrained, 162.

of consideration before suing in trespass for goods sold, 160.

of issue, when replication to plea in abatement should not make, 677.

how made in plea in bar, 690.

by conclusion of special plea, required, 701.

of part, denial of residue, form of averment of, in special plea, or notice with general issue (*No. 328*), 710.

plea of, in distress for rent, 1227.

pleaded specially in *assumpsit*, 702.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

"TENDER"—Continued.

- pleaded specially in debt, 703.
- pleaded specially in covenant, 704.
- pleaded specially in trover, 707.
- will bar *scire facias* to revive judgment, when (*Form No. 328*), 710.

TERRE-TENANTS:

- notice to, on writ of error, 1057.

TERM:

- title of, not required to plead, 710, note.
- see "Pleading" and "Forms."

TERM OF COURT:

- authority ceases with, 6.
- when judge may appoint special, 9.
- judge may not postpone, 9.
- see "Courts."

TERMINATION OF SUIT:

- necessary to malicious prosecution, 200.

TERRITORIAL JURISDICTION:

- defined, 4.
- see "Jurisdiction."

"TEST-OATH ACTS:"

- determined the nature of lawyer's office, 1232.
- see "Lawyers."

TESTIMONY:

- admission of, error in, ground for new trial, when, 974.
- correcting by recalling witness, 884.
- narrative form permitted, 843.
- of expert, general rule regarding, 871.
- laying foundation for, form, 872.
- of witnesses on both direct and cross-examination taken together, 880.
- on impeachment, not primary evidence, 886.
- responsive answer required, 841.
- what, attorney may give, 1261.
- see "Evidence" and "Proof."

THINGS:

- classification of, 4.
- see "*Res.*"

TIGERS:

- liability for trespass of, 128.
- see "Animals."

TIMBER:

- recoverable in replevin, when, 156.
- sold and not taken away, declaration for, in assumpsit (*Form No. 91*), 536.

TIME:

- avertment of, unnecessary in declaration, when, 484.
- in declaration in debt, 556.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

TIME—Continued.

- computation of, in service of summons, 436.
- for false imprisonment, 209, note.
- for filing transcript of record, etc., extension of, 1061.
- for taking appeal from justice's court, 412.
- of possession must be averred in declaration of ejectment, 484.
- of promise must be stated in declaration, 517.
- proof of, when required to be made, 818.
- variance in, 819, note.
- to plead in abatement, 675.
 - extension of, for plea in abatement, 675.
 - in *mandamus*, 1110.
 - in *quo warranto*, 1134.
 - in upper court when defendant prefers not to join in error, 1067.
- and place, averment of, in declaration when sufficient, 485, note.
- averments of, in declaration, 518.
- and order of pleading, 476.

TITLE:

- as affecting action of trover, 139.
- color of, payment of taxes in ejectment, 244.
 - to defeat action of ejectment, 253, note.
 - and payment of taxes will support ejectment, 257.
- commencement and conclusion to special pleas, form of (*No. 318*), 710.
- covenant of—See "Covenant of Seizin."
- equitable, not considered in ejectment, 248.
 - will not sustain ejectment, 248.
- from common source, in action of ejectment, 251.
 - denial on oath in ejectment, 251.
- investigation of, duty of attorney to client in, 1273.
- legal, necessary to support ejectment, 248.
 - length of, will defeat ejectment, 256.
- necessary to maintain replevin, 156, 157.
- of landlord, disputing, 272, note.
- of pleas need not be of a term, 710, note.
- outstanding, as defense to ejectment, 272.
- passes on conditional sale, when, 144.
- presumed, in action of ejectment from possession of deed, 251.
- proof of, when necessary in action of trespass to land, 123.
 - in action of ejectment, must be identical claimed, 250.
- recording, will interrupt ejectment plaintiff's possession, 257, note.
- source of, for what may be shown in forcible entry and detainer, 1215.
- to affidavit, necessity for, 713.
- to land, slander of, 189.
 - tried by ejectment, 238.
 - not determined in action for forcible entry and detainer, 1215.
- to remain in vendor, replevin for goods so sold, 159.
- to pleas in bar, general issue, 687.
- to support ejectment, 246.
- transfer of, effect of, pending ejectment, 249.

"TITLE COURT:"

- statement of, in declaration illustrated, 489.
- and cause to plea in bar, 687.
- see "Pleading" and "Declaration."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

TITLE COURT, TERM, VENUE AND COMMENCEMENT OF DECLARATION:

in "debt," 552.

see "Declaration," "Debt" and "Forms."

TITLE DEEDS:

in evidence in action of forcible entry and detainer, 1215.

see "Deeds," "Proof" and "Evidence."

"TITLE TERM:"

statement of, in declaration illustrated, 489.

not required to pleas, 710, note.

see "Declaration" and "Forms."

"TO WIT:"

the letters "ss" mean, 171, note.

use of, in declaration, 484.

in averments in declaration, 517.

in declaration for actions for torts, 583.

see "Videlicet."

TORTS:

definition of, 112.

actions for, classification of, 112.

actions for plaintiffs in, generally, 26.

who to join as plaintiffs in actions for torts, 27.

plaintiffs, in when interest assigned, 28.

when a party dies, 29.

in case of marriage, 30.

in case of infancy, 31.

in case of insanity, 32.

defendants, as between original parties, 41.

in case of death, 42.

for acts of animals, 43.

where interest assigned, 45.

when wrongdoer dies, 46.

when wrongdoer marries, 47.

in case of infant wrongdoer, 48.

not waived if *assumpsit* dismissed, 57.

trespass, 112.

defense in, 131.

children liable for, 115.

aided by attachment, 351.

justification in, must be specially pleaded (*Form No. 348*), 710.
note.

declaration. in action for, generally, 582.

averment of matter or thing affected, 583.

statement of plaintiff's right or interest in subject matter, 584.

averment of defendant's duty or obligation, 585.

averment of injury, when immediate, 586.

when consequent, 587.

variance between declaration and proof, 588.

averment of damages, 589.

for injury to the person (*Forms Nos. 184-191*), 590.

for injury to personal property (*Forms Nos. 192-198*), 591.

for injury to real property (*Forms Nos. 199-202*), 592.

in replevin, generally (*Form No. 203*), 593.

in case, 591.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

TORTS—Continued.

- declaration, against bailees, case (*Forms Nos. 208-219*), 596.
- for negligent driving, case (*Forms Nos. 211-212*), 597.
- against common carriers for negligence, case (*Forms Nos. 213-216*), 598.
- against railroad companies for negligence, case (*Forms Nos. 217-224*), 599.
- against municipal corporations for negligence, case (*Forms Nos. 225-230*), 600.
- for nuisance, case (*Form No. 231*), 601.
- for injury to personal property, case (*Forms Nos. 232-233*), 602.
- for negligence regarding animals, case (*Forms Nos. 234-237*), 603.
- upon warranty, case (*Form No. 238*), 604.
- fraud and deceit, case (*Forms Nos. 239-243*), 605.
- for criminal conversation, case (*Forms Nos. 244-246*), 606.
- for malicious prosecution and false imprisonment, case (*Forms Nos. 247-250*), 607.
- for seduction, case (*Form No. 251*), 608.
- for enticing away workmen, case (*Form No. 252*), 609.
- for negligence in practice of profession, case (*Forms Nos. 253-255*), 610.
- for waste, case (*Forms Nos. 256-257*), 611.
- for negligence of officer (*Forms Nos. 258-261*), 612.
- for negligence regarding boats and vessels, case (*Forms Nos. 262-265*), 613.
- for negligence of warehouseman, case (*Form No. 266*), 614.
- for negligence regarding water course, case (*Forms Nos. 267-270*), 615.
- for obstructing highways (*Forms Nos. 271-272*), 616.
- for negligence to produce documents on notice, etc., case (*Form No. 274*), 617.
- for libel, case (*Forms Nos. 275-281*), 618.
- for slander (*Forms Nos. 282-291*), 619.
- waiver of, and suing in *assumpsit*, 57.
- rule regarding, 132.
- as to lands, 58.
- form of action to be employed upon, 90.
- disadvantage of, 237.
- see "Actions for Torts."

TOWNSHIP OFFICER:

- mandamus* will lie to, when, 1102.
- see "Officer."

TRANSCRIPT:

- of justice, when to be filed on an appeal, 416.
- filing of, gives court jurisdiction of appeal, 420.
- of records, incorporating bill of exceptions itself into, 1026, note.
- certified, necessary to procure *supersedeas*, 1040.
- filing with writ of error, when to operate as *supersedeas*, 1052.
- cost of sending, to upper court, 1058, note.
- of what to consist, 1058.
- when cause removed from appellate to supreme court, 1059.
- original bill of exceptions may be incorporated into, 1058, note.
- voluminous, costs, 1060.
- clerk may be directed what to include in, 1060.
- when to be filed, 1061.
- of remanding order, when to be filed, 1085.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

TRANSFER:

- of claims for garnishment prohibited, 387.
- for garnishment, penalty, 388.
- of title, effect of, pending ejectment, 249.
- see "Assignment."

TRANSITORY ACTION:

- when trespass is, 133.
- replevin is, 170.
- declaration in, statement of venue in, 493.
- see "Actions."

TRANSLATION:

- of documents by witness without being sworn as interpreter, 839.
- see "Interpretation."

TRANSMITTING PAPERS, ETC.:

- on change of venue, 766.
- see "Venue."

TRAVERSE:

- of garnishee's answer, 372.
- plea of, in attachment, 344.
- in abatement, 677.
- of return, how issue raised, 446.
- see "Pleas."

TREASURER:

- of county, *mandamus* will lie to when, 1101.
- of school, *mandamus* will lie to when, 1105.
- of school district, *mandamus* will lie to, when, 1102.
- see "Officers."

TREES:

- cutting, action of trespass for, 124.
- declaration in case for waste (*Form No. 256*), 611.
- penalty for cutting, recoverable in debt, 93.
- see, also, "Timber."

TRESPASS:

- how classified, 112.
- what it will include, 113.
- what is not, in taking one's own property, 115.
- children liable for, 115.
- when will lie by forcible entry, 115.
- for acts of animals, when owner liable, 43.
- when it will lie for injuring animals, 116.
- by animals, joinder of defendants in action for, 44.
- when joint action to be brought for, 44.
- of cattle, declaration in case for (*Form No. 233*), 602.
- to and by animals, declarations in case for (*Forms Nos. 234-237*), 603.
- for taking and carrying away, when it will lie, 116.
- constructive possession will sustain, when, 117.
- possession by agent or servant sufficient to sustain, 117.
- when interest recoverable in action of, 119.
- no bar to replevin, when, 120.
- who to sue for, 26.
- what is, 121.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

TRESPASS—Continued.

- waiving, suing in *assumpsit*, 58.
- owner may be guilty of, when, 123.
- when an ouster is, 123.
- when will lie to recover power, 123.
- of animals, who liable for, 127.
- of officer, injury under color of legal process, 129.
- justification of, under legal process, 129.
- ratification of, of officer by plaintiff, 129.
- when preferable to *assumpsit*, 60, note.
- and case, compared, 114, 183.
- concurrent remedies, 135.
- or case, special plea in, or notice with general issue, when required, 706.
- waiver of, by action of trover, 136.
- proof in, of pecuniary circumstances, 115.
- justification of, when self defense is, 115.
- husband may testify for wife in, 828.
- when attorney commits, in service of writ, 1263.
- action of, how classified, 50.
 - generally, 112.
 - nature of, 113.
 - when the proper form, 114.
 - for injury to the person, 115.
 - for injuries to personal property, 116.
 - when it will lie for taking fish, 116.
 - possession or right of, necessary to sustain, 117.
 - for injury to horse, 117.
 - when officer may maintain, 117.
 - when tenants in common may maintain, 117.
 - for injury by animals, 118.
 - concurrent with trover, when, 119, 137.
 - when concurrent with replevin, 120.
 - for injuries to real estate, 121.
 - to land, possession necessary to support, 123.
 - for cutting trees, 124.
 - for injury to orchard, 125.
 - will lie against officer for property held under tax levy, 165.
 - for injury to garden, yard, or field, 126.
 - for injury to land by domestic animals, 127.
 - by wild animals, 128.
 - for injury under color of legal proceedings, 129.
 - against judicial officer, 130.
 - against one or more trespassers, 131.
 - waiver of, and suing in *assumpsit*, 132.
 - when to be begun, 133, 134.
 - defenses to, self defense or defending another, forms of pleas (Nos. 345, 346), 710.
 - landlord liable to, after distress for rent, when, 1221, note.
- declaration for, generally, 582.
- declaration in, statement of venue, 490.
 - form of, assault and battery (No. 184), 590.
 - for assault with firearm, wounding, etc. (No. 185), 590.
 - for riding and driving against plaintiff (No. 186), 590.
 - for false imprisonment (No. 187), 590.
 - for criminal conversation (No. 188), 590.
 - for assault upon plaintiff's wife (No. 189), 590.
 - by husband and wife for assault on the latter (No. 190), 590.
 - for debauching plaintiff's daughter (No. 191), 590.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1278.]

TRESPASS—Continued.

declaration in, form of, for goods taken and carried away (*No. 192*), 591.

against officer for seizing exempt property (*No. 193*), 591.

for chasing sheep (*No. 194*), 591.

for shooting dog (*No. 195*), 591.

for running vehicle against plaintiff's horse (*No. 196*), 591.

for running vehicle against plaintiff's vehicle and injuring plaintiff and vehicle (*No. 197*), 591.

for cutting rope and loosening boat (*No. 198*), 591.

for injury to dwelling house and goods (*No. 199*), 592.

for expulsion from house (*No. 200*), 592.

quare clausum fregit, stating many injuries (*No. 201*), 592.

for tearing up railroad and making another across same (*No. 202*), 592.

plea in, general issue, what may be shown under, 695. ✓

TRESPASS DE BONIS ASPORTATIS:

forms (*Nos. 192-193*), 591.

when it will lie, 116.

TRESPASS QUARE CLAUSUM FREGIT:

when it will lie, 121.

declaration in, must describe abutments, 486.

see "Trespass."

TRESPASS VIET ARMIS:

when the proper form of action, 115.

see "Trespass."

TRESPASS ON THE CASE:

by statute includes trespass, 113.

action of, nature of, 183.

for damages to reputation, 184.

for slander, generally, 185.

for words actionable in themselves, 186.

words not actionable may become so, 187.

when words actionable in themselves, not, 188.

of title to land, 189.

words charging adultery, 190.

accusing one of false swearing, 191.

gist of action, 192.

words must have been understood, 193.

and libel, when action to be begun, 198.

libel, 194.

publication in good faith, 195.

publication in newspaper, 196.

when punishable as contempt of court, 197.

for malicious prosecution, 198.

falsity of the charge, 200.

malice and want of probable cause must concur, 201.

what is probable cause, 202.

when malice will be inferred, 203.

advice of counsel as a defense, 204.

damages resulting from, 205.

of civil action, 206.

when to be begun, 207.

for false imprisonment, 208.

what constitutes, 209.

wherein it is false, 210.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

TRESPASS ON THE CASE—*Continued.*

- action of, for false imprisonment, pleading and proof in, 211.
 - when to be begun, 212.
- for assault and battery, 213.
- for seduction, 214.
- for enticing servant to leave employment, 215.
- for criminal conversation, 216.
 - when to be begun, 217.
- for breach of promise of marriage, 218.
- for damages resulting from negligence, 219.
- for negligence, when a question of fact or law, 221.
 - what is "slight" and what "gross," 222.
 - what will sustain recovery, 223.
- contributory negligence, rule, 224.
- contributory, of servant, 225.
- contributory, rule will not apply when, 226.
- causing death, 227.
- of municipal corporation, 228.
- of servant, 229.
- for injury caused by intoxicating liquor, 230.
- for nuisance, 231, 235.
- for injury to property, 231.
 - occasioned by improper custody and use, 232.
 - when to be begun, 236.
- for damages occasioned by fraud and deceit, 233.
- for damages occasioned by waste, 234.
- for injuries to the person, when to be begun, 236.
- for goods fraudulently sold, may be begun before price due, 237..
- for obstruction to public way, 242.
- advantage over other forms of action, 237.
- see also "Case."

TRESPASSER:

- when to be joined as defendants, 44.
- infancy does not avoid liability of, 48.
- when plaintiff becomes, 129.
- a servant becomes, when, 229.
- liability of, joint or several, 131.
- see "Trespass."

TRIAL:

- by the court, finding on, on propositions of law, 958.
 - findings on, exceptions to, 959.
 - two ways of correcting, 960.
 - how review of obtained, 960.
 - when proper, 803.
 - or jury, optional, 803.
- by jury, waiver of, 803.
 - in absence of defendant, 801.
 - right of, waiver, 803.
 - when defendant not entitled to, 803.
- by referee, compelling attendance, oath, 1200.
- continuance of, general rule, 789.
 - before auditors, in action of account, 106.
 - discretionary with court, 790.
 - cause for, 791.
- de novo*, obtained by appeal from justice, 409.
 - on *scire facias* to make party to judgment, 1165, note.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

TRIAL—Continued.

- goods taken on, to be returned or paid for at certain time, declaration in assumpsit (*Form No. 92*), 536.
- improper out of its order, reviewed only by aid of bill of exception, 1023.
- in suggestion of damages, rights of parties, 284.
- new, in ejectment, 277, note.
 - see "New Trials."
- of action, begun by *capias*, 460.
- of case, when to be opened, 810.
 - opening statement of plaintiff, 811.
- of cause, out of its order, 797.
 - argument of counsel on, rule governing, 906.
 - in absence of plaintiff, default, 801, note.
- of interplea in garnishment, 364.
- of issue, in action of account, 104, 105, 108.
 - before auditors in action of account, 106, 107.
 - on garnishee's answer, 372.
 - on *mandamus*, 1110.
 - in *quo warranto*, 1135.
 - on *habeas corpus* generally, 1151.
 - on forcible entry and detainer, 1215.
- of set-off, rule regarding, 728.
 - by defendant, when plaintiff in default, 798.
- of short causes to occupy one hour only, 786.
 - day to be set aside for, 785.
- on appeal, from justice's court, 424.
 - from county court, 10, note.
- certiorari*, evidence, 404.
- scire facias*, before justice of the peace, 1165, note.
- postponing—See "Continuance," also "Hearing Causes."

TROVER:

- definition of, 136.
- action of, how classified, 50, 112.
 - concurrent with trespass, when, 119, 137.
 - when interest recoverable in, 119.
- nature of, 136.
- conversion, what constitutes, 138.
- when it will lie, 139.
- possession, right of, requisite to sustain, 139.
- when bailee may maintain, 140.
- rests on strength of plaintiff's right, 141.
- when it will lie at suit of a bailee, 140.
- purpose of, 142.
- application of the remedy, 143.
- officer liable in, for goods taken under process, when, 143.
- against one who has acquired no title, 144.
- at suit of a wife, 145.
- by and against tenants in common, 146.
- by and against executors, etc., 147.
- by mortgagee of chattels, 148.
- demand in, necessary before suit, when, 149.
- demand in, not necessary, when, 150.
 - by and of whom made, 151.
- amount of damages recoverable in, 152.
- equitable in its nature, 152.
- will lie though property returned, 152.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

TROVER—Continued.

- action of, new trial in, 153.
- judgment in, 154.
- compromise of, effect of on title, 154.
- by and against co-tenant, partner, 161.
- for grain in warehouse, 164.
- will lie for property seized under tax levy, 165.
- declaration for, general rules, 582.
- declaration in, form of (*No. 204*), 594.
- by executor for conversion in testator's lifetime (*No. 206*), 594.
- by executor for conversion after testator's death (*No. 207*), 594.
- and replevin, accounts in may be joined, 707, 708.
- or replevin, choice of remedy, 593.
- plea in, general issue, what may be shown under, 696.
- special plea in, or notice with general issue, when required, 707.

TRUSTEES:

- when may sue on subscription, 17.
- liability of, regarding waste, 234.
- may maintain ejectment, when, 261.
- of schools, when may sue for damages, 26.

TRUST FUND:

- not susceptible of garnishment, 360.

TRUTH OF WORDS:

- in slander must be pleaded specially, 698.

TRYING CASE:

- out of its order, 797.
- see "Trial" and "Calendar."

TUMBLING-RODS:

- liability for, when not boxed, 41.
- see "Negligence."

TURK:

- oath to, how administered, 838, note.
- see "Oaths."

TWO-FOLD NATURE:

- of attachment, 293, 337.
- see "Attachment."

TWO-FOLD PURPOSE:

- of bond in replevin, 173.
- see "Replevin."

U.**ULTRA VIRES CORPORATIONS:**

- form of averment of, in special plea, or notice with general issue (*No. 324*), 710.

"UNDERTOOK:"

- use of in declaration in *assumpsit*, 526, note.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

UNDISPOSED OF CAUSES:

continued by operation of law, 796.
see "Continuances."

UNDUE INFLUENCE:

as ground for change of venue, 762.

UNITED STATES SUPREME COURT:

admission to practice law in, 1244.
see "Courts" and "Attorney at Law."

UNLAWFUL RESTRAINT:

is false imprisonment, 209.

UNLAWFUL TAKING:

not necessary to replevin, 156.
see, also, "Trespass."

UNLIQUIDATED DAMAGES:

not recoverable in debt, 90.
not susceptible of garnishment, 360.
cannot be subject of set-off, 370.
see "Damages."

USE:

action for, set-off in, 724, note.
and occupation, declaration in common counts for, 100.
assumpsit to recover for, 78.
of property, damages occasioned by, trespass on case for, 232.
of defendant, money paid for, declaration in common counts for
(IX), 510.

USURIOUS INTEREST:

when not recoverable, 68.
see "Assumpsit" and "Declaration."

USURY:

pleaded specially in *assumpsit*, 702.
form of averment of, in special plea, or notice with general issue
(No. 337), 710.
as a defense, form of plea (No. 337), 710.
see "Interest" and "Plea."

V.

VACANT LAND:

payment of taxes, defense in ejectment, 244.
see "Ejectment" and "Real Estate."

VACATION:

of judgment, entered on confession, 999.
power of judges in, 9, note.
see "Setting Aside" and "Judgment."

VACATING JUDGMENT:

entered on verdict, 1007.
see "Judgment."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

"VALIDITY OF STATUTE:"

when involved, 1017, note.
cases involving, appealed directly to supreme court,
see "Jurisdiction."

VALUE:

averment of, in declaration for tort, 584.
of improvement in ejectment, oath, power, and report of commis-
sioners, 287-288.
of services, proof of in action on contract, 74.
proof of, professional services, 77.
statement of, in affidavit for replevin, 171, note.

VARIANCE:

between affidavit and writ, effect of, 171.
between declaration and process, 480.
must be urged by plea in abatement in apt time, 480.
between declaration and writ, pleaded in abatement, 665.
between pleading and proof, in ejectment, 250.
fatal, 819.
in declaration, cannot be urged in appellate court, 480.
in name of defendant from that sued on, 483.
how taken advantage of, 487.
what cured by verdict, 487.
as to statement to contract, 517.
on bond of indemnity (*Form No. 152*), 567, note.
from instrument sued on, 557.
how taken advantage of, 694.
in name of plaintiff in action on contract, effect of, 19.
in pleading and proof, on "promissory note" not payable in money
(*Form No. 122*), 545, note.
as to time when bill payable (*Form No. 123*), 545, note.
in proof, cured by amendment, 819.
a question of law for the court, 819.
as to name of party, 819, note.
regarding amount of money, 819, note.
of contents of note, 819, note.
of time, 819, note.
of description, 819, note.
of number of animals, 819, note.
what is not, 819, note.
of defendant's name, what is not, 819, note.
objection to, when to be made, 895.
in writ of *mandamus*, objection for, 1111, note.
plea in abatement for, in process, 665.
waiver of objection to, in proof, 819.
see "Declaration," "Requisites" and "Pleading and Proof."

VENDEE:

may sue in replevin when title has passed, 158.
declaration against in *assumpsit* for goods sold at market price, not
accepted (*No. 90*), 536.
see "Sale."

VENDOR:

replevin by, for goods sold, title not to pass, etc., 159.
declaration against in *assumpsit*, for not delivering (*Forms Nos. 93-94*), 536.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

VENDOR—Continued.

- declaration against in *assumpsit*, for not delivering goods at particular place within a reasonable time (*No. 95*), 536.
- for non-delivery of goods, whereby plaintiff procured others at higher price (*Form No. 96*), 536.
- for sum deposited, to be returned if goods unsatisfactory (*Form No. 97*), 536.
- see "Sale."

VENIRE:

- amendment of, 749.
- see also "Jury."

VENIRE FACIAS:

- see "Summoning the Jury."

VENIRE FACIAS DE NOVO:

- motion for, when to be granted, 962.
- new trial obtained by, 962.
- and new trial compared, 962.

VENUE:

- change of, when granted, 760.
- application for, by whom to be made, etc., 761.
- requisites of, 761.
- when prejudice or undue influence the ground relied on, 762.
- when shall be made, 763.
- to what court granted, 764.
- order for, conditions, expenses, 765.
- transmitting papers, etc., 766.
- filing papers and docketing cause, 767.
- irregularities of cured by verdict, 768.
- in courts of review, 1096.
- cannot be compelled by *mandamus*, 1099.
- in *quo warranto* proceedings, 1132, note.
- in declaration, statement of, 490.
- statement of, in local actions, 491.
- transitory in certain case, 492.
- statement of, in transitory actions, 493.
- of action of replevin, 170.
- omission from declaration cured by verdict, when, 400.
- statement of, in declaration, illustrated, 489.
- in declaration in trespass, necessity for, 490.
- see also "Declaration" and "Change of Venue."

VERDICT OF JURY:

- "general," rule regarding, 944.
- where there are several counts in declaration, 944.
- cannot be arrived at by a general average, 943, note.
- determined by casting lots, ground for new trial, 968.
- "sealed verdict," 945.
- general form of, 946.
- distinction between "general" and "special," 951.
- purpose of special verdict, 952.
- effect of inconsistency between "general" and "special," 956.
- "special," prevails over "general," 949.
- origin and nature of, 952.
- either party may require, 953.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

VERDICT OF JURY—Continued.

- "special," questions restricted in number, 953.
- exceptions to, 954.
- duty of court to construe, 956.
- taking advantage of failure to return, 955.
- taking advantage of error in, 957.
- may of its own motion find specially, 953.
- directing, for defendant, when proper, 901.
- general rule regarding, 919.
- the practice, 922.
- by instruction to jury, general rule, 934.
- for plaintiff, by instructing jury, 935.
- for defendant by instructing jury, 936.
- motion for, in the nature of demurrer to evidence, 936.
- how defendant's motion defeated, 923.
- in ejectment, generally, 273.
- when plaintiff's right expires, 275.
- form of, in ejectment, 274.
- when plaintiff's right expires, 275.
- in action of forcible entry and detainer, 1215.
- In replevin, 178.
- in action on penal bond, 93.
- how stated on return, 946.
- may be sent back to correct, 946.
- polling the jury, 947.
- recording, 948.
- correcting the form, 948.
- entry of *nunc pro tunc*, 948.
- not set aside for defective count, 948, note.
- conclusiveness of, 949.
- presumed correct until contrary shown, 949.
- find of the court equivalent to, 949, note.
- imperfection or ambiguity in, ground for *venue facias de novo*, 962.
- too great, remittitur, 992.
- impeachment of, 949.
- not impeached by, affidavit of jurors, 968.
- sustained by affidavit of jurors, 968.
- influence, ground for new trial, 968.
- error in, ground for new trial, 975.
- contrary to law, ground for new trial, 975.
- contrary to the evidence, ground for new trial, 975.
- mistake in, ground for new trial, when, 975.
- setting aside, cause must be shown for, at same term, 978.
- in action of trover, 154.
- not effected by setting aside judgment, 1007, note.
- motion for judgment notwithstanding, 984.
- judgment on, how set aside, 1007.
- errors cured by, 750, 768, 950.
- errors cured by averment of notice, 519.
- see "Finding," also "Jury."

VERIFICATION:

- form of, to special pleas (*No. 318*), 710.
- of petition for *mandamus* necessary, 1108.
- of plea, necessary to denial of execution of instrument sued on, 711.
- "by the record," when required, 701.
- to jurisdiction not required, 653.
- in abatement, 18.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

VERIFICATION—Continued.

- of plea in abatement required by statute, 673.
 - form of (*No. 302*), 674.
 - always required, 671.
- of replication to plea in abatement, 677.
 - see "Affidavit of Truth."

VESSEL:

- captain of, declaration against, for negligence in care of goods, case (*Form No. 213*), 598.
- dockage of, declaration in common counts for (*XXII*), 510.
 - see, also, "Ships and Boats."

VESSEL OWNER:

- declaration in case against, for running foul of plaintiff's vessel (*Form No. 262*), 613.
 - for running down plaintiff's boat (*Form No. 263*), 613.
 - for obstructing public way (*No. 271*), 616.
 - see "Common Carrier."

VICIOUSNESS:

- of animal, effect of notice of, 127.
 - see, also, "Malice."

VIDE LICIT:

- use of, in averments in declaration, 484, 517.
- use of, in declaration in actions for tort, 583.
 - see "To Wit."

VIEW:

- is circumstantial evidence, 891.
- jury may be sent out to make, for proof, 891, 893.
 - see "Proof" and "Jury."

VILLAGE ORDINANCES:

- how proven, 855.
 - see "Ordinance" and "Proof."

VIOLATION OF ORDINANCE:

- action of debt will lie for, 93.
 - see "Action," "Debt" and "Statute."

VINDICTIVE DAMAGES:

- recoverable in trespass, when, 114.
- in action on replevin bond, 182.
- recoverable in action for malicious prosecution, 205.
 - see "Damages" and "Exemplary Damages."

VOID FOR UNCERTAINTY:

- when written instrument is, 868.
 - see "Validity."

VOIR DIRE:

- jury may be examined upon, 806.
- examination of juror on, 806, 966.
- examination of witness on, 837.
 - see "Jurors," "Witnesses" and "Proof."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

VOLUNTARY APPEARANCE:

in attachment, 340.

equivalent to personal service, 292.

see "Attachment" and "Appearance."

VOLUNTARY NON-SUIT:

what is, 798.

when to plaintiff's advantages to take, 923.

see "Non-suit" and "Dismissal."

W.**WAGER:**

recoverable in *assumpsit*, 60, 65.

see "Assumpsit" and "Gaming."

WAGES:

plaintiff in suits for, 23.

assumpsit to recover for, 73.

exempt from garnishment, 360.

exemption of, must be shown by garnishee's answer, 368.

claim for not to be assigned for garnishment, when, 388.

and salary, declaration in common counts for (XX), 510.

WAIVER:

by plea of general issue, 691.

by pleading over, 737, note.

By replication, 737, note.

cannot be of jurisdiction, 652.

of argument of counsel in upper court, 1076.

of exception to ruling on evidence, 897.

of exemption by attorney from serving as juror, 1254.

of ground for new trial, 972.

of irregularities, by taking appeal, 417-418.

in *mandamus*, 1114.

in appeal bond, may be by stipulation, 1034, note.

of motion, when not interposed in apt time, 779.

for new trial, by motion in arrest of judgment, 979, note.

in arrest of judgment waived by demurrer, 980.

of objection, for variance in proof, 819.

to evidence, 895.

for lack of notice of petition for *mandamus* in supreme court, 1108, note.

of privilege, by party interested, 833.

of witness, 834.

by client, of communication with attorney, 1257.

of replication, 733, note.

of right, of recover by withdrawal of counts, 525.

to plead over after judgment on demurrer, 640.

to set off, 724, note.

to opening statement, 812.

to ask for instructions, 925.

of set-off, 726, note.

of torts, disadvantages of, 237.

to lands, 58.

form of action to be employed upon, 90.

in suing in *assumpsit*, rule regarding, 132.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

WAIVER—Continued.

of trespass by action of trover, 136.
of trial by jury, 803.

WAIVER OF OBJECTIONS:

not assigned for error, 1062.
see "Error" and "Objections."

WALL:

injury to, declaration in case for (*Form No. 227*), 600.
see "Trespass."

WANT:

of capacity, form of averment of, in special plea, or notice, with
general issue (*No. 329*), 710.
of consideration, plea of (*Form No. 331*), 710.
and "failure of consideration," pleas of distinguished (*Form No.*
331), 710, note.
form of averment of, in special plea, or notice with general
issue (*No. 331*), 710.

WAR:

seizure of property in time of, 4, note.

WAREHOUSEMAN:

duties of, upon service of writ of replevin, 138.
liable to replevin, when, 164.
declaration in case against, for not forwarding goods (*No. 266*), 614.
see "Ballees."

WAREHOUSE ROOM:

storage, etc., declaration in common counts for (*XXI*), 510.

WARNING OF DANGER:

railroad crossing, is of itself, 223.
see "Bell" and "Whistle."

WARRANT:

form of, in distress for rent (*No. 400*), 1223.
service, in distress for rent, who may make, 1223.
distress—See "Distress for Rent."

WARRANT OF ATTORNEY:

to confess judgment, form of (*No. 296*), 624.
when required, 996.
partner cannot execute, 996, note.
form, what sufficient, 996, note.
affidavit of execution of, required, 997, note.
becomes a part of the record on confession of judgment, 998.
to confess judgment, when void, 999.
not required in ordinary cases, 1266.

WARRANTY:

breach of, action on case for damages occasioned by, 233.
of chattels, declaration in *assumpsit* for breach of (*Forms Nos. 100-*
103), 539.
covenant of, breach of, declaration for generally (*Forms Nos. 171-*
176), 577.

[The references are to sections: Vol. I, §§ 1-787; Vol. II, §§ 788-1276.]

WARRANTY—*Continued.*
covenant of, declaration for, against incumbrances (*Form No. 177*), 578.

for quiet enjoyment (*Form No. 178*), 579.
of seizin and power to convey (*Form No. 179*), 580.
declaration upon in case (*Form No. 233*), 604.
implied by indorsement without recourse, 83.
plea in action for breach of (*Form No. 342*), 710.
see "Breach of Warranty."

WASTE:

by cutting trees, declaration in case against tenant for (*Form No. 256*), 611.
by injuring premises, declaration in case against tenant for (*Form No. 257*), 611.
damage occasioned by, action on the case for, 234.
declaration for in case (*Form No. 256*), 611.
stay of, power of court, 290.
see "Trespass" and "Trespass on the Case."

WATER:

included in definition of real estate, 122.
overflow of, action on case for damage occasioned by, 231.
land under, recoverable in action of ejectment, 241.

WATERCOURSE:

declaration in case for diverting (*Forms Nos. 267-268*), 615.

WATER TOWER:

negligence of municipal corporation regarding, liability for, 600.
note.

WAY:

public—See "Highway."

WEIGHT OF EVIDENCE:

to be determined by jury, 821, 916.
how ascertained—See "Evidence" and "Jury."

WHEAT:

growing on land of decedent, 147.
see "Crops."

WHISTLE:

duty of railroad regarding, 118.
sounding, wilfully, is negligence when, 220.
declaration in case against railway company for not sounding (*Form No. 219*), 599.

WIDOW:

when may sue for damages for death of husband, 29.
see "Parties" and "Negligence."

WIDOW'S DOWER:

when trespass will lie to recover, 123.

WIFE:

when not to sue for injury to child, 26.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

WIFE—Continued.

service of summons upon, 436.
assault upon, declaration in trespass for (*Forms Nos. 189-190*), 590.
see "Married Women."

WIFE AND HUSBAND:

may not testify, when, 828.
appearance and foreclosure by *scire facias*, 1173, note.
see "Husband and Wife."

WILD ANIMALS:

trespass for taking, when, 116.
liability for trespass of, 128.
see "Animals."

WINDING UP BUSINESS:

of corporation, who to sue, 24.
of partnership, who to sue, 19.

WINDOW LIGHTS:

law in this state regarding, 616.
obstructing, declaration in case (*Form No. 273*), 616.
see "Lights."

WITHDRAWAL OF APPEARANCE:

by attorney, 1267.
see "Appearance."

WITHDRAWAL OF COUNTS:

waives right of recovery, 525.

WITHDRAWAL OF EVIDENCE:

effect, 903.
parties right to, 903.
power for, 898.
see "Evidence" and "Striking Out."

WITHDRAWAL OF JUROR:

and judgment for defendant, 923.
see "Jurors."

WITHDRAWAL OF MOTION:

for new trial, 964.
see "Motions" and "New Trial."

WITHDRAWAL OF PLEA:

rules relating to, 717.
see "Striking Out."

"WITHOUT RECOURSE:"

liability of indorsement, 83.

WITNESS:

absence of, ground for continuance when, 791.
ground for continuance rather than for new trial, 969.
ground for new trial, when, 969.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

WITNESS—Continued.

- attorney as, generally, 832.
- commitment for refusal to testify, in action of account, 107.
- compelling attendance before referee, 1200.
- competency of attorney in recovery of fees for services, 1275.
- incompetency of, need not be urged when taking depositions, 895.
- note.
- credibility of, to be determined by the jury, 821, 917.
- how ascertained, 821.
- credit of, how impeached, 885.
- disability of attorney from being, 1261.
- discrediting, on cross-examination, 877.
- examination of, order in which made, 815.
- exhausting witness and subject, 816.
- where there are several defendants, 817.
- when party in interest may testify, 825.
- when party in interest may not testify, 826.
- partners, joint contractors, etc., may not testify when, 827.
- husband and wife may not testify, when, 828.
- children competent to testify, when, 829.
- physician or surgeon, rule regarding, 830.
- minister or priest, rule regarding, 831.
- attorney, rule regarding, 832.
- witness not compelled to criminate himself, 834.
- where refusal to answer is evidence against witness, 835.
- whether compulsory answer to be taken against witness, 836.
- on his *voir dire*, 837.
- direct, preliminary, 837.
- oath or affirmation (*Forms Nos. 361-362*), 838.
- in chief, general rule, 840.
- leading questions not permitted on direct examination, 842.
- narrative testimony permitted, 843.
- objection to evidence, saving exceptions, 844.
- number of witnesses, 845.
- best evidence must be produced, 846.
- admissions, generally, 847.
- refreshing recollection, 848, 849.
- showing entries in books, 850.
- proof of sales, with or without books, 850, 851.
- expert testimony, generally, 871.
- laying foundation for expert testimony, form, 872.
- whether expert to hear evidence, 873.
- cross-examination, time for and importance of, 874.
- objects of, 875.
- extent of, 876.
- leading questions permissible, 879.
- object of, to develop new matter favorable to party examining, 877.
- of impeaching witness, 887.
- sustaining witness, 889.
- object of, to sift, explain, or modify, 876.
- discrediting the witness, 877.
- all testimony on both direct and cross-examination taken together, 880.
- form of question for impeachment, 885.
- re-direct, for what purpose allowable, 881.
- rebuttal, in what it consists, 883.
- recalling, to correct testimony, 884.
- impeaching, 885.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

WITNESS—Continued.

- examination of, supporting witness, 888.
- number of supporting witnesses, 890.
- sufficiency of answer to be determined by court, 912.
- exclusion of, from court room, rule regarding, 824.
- disobedience to order, how punished, 824.
- experts, lawyers are as to professional matters, 1269, note.
- impeaching, general rule, 885.
- cross-examination of, 887.
- interpreter, privileged, 1257.
- privilege of, general rule regarding, 825.
- not compelled to criminate himself, 834.
- as to crimination, may be waived, 834.
- of attorney from being, for client, 1257.
- protection of, from insolent examination of counsel, 841.
- recognizance of, in *habeas corpus*, penalty for omission, 1154.
- reputation of, impeachment, 885.
- subpoenas for, in action of account, 106.
- to be issued in *habeas corpus*, when, 1147.
- supporting, manner of, 888.
- surety incompetent, 173, note.
- sustaining, cross-examination of, 889.
- number of, 890.
- see "Proof."

WOMEN:

- see "Married Women."

WORDS:

- accusing one of false swearing is slander, 191.
- actionable in themselves, slander, 186.
- when not slander, 188.
- not actionable in themselves may become slander, 187.
- charging adultery, slander, 190.
- imputing crime, when not slander, 188.
- truth of, in slander must be pleaded specially, 698.

WORK AND LABOR:

- performed, *assumpsit* for, generally, 60.
- when married woman liable for, 38.
- assumpsit* to recover for, 73.
- declaration on contract for (*Forms Nos. 105-106*), 542.

WORKMAN:

- enticing away, declaration in case for (*Form No. 252*), 608.

WRIT:

- alias* in replevin, 172.
- amendment of, in attachment, 319.
- caption of, "in the name of the people," etc., 434, note.
- damage under color of, trespass on the case for, 232.
- execution of, in replevin, 175.
- form of *habeas corpus ad testificandum* (*No. 377*), 1146.
- habeas corpus* general (*No. 376*), 1146.
- on *scire facias*, to revive a judgment (*No. 379*), 1163.
- to make party to justice's judgment, 1165, note.
- to make party to a judgment (*No. 380*), 1165.
- against bail (*No. 381*), 1168.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

WRIT—Continued.

- form of, on *scire facias*, against sureties on an appeal bond (No. 382), 1169.
 - against garnishees (No. 383), 1170.
 - to foreclose a mortgage, 1171.
 - in replevin (No. 2), 172.
 - plea in abatement to, 661.
- issuance of, in attachment to other counties, 321.
- liability for trespass done under, 129.
- obedience to, of *habeas corpus* enforced by attachment, penalty, 1150, note.
- original, powers of circuit and other courts to issue, 389.
- plurics*, in replevin, 172.
- when may be issued in commencement of suits, 435.
- return of, when erroneous, no ground for setting aside default, 802, note.
 - on *habeas corpus*, producing the body, 1150.
 - form, 1150.
 - proceedings on generally, 1151.
 - on *scire facias* to foreclose a mortgage, what necessary to support default, 1174.
- service of, on defendant personally, return, 329.
 - on *habeas corpus*, who to make, 1148.
 - how made, 1149.
 - on *scire facias*, by publication, 1163.
 - to foreclose a mortgage, publication, 1173.
 - liability of attorney relating to, 1263.
- and declaration, variance between, pleaded in abatement, 665.
- and affidavit, effect of variance in, 171.
- for kinds of writ, see following headings.

WRIT OF ATTACHMENT:

- generally, form, 318.
- amendment of, 319.
- issuance to other counties, 321.
- execution of, how levy to be made, 323.
 - levy on corporate stock, 324.
 - where levy should be made, 325.
 - no levy on exempt property, 326.
 - lien credited by, 327.
 - certificate of levy on land, 328.
 - service on defendant personally, return, 329.
 - effect of death of defendant after personal service, 330.
- proceedings when personally served, 337.
 - publication of notice, mailing, 338.
- proceedings on return of, not served, continuance, 339.
- service of, effect of death of defendant after, 330.
- return of, personally served, 329.
- appearance equivalent to personal service of, 340.
- insufficiency of, grounds for dissolution, 341.
- see "Attachment."

WRIT OF CAPIAS AD RESPONDENDUM:

- issuance of, 453.
- form of (No. 25), 453.
- bond for, form 454.
- service, arrest, 455.
- when to issue against body, 1005.
- see "Capias."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

WRIT OF CERTIORARI:

- nature and purpose of, 392.
- what may be reviewed by, 393.
- who may issue, 394.
- when city courts may issue, 394, note.
- who may procure it, 395.
- when it may be obtained, 396.
- how obtained, petition, 397.
- circumstances not warranting the issue, etc., 397, note.
- circumstances warranting the issue, etc., 397, note.
- form (*No. 13*), 400.
- justice's return, 400.
- effect of, to stay proceedings, 401.
- does not vitiate sale on execution, 402.
- judgment for damages after execution and sale, 403.
- death of parties to, 407.
- trial and hearing upon, 404.
- judgment upon, 405.
- costs, when awarded, 406.
- execution of judgment, 408.
- see "Certiorari."

WRIT OF CONSULTATION:

- when to issue on judgment on writ of prohibition, 1123.

WRIT OF CORAM NOBIS:

- to correct errors in judgment in same court, 1002.
- see "Writ of Error in Same Court."

WRIT OF ENTRY OR ASSIZE:

- ancestors to ejectment, 238.
- see "Ejectment."

WRIT OF ERROR:

- definition of, 1037.
- not a writ of right, 1038.
- when will lie to supreme court, generally, 7.
- jurisdiction of appellate court in, 8.
- from county court, 10, note.
- or appeal, in action of count, 111.
- when former available, 1031, 1038.
- and appeal two modes of review, 1015.
- in attachment proceedings, 354.
- when *certiorari* preferable to, 393.
- coram nobis*, to correct judgment in same court, 1002.
- what reviewed on, generally, 1013.
- who may obtain, 1014.
- from what court may issue, 1016.
- when from supreme court to trial court, cases enumerated, 1017.
- when from appellate court to trial court, 1018.
- when will issue from supreme court to appellate court, 1019.
- when will not issue from supreme court to appellate court, 1020.
- who may have, 1030.
- from appellate or supreme court, generally, 1036.
- definition and nature of, 1037.
- what the record must show, 1038.
- time for, begins to run at entry of final judgment, 1038.

[The references are to sections: Vol. I, §§ 1-787; Vol. II., §§ 788-1276.]

WRIT OF ERROR—*Continued.*

- from appellate or supreme court, when it will lie, 1038.
- when it will not lie, 1039.
- by and against whom to be sued out, 1040.
- within what time may be sued out, 1041.
- dismissal of, 1042.
- time for filing transcript, etc., 1061.
- when it will lie, 1038, note.
- proceeding on, when to operate as a *supersedeas*, 1051.
- indorsement, filing, return, certificate, 1052.
- to whom directed, 1053.
- when service unnecessary, return, 1053.
- process, *scire facias*, 1054.
- process, service and return, appearance and notice thereof, 1055.
- process, plaintiff's duty to order *scire facias*, notice, continuance, 1056.
- certificate that to operate as *supersedeas* (Form No. 372), 1052.
- return of, 1053.
- when to operate as *supersedeas*, 1052.
- service of, when unnecessary, 1053.
- filing with transcript, when to operate as *supersedeas*, 1052.
- indorsement of, when operate as *supersedeas*, 1052.
- direction of, 1053.
- issuance of, practice, 1053.
- process on, *scire facias*, 1054.
- service of, 1055.
- return of, 1055.
- plaintiff's duty to order, notice, continuance, 1056.
- appearance and notice of on, 1055.
- dismissal for want of security for costs, 1055, note.
- continuance on, when to operate as *supersedeas*, 1056.
- notice to purchasers and terre-tenants, 1057.
- parties defendant on, 1057.
- "authenticated copy," etc., of what to consist, 1058.
- practice on, assignment of error on, 1062.
- assignment of error in supreme court, when reviewing appellate court decision, 1063.
- form of assignment of errors (No. 373), 1064.
- assignment of cross errors, 1065.
- omission to join in error, effect, 1066.
- time to plead, when defendant prefers not to join in error, 1067.
- abstract preparing and filing, 1068.
- what it shall contain, 1069.
- when to be filed, default, 1070.
- when further one required, 1071.
- brief, preparing and filing, 1072.
- when to be filed, 1073.
- number of copies to be filed, 1074.
- docketing and hearing the same, 1075.
- argument of counsel, rule governing, 1076.
- none oral on motion for rehearing, 1077.
- oral, time allowed for, 1078.
- judgment, generally, 1079.
- of affirmance, execution, 1080.
- of reversal in whole, execution on, 1081.
- of reversal in part, remittitur, execution, 1082.
- of dismissal, execution, 1083.
- remanding cause, retrial, when unnecessary, 1084.
- when case remanded for retrial, 1085.

[The references are to sections: Vol. I., §§ 1-787: Vol. II., §§ 788-1276.]

WRIT OF ERROR—Continued.

- practice on, rehearing, petition for, 1086.
- notice, filing, 1087.
- no argument admitted to support a petition for, 1088.
- supersedeas* or stay of proceedings, 1089.
- redocketing case, 1090.
- record, abstract, brief, and argument, 1091.
- reply to petition, 1092.
- closing argument of petitioner, 1093.
- oral arguments, conclusion, 1094.
- motions, rules governing, generally, 1095.
- change of venue in upper court, 1096.
- or *mandamus*, which proper remedy, 1099.
- to review *quo warranto* proceedings, 1137.
- to review arbitration and award, 1197.
- to review forcible entry and detainer, 1219.
- to review proceedings to disbar attorneys, 1251.
- see "Error" and "Review."

WRIT OF GARNISHMENT:

- how procured and served, 357.
- service and return, 358.
- see "Garnishment."

WRIT OF HABEAS CORPUS:

- origin and nature, 1139.
- ranks in power above all other writs, 1139.
- a civil process in this state, 1139.
- what courts may issue, 1140.
- when suspended, 1140.
- who entitled to, 1141.
- to bring prisoner to testify, 1141.
- what it will not relieve, 1141.
- to determine right of custody of child, 1141.
- application for, how made, 1142.
- petition for, form of (*No. 374*), 1143.
- petition for *ad testificandum*, form of (*No. 375*), 1143.
- "probable cause" must be shown to procure, 1144.
- when to be granted, penalty, 1145.
- form of, *ad testificandum* (*No. 377*), 1146.
- form of, general (*No. 376*), 1146.
- subpœna for witnesses to be issued, when, 1147.
- service of, who to make, 1148.
- how made, 1149.
- expenses must be paid, exception, 1149.
- return of, form, 1150.
- producing the body, 1150.
- obedience to enforce by attachment, 1150, note.
- emergency proceedings on, 1150, note.
- proceedings on return of, generally, 1151.
- when prisoner held on process will be discharged, 1152.
- when prisoner held on process will not be discharged, 1153.
- new commitment, recognizance of witnesses, penalty for omission, 1154.
- remanding prisoner, order, 1155.
- second, limits of court's power, 1156.
- discharged person cannot be reimprisoned, exceptions, 1157.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

WRIT OF HABEAS CORPUS—*Continued.*
 proceedings on, cannot be reviewed, 1157.
 penalty for rearresting person discharged, 1159.
 penalty for avoiding, 1160.
 how recovered, 1161.
 see "Habeas Corpus."

WRIT OF INQUIRY:
 judgment on, 284, note.
 to assess value of *mesne* profits in ejectment, 284, note.

WRIT OF MANDAMUS:
 definition and nature of, 1097.
 when granted or denied, 1098.
 not granted to enforce trifling interests, 1098.
 enforced by attachment, 1099.
 will not compel a discretionary act, 1098.
 will lie to inferior tribunal, when, 1099.
 will not lie to compel change of venue, 1099.
 will lie to compel judge to sign bill of exceptions, 1099, note.
 will lie to compel administration of oath, 1099, note.
 will lie to state officer, when, 1100.
 will not lie to governor, 1100.
 will lie to county officer, when, 1101.
 will lie to highway commissioners, when, 1101.
 will not lie till precedent duty performed, 1102.
 will not lie to compel additional tax levy for roads and bridges, 1102.
 will lie to township officer, when, 1102.
 will not lie to compel auditing of account, when, 1102, note.
 will lie to municipal corporation or officer, when, 1103.
 will lie to private corporation, when, 1104.
 will lie to board of education of school officers, when, 1105.
 will lie to compel admission of pupil to school, 1107.
 who to apply for, 1106.
 parties, the relator or petitioner, 1106.
 names of parties in proceedings by, 1102, note.
 parties, the respondent, 1107.
 answer to, when officer must make "individually," 1107.
 default, preemptory writ, 1110.
 pleas to answer to, 1110.
 private citizen may procure, 1107.
 petition, must be verified, 1108.
 leave to file in supreme court must be obtained, 1108.
 construed like a declaration, 1108.
 notice required in supreme court, 1108.
 what it must contain, 1108.
 demurrer to, 1110, note.
 demand for performance must precede, when, 1108.
 objection for want of, when to be made, 1108, note.
 not denied because other remedies exist, 1108.
 "alternative" superseded by petition in present practice, 1108.
 a preemptory writ, 1108.
 judgment, costs, 1111.
 contents of, 1111.
 issues on, what tried in supreme court, 1108.
 how made up, 1110.
 trial of, 1110.
 summons to show cause, when returnable, 1109.

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

WRIT OF MANDAMUS—*Continued.*

- extension of time to plead in, etc., 1110.
- defense to, plea or answer, 1110.
- judgment on, default, *nil dicit* and preemptory writ, 1110.
- concludes litigation, 1111.
- service of, 1111.
- objection for variance, 1111, note.
- excuse for not obeying, 1111, note.
- new parties, defendant, not interpleaders, 1112.
- not abated by death of defendant, 1113.
- abatement of, what not, 1113.
- review of proceedings on, 1114.
- how enforced, 1115.
- will lie to restore attorney's name to role, when, 1251.
- see "Mandamus."

WRIT OF POSSESSION:

- form of, in ejectment (*No. 4*), 278.
- in ejectment, how to be executed, 278.
- officer may summon aid to execute, 278.
- what court may grant, 278.
- see "Ejectment."

WRIT OF PROHIBITION:

- definition and nature of, 1116.
- demand must precede, 1116.
- when the proper proceeding, 1116.
- how obtained, practice, 1119.
- petition for, must be verified, 1119.
- contents of, 1119.
- at what stage of proceeding to issue, 1119.
- rules of practice of common law govern, when, 1119.
- may be obtained, when, examples, 1120.
- will not lie to restrain executive, 1121.
- service and return of, 1122.
- judgment on, 1123.
- see "Prohibition."

WRIT OF QUO WARRANTO:

- origin, definition and nature, 1124.
- when it may issue, 1125.
- at whose instance it may issue, 1126.
- how leave for asked, counter showing, 1127.
- names of parties to proceedings, 1128.
- style of, 1129.
- summons on, when returnable, 1130.
- how served, 1131.
- defendant must plead or demur, 1132.
- judgment of ouster, fine, costs, 1136.
- review of judgment on, 1137.
- see "Quo Warranto" and "Information."

WRIT OF REPLEVIN:

- general rules, 172.
- execution of, 175.
- constructive service upon non-residents, etc., 176.
- duty of warehouseman upon service of, 138.
- will protect officer, when, 163, note.
- see "Replevin."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

WRIT OF RESTITUTION:

- in action of ejectment, 278.
- form of, in forcible entry and detainer (*No. 398*), 1218.
- see "Ejectment" and "Forcible Entry and Detainer."

WRIT OF RIGHT:

- ancestor to ejectment, 238.
- mandamus* is not, 1097.
- when *habeas corpus* is, 1145.

WRIT OF SCIRE FACIAS:

- origin, nature and purpose of, 1162.
- to make default judgment final in garnishment, 376.
- service of by publication, 1163.
- to revive a judgment, 1163.
- changing name of plaintiff by amendment, 1163, note.
- form (*No. 379*), 1163.
- to revive execution after seven years, 1164.
- to make defendants not served with process parties to a judgment, 1165.
- considered as a summons and nothing more, 1165.
- to make party to a judgment (*Form No. 380*), 1165.
- attachment may be sued out in aid of, 1165.
- in justices' court, 1165, note.
- defense, 1165, note.
- to collect special assessment, 1166.
- to try legal existence of corporation, 1167.
- against bail, 1168.
- against bail (*Form No. 381*), 1168.
- against sureties of appeal bond, 1169.
- against sureties on bond of appeal (*Form No. 382*), 1169.
- against a garnishee (*Form No. 383*), 1170.
- to foreclose a mortgage (*Form No. 384*), 1171.
- generally, 1171.
- formal requisites, 1172.
- no declaration required, 1172.
- service of, publication, 1173.
- defense to, 1174.
- judgment, 1175.
- is a proceeding *in rem*, 1175.
- special execution, lien, 1176.
- pleadings on, generally, 1177.
- plea of *nul tici* record to (*Form No. 385*), 1177.
- plea of payment to (*Form No. 386*), 1177.
- plea of death to (*Form No. 387*), 1177.
- judgment on, generally, damages, costs, 1178.
- execution on judgment, 1179.
- see "Scire Facias."

WRIT OF SUPERSEDEAS:

- form of (*No. 15*), 414.
- see "Writ of Error" and "Supersedeas."

WRIT OF SUMMONS:

- in garnishment, form of (*No. 9*), 357.
- see "Process," "Summons" and "Garnishment."

[The references are to sections: Vol. I., §§ 1-787; Vol. II., §§ 788-1276.]

WRITING:

notice in, with plea of general issue, required by statute, when, 699.
see "Notice."

WRITTEN CONTRACT:

how set forth in declaration, 517.
in debt, 558.
for labor, etc., *assumpsit* upon, 74.
proof of, when lost, 74.

WRITTEN INSTRUMENT:

sued on, copy to be attached to declaration, 546.
copy of, to accompany set-off, 725.
denial of execution or assignment of, when set-off, 725.
how proved, 846.
existence of, how proved, 846.
contents of, how proved, 846.
how explained by oral evidence, 868.
presumption as to, how rebutted, 868.
contradicting by oral evidence, rule, 869.
as evidence, objection to, when to be made, 895, note.
see "Contract in Writing."

WRITTEN PLEADINGS:

may be dispensed with at any stage of the case, 475.
see "Pleading."

WRONGDOER:

liability of, in action of trespass, 114.
see "Trespasser" and "Torts."

WRONGFUL ACT:

death by, action on case for, 227.
see "Negligence."

WRONG NAME:

rule regarding, when sound is like, 483.
see "Misnomer."

Y.**YARD:**

action of trespass for injury to, 126.
see "Trespass" and "Action."

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